

## Summary of Key Revisions to BIA Guidelines

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The Webinar discussed ICWA and the 1979 Bureau of Indian Affairs *Guidelines for State Courts; Indian Child Custody Proceedings* (the “**1979 Guidelines**”). Following the Webinar, however, the Department of the Interior released updated Guidelines. The Bureau of Indian Affairs *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings* (“**BIA Guidelines**”) became effective February 25, 2015.

The updated BIA Guidelines clarify and modify the 1979 Guidelines. Highlighted below are key changes to the 1979 Guidelines.

### **Section A. General Provisions (formerly titled, “Policy”)**

Section A previously provided a brief policy statement. Now, Section A includes definitions of terms used throughout ICWA and a section regarding the applicability of ICWA.

#### **Definitions:**

- As a result of inconsistent interpretations of the term, “active efforts,” the updated BIA Guidelines specifically define the term and provide examples of “active efforts.” The updated BIA Guidelines make clear that “active efforts” means more than “reasonable efforts.” Examples of “active efforts” include, but are not limited to:
  - Engaging the child’s parents and extended family members;
  - Taking steps to keep siblings together;
  - Identifying appropriate services for parents and actively assisting parents in obtaining those services;
  - Conducting a diligent search for the child’s extended family members;
  - Requesting the assistance of representatives of the child’s tribe;
  - Employing all culturally appropriate family preservation strategies that are available;
  - Notifying extended family members of the child to create cultural connections;
  - Relying on extended family members of the child as placement resources;
  - Ensuring the child’s safety during removal by arranging for family interaction in natural settings;
  - Identifying community resources (e.g., housing, financial, and mental health resources) for the child’s parents and extended family members;
  - Supporting visits and trial home visits during any period of removal; and
  - Providing post-reunification services and monitoring.

According to the updated BIA Guidelines, “active efforts” are separate and distinct from the Adoption and Safe Families Act (“**ASFA**”), and the exceptions to reunification under ASFA do not apply to ICWA proceedings.

- The updated BIA Guidelines also define the term, “imminent physical damage or harm.” The term is defined as “present or impending risk of serious bodily injury or death that will result in severe harm if safety intervention does not occur.”

## Applicability:

With respect to the application of ICWA to child custody proceedings, the BIA Guidelines clarify that:

- Agencies and State courts must ask if ICWA applies in **every** child custody proceeding.
- Courts should follow ICWA procedures even when the child is not removed from the home. According to the BIA Guidelines, this is intended to ensure that tribes will be able to intervene as early as possible and prevent breaking up the family.
- There is no existing Indian Family Law exception to the application of ICWA. The updated BIA Guidelines make clear that this judicially-created exception to the application of ICWA is no longer recognized.

### Section B. Pretrial Requirements

- As noted above, whether or not the child is an Indian child is a threshold question that State courts must ask at the beginning of every child custody proceeding. The BIA Guidelines indicate that State courts should ask this question by asking the parties, guardian ad litem, and agency representative to certify whether they have any reason to believe the child is an Indian child.

During the Webinar, it was noted that it is good practice for State courts to require the agency to provide genograms or ancestry charts for both of the child's parents. The BIA Guidelines now specifically include this as a recommended practice for State courts.

- In addition to defining "active efforts," the BIA Guidelines make clear that "active efforts" must begin from the moment that the possibility arises that the child may be removed. Further, "active efforts" should begin while verifying that the child is an Indian child, not afterwards.
- The BIA Guidelines clarify that the tribe is responsible for determining tribal membership of the child. The provision that allowed the BIA, in place of the tribe, to verify the child's tribe membership status has been deleted. That being said, this change does not prevent the BIA from assisting in contacting the tribe to ensure a determination is made.

Further, this does not change the provision of ICWA requiring that notice be given to the Secretary the Interior if the child's tribe membership status is unknown. See 25 U.S. Code § 1912(a) ("If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary [of the Interior].").

- Under the updated BIA Guidelines, the process and questions for determining which tribe the child has had "significant contacts" with has changed. Some factors have been deleted, while other factors have been added.

The following factor is new and should be considered when evaluating the child's "significant contacts" with the tribe:

- The parent's preference regarding the child's membership to a particular tribe.

The following factors have been deleted, and thus, should no longer be considered:

- The child's participation in activities of each tribe;
  - The child's fluency in the language of each tribe; and
  - Whether there has been a previous adjudication of custody with respect to the child by a court of one of the tribes.
- When seeking verification of the child's membership status, the BIA Guidelines now state that, in a voluntary placement proceeding, a parent's desire for anonymity must be honored by keeping relevant documents confidential and under seal.
  - The notice requirements in the BIA Guidelines have also been clarified or changed:
    - All tribes of which the child may be a member or may be eligible for membership must be notified that the child is involved in a child custody proceeding. The notice must list the other tribes of which the child may be a member.
    - Once a tribe is designated as the child's tribe, the tribes that originally received notice of the proceeding must receive written notice of the determination and copy of the notice must be filed with the court and provided to the parties.
    - When an agency or court knows or has reason to know that the child who is subject of an involuntary child custody proceeding is Indian, notice of each proceeding must be sent to the child's parents and the Indian custodian. This notice must be sent by registered mail. The notice must now contain the child's birthdate and birth place and a list of each tribe of which the child may be a member.
  - The BIA Guidelines change the procedure for emergency removals/placements. Emergency removals/placements must be "as short as possible." The time period for temporary custody without a hearing, absent extraordinary circumstances, has been shortened from 90 days to 30 days. Further, the BIA Guidelines state that temporary emergency custody should not continue beyond 30 days unless:
    - A hearing is held and the court determines, by clear and convincing evidence and based on the testimony of at least one qualified expert, that custody of the child by the parents or the Indian custodian is likely to result in imminent physical damage or harm to the child; or
    - Extraordinary circumstances exist.

The agency or court involved in an emergency removal/placement must immediately terminate the removal/placement once the court has sufficient evidence to determine that the emergency has ended.

Petitions requesting that the court authorize emergency removal must contain an affidavit with information including but not limited to the following:

- A statement of the specific "active efforts" that have been made to help the parents or Indian custodians so that the child could be safely returned to their custody; and
- A statement of the "imminent physical damage or harm" expected and evidence that the removal continues to be necessary to prevent such harm.

### **Section C. Procedures for Transfer to Tribal Court**

- In the 1979 Guidelines, there was a requirement that requests to transfer to tribal court be made “promptly” after notice of the proceeding. Now, the updated BIA Guidelines state that the right to transfer exists throughout the proceeding and that a request can be during any stage of the proceeding, including an emergency removal.
- When a request for transfer is made, the tribal court must inform the State court of its decision to accept or decline jurisdiction within the time required by the State court’s notice.
- Under the BIA Guidelines, the “good cause factors,” the factors used in denying transfer to tribal court, have been updated. Under the updated analysis, “good cause” may be found if:
  - Either parent objects;
  - The tribal court declines; or
  - The State court otherwise determines that good cause exists.

The following factors, however, have been deleted and should no longer be considered:

- Whether the proceeding is at an advanced stage when the request to transfer is made;
- Whether transfer would result in a change in placement of the child;
- The level of contacts the child has had with the tribe or reservation;
- Socio-economic conditions; and
- The tribal court’s prospective placement of the child.

### **Section D. Adjudication of Involuntary Placements, Adoptions, or Terminations or Terminations of Parental Rights**

- The updated BIA Guidelines outline how to comply with the “active efforts” requirement. For instance, “active efforts” must be made prior to the commencement of the proceeding and continue until the proceeding begins. These efforts must also be documented.

### **Section F. Dispositions**

- Under the updated BIA Guidelines, when determining whether “good cause” exists to deviate from ICWA’s placement preferences, courts are specifically directed **not** to consider the “best interest” factors. The BIA Guidelines state that the child’s best interest has already been addressed by Congress in ICWA, making a court’s analysis of the factors inappropriate.

### **Section G. Post-Trial Rights**

- The updated BIA Guidelines has also expanded on the rights of adult adoptees. The following provisions have been added:
  - In States where adoptions remain closed, the agency should communicate with the tribe’s enrollment office and provide information necessary to help establish the adoptee’s tribal status.

- Agencies should work with the tribe to identify at least one tribal designee familiar with 25 U.S.C. 1917 to help adult adoptees reconnect with their tribes and provide information about this provision to State judges on an annual basis.