

## ICWA 1979 vs. 2015

1979 Version	2015 Version	Reasons for Change
Commentary following Sections	Omitted the commentary	“The updated guidelines are clearer, making the commentary unnecessary.” (2015 version, p. 4, III. Summary of Updates)
<b>SECTION A – POLICY (1979)/GENERAL PROVISIONS (2015)</b>		
<p><b>Section A. Policy</b></p> <p>(1) Congress through the Indian Child Welfare Act has expressed its clear preference for keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children and placing Indian children who must be removed from their homes within their own families or Indian tribes. Proceedings in state courts involving the custody of Indian children shall follow strict procedures and meet stringent requirements to justify any result in an individual case contrary to these preferences. The Indian Child Welfare Act, the federal regulations implementing the Act, the recommended guidelines and any state statutes, regulations or rules promulgated to implement the Act shall be liberally construed in favor of a result that is consistent with these preferences. Any ambiguities in any of such statutes, regulations, rules or guidelines shall be resolved in favor of the result that is most consistent with these preferences.</p> <p>(2) In any child custody proceeding where applicable state or federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Indian Child Welfare Act, the state court shall apply the state or other federal law, provided that application of that law does not</p>	<p>Section A. General Provisions</p> <p><b>A.1. What is the purpose of these guidelines?</b></p> <p>These guidelines clarify the minimum Federal standards, and best practices, governing implementation of the Indian Child Welfare Act (ICWA) to ensure that ICWA is applied in all States consistent with the Act’s express language, Congress’ intent in enacting the statute, and the canon of construction that statutes enacted for the benefit of Indians are to be liberally construed to their benefit. In order to fully implement ICWA, these guidelines should be applied in all proceedings and stages of a proceeding in which the Act is or becomes applicable.</p>	<p>Section A of the 2015 version has been expanded beyond just policy to include the act’s purpose (A.1.), term definitions (A.2.), when ICWA applies (A.3.), how to contact tribe (A.4.), how do these guidelines interact with State laws (A.5.).</p>

*Compiled by L. Cami Ruff, Third Year Law Student at Oklahoma City University School of Law, March 2015*

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<p>infringe any right accorded by the Indian Child Welfare Act to an Indian tribe or child.</p>		
<p>See 25 U.S.C. §1901 from statute for definitions</p>	<p><b>A.2. The term definitions have been added in this section. &amp; “Active Efforts” defined</b>  <b>A.2. What terms do I need to know?</b>  <i>Active efforts</i> are intended primarily to maintain and reunite an Indian child with his or her family or tribal community and constitute more than reasonable efforts as required by Title IV–E of the Social Security Act (42 U.S.C. 671(a)(15)). Active efforts include, for example:</p> <ol style="list-style-type: none"> <li>(1) Engaging the Indian child, the Indian child’s parents, the Indian child’s extended family members, and the Indian child’s custodian(s);</li> <li>(2) Taking steps necessary to keep siblings together;</li> <li>(3) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;</li> <li>(4) Identifying, notifying, and inviting representatives of the Indian child’s tribe to participate;</li> <li>(5) Conducting or causing to be conducted a diligent search for the Indian child’s extended family members for assistance and possible placement;</li> <li>(6) Taking into account the Indian child’s tribe’s prevailing social and cultural conditions and way of life, and requesting the assistance of representatives designated by the Indian child’s tribe with substantial knowledge of the prevailing social and cultural standards;</li> <li>(7) Offering and employing all available and culturally appropriate family preservation strategies;</li> <li>(8) Completing a comprehensive assessment of the circumstances of the Indian child’s family, with a focus on safe reunification as the most desirable goal;</li> <li>(9) Notifying and consulting with extended family members of the Indian child to provide family structure and support for the Indian child, to assure cultural connections, and to serve</li> </ol>	<p>The phrase “active efforts” has been inconsistently interpreted. The 2015 version provides examples for exactly what are active efforts.</p>

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	<p>as placement resources for the Indian child;</p> <p>(10) Making arrangements to provide family interaction in the most natural setting that can ensure the Indian child's safety during any necessary removal;</p> <p>(11) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or extended family in utilizing and accessing those resources;</p> <p>(12) Monitoring progress and participation in services;</p> <p>(13) Providing consideration of alternative ways of addressing the needs of the Indian child's parents and extended family, if services do not exist or if existing services are not available;</p> <p>(14) Supporting regular visits and trial home visits of the Indian child during any period of removal, consistent with the need to ensure the safety of the child; and</p> <p>(15) Providing post-reunification services and monitoring. "Active efforts" are separate and distinct from requirements of the Adoption and Safe Families Act exceptions to reunification efforts do not apply to ICWA proceedings.</p> <p><b>Agency</b> means a private State-licensed agency or public agency and their employees, agents or officials involved in and/or seeking to place a child in a child custody proceeding.</p> <p><b>Child custody proceeding</b> means and includes any proceeding or action that involves:</p> <p>(1) <i>Foster care placement</i>, which is any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, although parental rights have not been terminated;</p> <p>(2) <i>Termination of parental rights</i>, which is any action</p>	
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	<p>resulting in the termination of the parent-child relationship;</p> <p>(3) <i>Preadoptive placement</i>, which is the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; or</p> <p>(4) <i>Adoptive placement</i>, which is the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.</p> <p><b>Continued custody</b> means physical and/or legal custody that a parent already has or had at any point in the past. The biological mother of a child has had custody of a child.</p> <p><b>Custody</b> means physical and/or legal custody under any applicable tribal law or tribal custom or State law. A party may demonstrate the existence of custody by looking to tribal law or tribal custom or State law.</p> <p><b>Domicile</b> means:</p> <p>(1) For a parent or any person over the age of eighteen, physical presence in a place and intent to remain there;</p> <p>(2) For an Indian child, the domicile of the Indian child's parents. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's mother. Under the principle for determining the domicile of an Indian child, it is entirely logical that "[o]n occasion, a child's domicile of origin will be in a place where the child has never been." <i>Holyfield</i>, 490 U.S. at 48. <i>Holyfield</i> notes that tribal jurisdiction under 25 U.S.C. 1911(a) was not meant to be defeated by the actions of individual members of the tribe, because Congress was concerned not solely about the interests of Indian children and families, but also about the impact of large numbers of Indian children adopted by non-Indians on the tribes themselves. <i>Id.</i> at 49.</p> <p><b>Extended family member</b> is defined by the law or custom of</p>	
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	<p>the Indian child's tribe or, in the absence of such law or custom, is a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.</p> <p><b>Imminent physical damage or harm</b> means present or impending risk of serious bodily injury or death that will result in severe harm if safety intervention does not occur.</p> <p><b>Indian</b> means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 43 CFR part 1606.</p> <p><b>Indian child</b> means any unmarried person who is under age eighteen and is either: (1) a member of an Indian tribe; or (2) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe.</p> <p><b>Indian child's tribe</b> means: (1) the Indian tribe in which an Indian child is a member or eligible for membership; or (2) in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has more significant contacts.</p> <p><b>Indian Child Welfare Act (ICWA) or Act</b> means 25 U.S.C. 1901 <i>et seq.</i></p> <p><b>Indian custodian</b> means any person who has legal custody of an Indian child under tribal law or custom or under State law, whichever is more favorable to the rights of the parent, or to whom temporary physical care, custody, and control has been transferred by the parent of such child.</p> <p><b>Indian organization</b> means any group, association, partnership, corporation, or other legal entity owned or</p>	
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	<p>controlled by Indians or a tribe, or a majority of whose members are Indians.</p> <p><b>Indian tribe</b> means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in 43 U.S.C. 1602(c).</p> <p><b>Parent</b> means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include an unwed father where paternity has not been acknowledged or established. To qualify as a parent, an unwed father need only take reasonable steps to establish or acknowledge paternity. Such steps may include acknowledging paternity in the action at issue or establishing paternity through DNA testing.</p> <p><b>Reservation</b> means Indian country as defined in 18 U.S.C 1151, including any lands, title to which is held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation.</p> <p><b>Secretary</b> means the Secretary of the Interior or the Secretary's authorized representative acting under delegated authority.</p> <p><b>Status offenses</b> mean offenses that would not be considered criminal if committed by an adult; they are acts prohibited only because of a person's status as a minor (e.g., truancy, incorrigibility).</p> <p><b>Tribal court</b> means a court with jurisdiction over child custody proceedings, including a Court of Indian Offenses, a</p>	
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	<p>court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe vested with authority over child custody proceedings.</p> <p><b>Upon demand</b> means that the parent or Indian custodians can regain custody simply upon request, without any contingencies such as repaying the child’s expenses.</p> <p><b>Voluntary placement</b> means a placement that either parent has, of his or her free will, chosen for the Indian child, including private adoptions.</p>	
<p><b>B.3. Determination that Placement is Covered by the Act.</b></p> <p>(a) Although most juvenile delinquency proceedings are not covered by the Act, the Act does supply to status offenses, such as truancy and incorrigibility, which can only be committed by children, and to juvenile delinquency proceeding that results in the termination of a parental relationship.</p> <p>(b) Child custody disputes arising in the context of divorce or separation proceedings or similar domestic relations proceedings are not covered by the Act so long as custody is awarded to one of the parents.</p> <p>(c) Voluntary placements which do not operate to prohibit the child’s parent or Indian custodian from regaining custody of the child at any time are not covered by the Act. Where such placements are made pursuant to a written agreement, that agreement shall state explicitly the right of the parent or custodian to regain custody of the child upon demand.</p>	<p><b>A.3. When does ICWA apply?</b></p> <p>(a) ICWA applies whenever an Indian child is the subject of a State child custody proceeding as defined by the Act. ICWA also applies to proceedings involving status offenses or juvenile delinquency proceedings if any part of those proceedings results in the need for placement of the child in a foster care, preadoptive or adoptive placement, or termination of parental rights.</p> <p>(b) There is no exception to application of ICWA based on the so-called “existing Indian family doctrine.” Thus, the following non-exhaustive list of factors should not be considered in determining whether ICWA is applicable: the extent to which the parent or Indian child participates in or observes tribal customs, votes in tribal elections or otherwise participates in tribal community affairs, contributes to tribal or Indian charities, subscribes to tribal newsletters or other periodicals of special interest in Indians, participates in Indian religious, social, cultural or political events, or maintains social contacts with other members of the tribe; the relationship between the Indian child and his/her Indian parents; the extent of current ties either parent has to the tribe; whether the Indian parent ever had custody of the child; and the level of involvement of the tribe in the State court proceedings.</p>	<ul style="list-style-type: none"> <li>• Clarifies that agencies and State courts must ask, in every child custody proceeding, whether ICWA applies;</li> <li>• Clarifies that courts should follow ICWA procedures even when the Indian child is not removed from the home, in order to allow tribes to intervene as early as possible to assist in preventing a breakup of the family; and</li> <li>• Provides that, where agencies and State courts have reason to know that a child is an Indian child, they must treat that child as an Indian child unless and until it is determined that the child is not an Indian child.</li> </ul> <p>These clarifications are necessary to ensure that the threshold question for determining whether ICWA applies (is the child an Indian child?) is asked, and asked as soon as possible. If such inquiry is not timely made, a court proceeding may move forward without appropriate individuals aware that ICWA applies and that certain</p>

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	<p>(c) Agencies and State courts, in every child custody proceeding, must ask whether the child is or could be an Indian child and conduct an investigation into whether the child is an Indian child. Even in those cases in which the child is not removed from the home, such as when an agency opens an investigation or the court orders the family to engage in services to keep the child in the home as part of a diversion, differential, alternative response or other program, agencies and courts should follow the verification and notice provisions of these guidelines. Providing notice allows tribes to intervene as early as possible in a child custody proceeding and provides an opportunity for the tribe to bring resources to bear to assist the family in preventing a breakup of the family.</p> <p>(d) If there is any reason to believe the child is an Indian child, the agency and State court must treat the child as an Indian child, unless and until it is determined that the child is not a member or is not eligible for membership in an Indian tribe.</p> <p>(e) ICWA and these guidelines or any associated Federal guidelines do not apply to:</p> <ul style="list-style-type: none"><li>(1) Tribal court proceedings;</li><li>(2) Placements based upon an act by the Indian child which, if committed by an adult, would be deemed a criminal offense; or</li><li>(3) An award, in a divorce proceeding, of custody of the Indian child to one of the parents.</li></ul> <p>(f) Voluntary placements that do not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand are not covered by the Act.</p> <ul style="list-style-type: none"><li>(1) Such placements should be made pursuant to a written agreement, and the agreement should state explicitly the right of the parent or Indian custodian to regain custody of the child upon demand.</li><li>(2) Nevertheless, it is a best practice to follow the procedures in these guidelines to determine whether a child</li></ul>	<p>procedures must be followed. Tragic consequences may result.</p> <p>An additional important note in the 2015 version is that ICWA and the guidelines apply in certain voluntary placements.</p>
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	<p>is an Indian child and to notify the tribe.</p> <p>(g) Voluntary placements in which a parent consents to a foster care placement or seeks to permanently terminate his or her rights or to place the child in a preadoptive or adoptive placement are covered by the Act.</p>	
Omitted	<p><b>A.4. How do I contact a tribe under these guidelines?</b> To contact a tribe to provide notice or obtain information or verification under these Guidelines, you should direct the notice or inquiry as follows:</p> <p>(1) Many tribes designate an agent for receipt of ICWA notices. The Bureau of Indian Affairs publishes a list of tribes' designated tribal agents for service of ICWA notice in the Federal Register each year and makes the list available on its Web site at <a href="http://www.bia.gov">www.bia.gov</a>.</p> <p>(2) For tribes without a designated tribal agent for service of ICWA notice, contact the tribe(s) to be directed to the appropriate individual or office.</p> <p>(3) If you do not have accurate contact information for the tribe(s) or the tribe(s) contacted fail(s) to respond to written inquiries, you may seek assistance in contacting the Indian tribe(s) from the Bureau of Indian Affairs' Regional Office and/or Central Office in Washington DC (see <a href="http://www.bia.gov">www.bia.gov</a>).</p>	This section was added in case the agency or State court is unfamiliar with whom to contact.
<p><b>Section A. Policy</b></p> <p>(2) In any child custody proceeding where applicable state or federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Indian Child Welfare Act, the state court shall apply the state or other federal law, provided that application of that law does not infringe any right accorded by the Indian Child Welfare Act to an Indian tribe or child.</p>	<p><b>A.5. How do these guidelines interact with State laws?</b></p> <p>(a) These guidelines provide minimum Federal standards and best practices to ensure compliance with ICWA and should be applied in all child custody proceedings in which the Act applies.</p> <p>(b) In any child custody proceeding where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires that the State court must apply the higher standard.</p>	This section was left relatively unchanged, with focus being left on the State's requirement to apply a higher standard.
Omitted	Section A is intended to make clear that there is no existing Indian family (EIF) exception to application of ICWA.	The EIF doctrine is a judicially-created exception to the application of ICWA. Since first recognition of the EIF in 1982, the

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		majority of State appellate courts that have considered the EIF have rejected it as contrary to the plain language of ICWA. Some State legislatures have also explicitly rejected the EIF within their State ICWA statutes. The Department agrees with the States that have concluded that there is no existing Indian family exception to application of ICWA.
<b>SECTION B – PRETRIAL REQUIREMENTS</b>		
Omitted	<p><b>B.1. When does the requirement for active efforts begin?</b></p> <p>(a) The requirement to engage in “active efforts” begins from the moment the possibility arises that an agency case or investigation may result in the need for the Indian child to be placed outside the custody of either parent or Indian custodian in order to prevent removal.</p> <p>(b) Active efforts of prevent removal of the child must be conducted while investigating whether the child is a member of the tribe, is eligible for membership in the tribe, or whether a biological parent of the child is or is not a member of a tribe.</p>	With regard to application of ICWA, the updated section B clarifies when the Act’s requirement to conduct “active efforts” begins. ICWA requires “active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family.” See 25 U.S.C. 1912(d). The updated section B clarifies that active efforts must begin from the moment the possibility arises that the Indian child may be removed. This updated section also clarifies that active efforts should be conducted while verifying whether the child is an Indian child; this clarification ensures compliance with ICWA in cases in which the status of whether the child is an Indian child is not verified until later in the proceedings.
<p><b>B.1. Determination That Child Is an Indian</b></p> <p>(a) When a state court has reason to believe a child involved in a child custody proceeding is an Indian, the court shall seek verification of the child’s status from either the Bureau of Indian Affairs or the child’s tribe. In a voluntary placement proceeding where a consenting</p>	<p><b>B.2. What actions must an agency and State court undertake in order to determine whether a child is an Indian child?</b></p> <p>(a) Agencies must ask whether there is reason to believe a child that is subject to a child custody proceeding is believe that the child is an Indian child, the agency must obtain verification, in writing, from all tribes in which it is believed</p>	Any changes made to ICWA in this provision were in an attempt to promote the early identification of ICWA applicability and to limit any delayed discoveries that ICWA applies. By requiring agencies and courts to consider, as early as possible, whether ICWA applies, the

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<p>parent evidences a desire for anonymity, the court shall make its inquiry in a manner that will not cause the parent’s identity to become publicly known.</p> <p>(b)(i) The determination by a tribe that a child is or is not a member of that tribe, or that the biological parent is or is not a member of that tribe is conclusive.</p> <p>(ii) Absent a contrary determination by the tribe that is alleged to be the Indian child’s tribe, a determination by the Bureau of Indian Affairs hat a child is or is not an Indian is conclusive.</p> <p>(c) Circumstances under which a state court has reason to believe a child involved in a child custody proceeding is an Indian include but are not limited to the following:</p> <p>(i) Any party to the case, Indian tribe, Indian organization or public or private agency informs the court that the child is an Indian child.</p> <p>(ii) Any public or state-licensed agency involved in child protection services or family support has discovered information which suggests that the child is an Indian child.</p> <p>(iii) The child who is the subject of the proceeding gives the court reason to believe he or she is an Indian child.</p> <p>(vi) The residence or the domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community.</p> <p>(v) An officer of the court involved in eh proceeding has knowledge that the child may be an Indian child.</p>	<p>that the child is a member or eligible for membership, as to whether the child is an Indian child.</p> <p>(b) State courts must ask, as a threshold question at the start of any State court child custody proceeding, whether there is reason to believe the child who is the subject of the proceeding is an Indian child by asking each party to the case, including the guardian ad litem and the agency representative, to certify on the record whether they have discovered or know of any information that suggests or indicates the child is an Indian child.</p> <p>(1) In requiring this certification, the court may require the agency to provide:</p> <p>(i) Genograms or ancestry charts for both parents, including all names known (maiden, married and former names or aliases); current and former addresses of the child’s parents, maternal and paternal grandparents and great grandparents or Indian custodians; birthdates; places of birth and death; tribal affiliation including all known Indian ancestry for individuals listed on the charts, and/or other identifying information; and/or</p> <p>(ii) The addresses for the domicile and residence of the child, his or her parents, or the Indian custodian and whether either parent or Indian custodian is domiciled on or a resident of an Indian reservation or in a predominantly Indian community.</p> <p>(2) If there is reason to believe the child is an Indian child, the court must confirm that the agency used active efforts to work with all tribes of which the child may be a member to verify whether the child is in fact a member or eligible for membership in any tribe, under paragraph (a).</p> <p>(c) An agency or court has reason to believe that a child involved in a child custody proceeding is an Indian child if:</p> <p>(1) Any party to the proceeding, Indian tribe, Indian organization or public or private agency informs the agency or court that the child is an Indian child;</p>	<p>updated guidelines will ensure that proper notice is given to parents/Indian custodians and tribes, that tribes have the opportunity to intervene or take jurisdiction over proceedings, as appropriate, and that ICWA’s placement preferences are respected.</p> <p>With regard to early discovery, section B requires agencies and courts to consider whether the child is an Indian child, and sets out the steps for verifying the tribe(s) and providing notice to the parents/Indian custodians and tribe(s). Section B also adds guidance regarding the evidence a court may require an agency to provide of the agency’s investigations into whether the child is an Indian child.</p>
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	<p>(2) Any agency involved in child protection services or family support has discovered information suggesting that the child is an Indian child;</p> <p>(3) The child who is the subject of the proceeding gives the agency or court reason to believe he or she is an Indian child;</p> <p>(4) The domicile or residence of the child, parents, or the Indian custodian is known by the agency or court to be, or is shown to be, on an Indian</p>	
<p><b>B.2. Determination of Indian Child's Tribe</b></p> <p>(a) Where an Indian child is a member of more than one tribe or is eligible for membership in more than one tribe but is not a member of any of them, the court is called upon to determine with which tribe the child has more significant contacts.</p> <p>(b) The court shall send the notice specified in recommended guideline B.4. to each tribe. The notice shall specify the other tribe or tribes that are being considered as the child's tribe and invite each tribe's views on which tribe shall be so designated.</p> <p>(c) In determining which tribe shall be designated the Indian child's tribe, the court shall consider, among other things, the following factors:</p> <ul style="list-style-type: none"> <li>(i) length of residence on or near the reservation of each tribe and frequency of contacts with each tribe;</li> <li>(ii) child's participation in activities of each tribe;</li> <li>(iii) child's fluency in the language of each tribe;</li> <li>(iv) whether there has been a previous adjudication with respect to the child by a court of one of the tribes;</li> </ul>	<p><b>B.3. Who makes the determination as to whether a child is a member of a tribe?</b></p> <p>(a) Only the Indian tribe(s) of which it is believed a biological parent or the child is a member or eligible for membership may make the determination whether the child is a member of the tribe(s), is eligible for membership in the tribe(s), or whether a biological parent of the child is a member of the tribe(s).</p> <p>(b) The determination by a tribe of whether a child is a member, is eligible for membership, or whether a biological parent is or is not a member of that tribe, is solely within the jurisdiction and authority of the tribe.</p> <p>(c) No other entity or person may authoritatively make the determination of whether a child is a member of the tribe or is eligible for membership in the tribe.</p> <ul style="list-style-type: none"> <li>(1) There is no requirement that the child maintain a certain degree of contacts with the tribe or for a certain blood quantum or degree of Indian blood.</li> <li>(2) A tribe need not formally enroll its members for a child to be a member or eligible for membership. In some tribes, formal enrollment is not required for tribal membership. Some tribes do not have written rolls and others have rolls that list only persons that were members as of a certain date. See <i>United States v. Broncheau</i>, 597 F.2d 1260, 1263 (9th Cir. 1979). The only relevant factor is whether the tribe verifies that the child is a member or</li> </ul>	<p>Section B adds a new paragraph clarifying that the tribe alone retains the responsibility to determine tribal membership. This section makes clear that there is no requirement for the child to have a certain degree of contact with the tribe or for a certain blood degree, and notes that a tribe may lack written rolls. The updated guidelines delete the provision allowing BIA, in lieu of the tribe, to verify the child's status. This provision has been deleted because it has become increasingly rare for the BIA to be involved in tribal membership determinations, as tribes determine their own membership. See e.g., <i>Santa Clara Pueblo v. Martinez</i>, 436 U.S. 49 (1978). ("Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained.") BIA may assist in contacting the tribe to ensure a determination, however.</p> <p>The updated section B also expands upon procedures for determining a child's</p>

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<p>(v) residence on or near one of the tribes' reservation by the child's relatives;</p> <p>(vi) tribal membership of custodial parent or Indian custodian;</p> <p>(vii) interest asserted by each tribe in response to the notice specified in subsection B.2.(b) of these guidelines; and</p> <p>(viii) the child's self identification.</p> <p>(d) The court's determination together with the reasons for it shall be set out in a written document and made a part of the record of the proceeding. A copy of that document shall be sent to each party to the proceeding and to each person or governmental agency that received notice of the proceeding.</p> <p>(e) If the child is a member of only one tribe, that tribe shall be designated the Indian child's tribe even though the child is eligible for membership in another tribe. If a child becomes a member of one tribe during or after the proceeding, that tribe shall be designated as the Indian child's tribe with respect to all subsequent actions related to the proceeding. If the child becomes a member of a tribe other than the one designated by the court as the Indian child's tribe, actions taken based on the court's determination prior to the child's becoming a tribal member continue to be valid.</p>	<p>eligible for membership.</p> <p>(d) The State court may not substitute its own determination regarding a child's membership or eligibility for membership in a tribe or tribes.</p> <p><b>B.4. What is the procedure for determining an Indian child's tribe when the child is a member or eligible for membership in more than one tribe?</b></p> <p>(a) Agencies are required to notify all tribes, of which the child may be a member or eligible for membership, that the child is involved in a child custody proceeding. The notice should specify the other tribe or tribes of which the child may be a member or eligible for membership.</p> <p>(b) If the Indian child is a member or eligible for membership in only one tribe, that tribe should be designated as the Indian child's tribe.</p> <p>(c) If an Indian child is a member or eligible for membership in more than one tribe, ICWA requires that the Indian tribe with which the Indian child has the more significant contacts be designated as the Indian child's tribe.</p> <p>(1) In determining significant contacts, the following may be considered:</p> <ul style="list-style-type: none"> <li>(i) Preference of the parents for membership of the child;</li> <li>(ii) Length of past domicile or residence on or near the reservation of each tribe;</li> <li>(iii) Tribal membership of custodial parent or Indian custodian; and</li> <li>(iv) Interest asserted by each tribe in response to the notice that the child is involved in a child custody proceeding;</li> </ul> <p>(d) When an Indian child is already a member of a tribe, but is also eligible for membership in another tribe, deference should be given to the tribe in which the Indian child is a member, unless otherwise agreed to by the tribes. However, if the Indian child is not a member of any tribe, an opportunity should be provided to allow the tribes</p>	<p>tribe in the event that more than one tribe is identified as the child's tribe. Specifically, it changes the criteria for determining with which tribe the child has "significant contacts," adding that the parents' preference for membership will be considered, and deleting factors that are subjective or inapplicable to infants.</p>
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	<p>to determine which of them should be designated as the Indian child's tribe.</p> <p>(i) If the tribes are able to reach an agreement, the agreed upon tribe should be designated as the Indian child's tribe.</p> <p>(ii) If the tribes do not agree, the following factors should be considered in designating the Indian child's tribe:</p> <p>(A) The preference of the parents or extended family members who are likely to become foster care or adoptive placements; and/or</p> <p>(B) Tribal membership of custodial parent or Indian custodian; and/or</p> <p>(C) If applicable, length of past domicile or residence on or near the reservation of each tribe; and/or</p> <p>(D) Whether there has been a previous adjudication with respect to the child by a court of one of the tribes; and/or</p> <p>(E) Self-identification by the child; and/or</p> <p>(F) Availability of placements.</p> <p>(iii) In the event the child is eligible for membership in a tribe but is not yet a member of any tribe, the agency should take the steps necessary to obtain membership for the child in the tribe that is designated as the Indian child's tribe.</p> <p>(3) Once an Indian tribe is designated as the child's Indian tribe, all tribes which received notice of the child custody proceeding must be notified in writing of the determination and a copy of that document must be filed with the court and sent to each party to the proceeding and to each person or governmental agency that received notice of the proceeding.</p> <p>(4) A determination of the Indian child's tribe for purposes of ICWA and these guidelines does not constitute a determination for any other purpose or situation.</p> <p>(d) The tribe designated as the Indian child's tribe may authorize another tribe to act as a representative for the tribe in a child custody case, including, for example, having</p>	
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	<p>the representative tribe perform home studies or expert witness services for the Indian child's tribe.</p>	
<p><b>B.4. Determination of Jurisdiction</b>                  (a) In any Indian child custody proceeding in state court, the court shall determine the residence and domicile of the child. Except as provided in Section B.7. of these guidelines, if either the residence or domicile is on a reservation where the tribe exercises exclusive jurisdiction over child custody proceedings, the proceedings in state court shall be dismissed.                  (b) If the Indian child has previously resided or been domiciled on the reservation, the state court shall contact the tribal court to determine whether the child is a ward of the tribal court. Except as provided in Section B.7. of these guidelines, if the child is a ward of a tribal court, the state court proceedings shall be dismissed.</p>	<p><b>B.5. When must a State court dismiss an action?</b>                  Subject to B.8 (emergency procedures), the following limitations on a State court's jurisdiction apply:                  (a) The court must dismiss any child custody proceeding as soon as the court determines that it lacks jurisdiction.                  (b) The court must make a determination of the residence and domicile of the Indian child. If either the residence or domicile is on a reservation where the tribe exercises exclusive jurisdiction over child custody proceedings, the State court must dismiss the State court proceedings, the agency must notify the tribe of the dismissal based on the tribe's exclusive jurisdiction, and the agency must transmit all available information regarding the Indian child custody proceeding to the tribal court.                  (c) If the Indian child has been domiciled or previously resided on an Indian reservation, the State court must contact the tribal court to determine whether the child is a ward of the tribal court. If the child is a ward of a tribal court, the State court must dismiss the State court proceedings, the agency must notify the tribe of the dismissal, and the agency must transmit all available information regarding the Indian child custody proceeding to the tribal court.</p>	<p>The new version puts emphasis on the need for quick decision making with regard to jurisdiction for the child custody proceeding. Also, the new version provides an extra reminder to state courts that when they dismiss a child custody claim for transfer to a tribal court, the state court needs to give notice to the tribe in addition to sending them all the information for the case.</p>
<p><b>B.5. Notice requirements</b>                  (a) In any involuntary child custody proceeding, the state court shall make inquiries to determine if the child involved is a member of an Indian tribe or if a parent of the child is a member of an Indian tribe and the child is eligible for membership in an Indian tribe.                  (b) In any involuntary Indian child custody proceeding, notice of the proceeding shall be sent to the parents and Indian custodians, if any, and to any tribes that may be the Indian child's</p>	<p><b>B.6. What are the notice requirements for a child custody proceeding involving an Indian child?</b>                  (a) When an agency or court knows or has reason to know that the subject of an involuntary child custody proceeding is an Indian child, the agency or court must send notice of each such proceeding (including but not limited to a temporary custody hearing, any removal or foster care placement, any adoptive placement, or any termination of parental or custodial rights) by registered mail with return receipt requested to:                  (1) Each tribe where the child may be a member or eligible</p>	<p>With regard to providing notice to Indian tribes and the child's parents/ Indian custodians, the updated section B:</p> <ul style="list-style-type: none"> <li>• Clarifies that notice is required for each proceeding (not just for the first or last proceeding);</li> <li>• States that notice must be sent, at a minimum, by registered mail, return receipt requested, and that personal service or other types of service may be in addition to, but not in lieu of,</li> </ul>

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<p>tribe by registered mail with return receipt requested. The notice shall be written in clear and understandable language and include the following information:</p> <ul style="list-style-type: none"> <li>(i) The name of the Indian child</li> <li>(ii) His or her tribal affiliation</li> <li>(iii) A copy of the petition, complaint or other document by which the proceeding was initiated.</li> <li>(vi) The name of the petitioner and the name and address of the petitioner’s attorney.</li> <li>(v) A statement of the right of the biological parents or Indian custodians and the Indian child’s tribe to intervene in the proceeding.</li> <li>(vi) A statement that if the parents or Indian custodians are unable to afford counsel, counsel will be appointed to represent them.</li> <li>(vii) A statement of the right of the natural parents or Indian custodians and the Indian child’s tribe to have, on request, twenty days (or such additional time as may be permitted under state law) to prepare for the proceedings.</li> <li>(viii) The location, mailing address and telephone number of the court.</li> <li>(ix) A statement of the right of parents or Indian custodians or the Indian child’s tribe to petition the court to transfer the proceeding to the Indian child’s tribal court.</li> <li>(x) The potential legal consequences of an adjudication on future custodial rights of the parents or Indian custodians.</li> <li>(xi) A statement in the notice to the tribe that since child custody proceedings are usually conducted on a confidential basis, tribal officials should keep confidential the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does</li> </ul>	<p>for membership;</p> <ul style="list-style-type: none"> <li>(2) The child’s parents; and</li> <li>(3) If applicable, the Indian custodian. (b) Notice may be sent via personal service or electronically in addition to the methods required by the Act, but such alternative methods do not replace the requirement for notice to be sent by registered mail with return receipt requested.</li> <li>(c) Notice must be in clear and understandable language and include the following: <ul style="list-style-type: none"> <li>(1) Name of the child, the child’s birthdate and birthplace;</li> <li>(2) Name of each Indian tribe(s) in which the child is a member or may be eligible for membership;</li> <li>(3) A copy of the petition, complaint or other document by which the proceeding was initiated;</li> <li>(4) Statements setting out: <ul style="list-style-type: none"> <li>(i) The name of the petitioner and name and address of petitioner’s attorney;</li> <li>(ii) The right of the parent or Indian custodian to intervene in the proceedings.</li> <li>(iii) The Indian tribe’s right to intervene at any time in a State court proceeding for the foster care placement of or termination of a parental right.</li> <li>(iv) If the Indian parent(s) or, if applicable, Indian custodian(s) is unable to afford counsel based on a determination of indigency by the court, counsel will be appointed to represent the parent or Indian custodian where authorized by State law.</li> <li>(v) The right to be granted, upon request, a specific amount of additional time (up to 20 additional days) to prepare for the proceedings due to circumstances of the particular case.</li> <li>(vi) The right to petition the court for transfer of the proceeding to tribal court under 25 U.S.C. 1911, absent objection by either parent: <i>Provided, that</i> such transfer is</li> </ul> </li> </ul> </li> </ul>	<p>such mail; and</p> <ul style="list-style-type: none"> <li>• Clarifies that the tribe has the right to intervene at any time.</li> </ul>
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<p>not need the information in order to exercise the tribe's right under the Act.</p> <p>(c) The tribe, parents or Indian custodians receiving notice from the petitioner of the pendency of a child custody proceeding has the right, upon request, to be granted twenty days (or such additional time as may be permitted under state law) from the date upon which notice was received to prepare for the proceeding.</p> <p>(d) The original or a copy of each notice sent pursuant to this section shall be filed with the court together with any return receipts or other proof of service.</p> <p>(f) If a parent or Indian custodian appears in court without an attorney, the court shall inform him or her of the right to appointed counsel, the right to request that the proceeding be transferred to tribal court or to object to such transfer, the right to request additional time to prepare for the proceeding and the right (if the parent or Indian custodian is not already a party) to intervene in the proceedings.</p> <p>(g) If the court or a petitioning party has reason to believe that a parent or Indian custodian is not likely to understand the contents of the notice because of lack of adequate comprehension of written English, a copy of the notice shall be sent to the Bureau of Indian Affairs agency nearest to the residence of that person requesting that Bureau of Indian Affairs personnel arrange to have the notice explained to that person in the language that her or she best understands.</p>	<p>subject to declination by the tribal court.</p> <p>(vii) The mailing addresses and telephone numbers of the court and information related to all parties to the proceeding and individuals notified under this section.</p> <p>(viii) The potential legal consequences of the proceedings on the future custodial and parental rights of the Indian parents or Indian custodians.</p> <p>(d) In order to assist the Indian tribe(s) in making a determination regarding whether the child is a member or eligible for membership, the agency or court should include additional information in the notice, such as:</p> <p>(1) Genograms or ancestry charts for both parents, including all names known (maiden, married and former names or aliases); current and former addresses of the child's parents, maternal and paternal grandparents and great grandparents or Indian custodians; birthdates; places of birth and death; tribal affiliation including all known Indian ancestry for individuals listed on the charts, and/or other identifying information; and/or</p> <p>(2) The addresses for the domicile and residence of the child, his or her parents, or the Indian custodian and whether either parent or Indian custodian is domiciled on or a resident of an Indian reservation or in a predominantly Indian community.</p> <p>(3) In the event that a parent has requested anonymity, the agency and court must take steps to keep information related to the parent confidential and sealed from disclosure.</p> <p>(e) If the identity or location of the Indian parents, Indian custodians or tribes in which the Indian child is a member or eligible for membership cannot be ascertained, but there is reason to believe the child is an Indian child, notice of the child custody proceeding must be sent to the appropriate Bureau of Indian Affairs Regional Director (see <a href="http://www.bia.gov">www.bia.gov</a>). To establish tribal identity, as much information as is known</p>	
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	<p>regarding the child’s direct lineal ancestors should be provided (see section B.6.(c) of these guidelines regarding notice requirements). The Bureau of Indian Affairs will not make a determination of tribal membership, but may, in some instances, be able to identify tribes to contact.</p> <p>(f) Because child custody proceedings are usually conducted on a confidential basis, information contained in the notice should be kept confidential to the extent possible.</p> <p>(g) The original or a copy of each notice sent under this section should be filed with the court together with any return receipts or other proof of service.</p> <p>(h) If a parent or Indian custodian appears in court without an attorney, the court must inform him or her of the right to appointed counsel, the right to request that the proceeding be transferred to tribal court, the right to object to such transfer, the right to request additional time to prepare for the proceeding and the right (if the parent or Indian custodian is not already a party) to intervene in the proceedings.</p> <p>(i) If the court or an agency has reason to believe that a parent or Indian custodian possesses limited English proficiency and is therefore not likely to understand the contents of the notice, the court or agency must, at no cost, provide a translated version of the notice or have the notice read and explained in a language that the parent or Indian custodian understands. To secure such translation or interpretation support, a court or agency should contact the Indian child’s tribe or the local BIA agency for assistance in locating and obtaining the name of a qualified translator or interpreter.</p> <p>(j) In voluntary proceedings, notice should also be sent in accordance with this section because the Indian tribe might have exclusive jurisdiction and/or the right to intervene. Further, notice to and involvement of the Indian tribe in the early stages of the proceedings aids the agency and court in</p>	
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	<p>satisfying their obligations to determine whether the child is an Indian child and in complying with 25 U.S.C. 1915.</p> <p>(k) If the child is transferred interstate, regardless of whether the Interstate Compact on the Placement of Children (ICPC) applies, both the originating State court and receiving State court must provide notice to the tribe(s) and seek to verify whether the child is an Indian child.</p> <p>(l) The notice requirement includes providing responses to requests for additional information, where available, in the event that a tribe indicates that such information is necessary to determine whether a child is an Indian child.</p>	
<p><b>B.6. Time Limits and Extensions</b></p> <p>(a) A tribe, parent or Indian custodian entitled to notice of the pendency of a child custody proceeding has a right, upon request, to be granted an additional twenty days from the date upon which notice was received to prepare for participation in this proceeding.</p> <p>(b) The proceeding may not begin until all of the following dates have passed:</p> <ul style="list-style-type: none"> <li>(i) ten days after the parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice;</li> <li>(ii) ten days after the Indian child’s tribe (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice;</li> <li>(iii) thirty days after the parent or Indian custodian has received notice if the parent or Indian custodian has requested an additional twenty days to prepare for the proceeding; and</li> <li>(iv) thirty days after the Indian child’s tribe has received notice if the Indian child’s tribe has requested an additional twenty days to prepare</li> </ul>	<p><b>B.7. What time limits and extensions apply?</b></p> <p>(a) No hearings regarding decisions for the foster care or termination of parental rights may begin until the waiting periods to which the parents or Indian custodians and to which the Indian child’s tribe are entitled have passed. Additional extensions of time may also be granted beyond the minimum required by the Act.</p> <p>(b) A tribe, parent or Indian custodian entitled to notice of the pendency of a child custody proceeding has a right, upon request, to be granted an additional 20 days from the date upon which notice was received in accordance with 25 U.S.C. 1912(a) to prepare for participation in the proceeding.</p> <p>(c) The proceeding may not begin until all of the following dates have passed:</p> <ul style="list-style-type: none"> <li>(1) 10 days after each parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice in accordance with 25 U.S.C. 1912(a);</li> <li>(2) 10 days after the Indian child’s tribe (or the Secretary if the Indian child’s tribe is unknown to the party seeking placement) has received notice in accordance with 25 U.S.C. 1912(a);</li> <li>(3) 30 days after the parent or Indian custodian has</li> </ul>	<p>All of the time limits appear the same; however, additional language was added to provide for alternative methods of participation in State courts to make those processes easier for family members and the associated tribe.</p>

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<p>for the proceeding.                  (c) The time limits listed in this section are the minimum time periods required by the Act. The court may grant more time to prepare where state law permits.</p>	<p>received notice in accordance with 25 U.S.C. 1912(a), if the parent or Indian custodian has requested an additional 20 days to prepare for the proceeding; and                  (4) 30 days after the Indian child’s tribe has received notice in accordance with 25 U.S.C. 1912(a), if the Indian child’s tribe has requested an additional 20 days to prepare for the proceeding.                  (d) The court should allow, if it possesses the capability, alternative methods of participation in State court proceedings by family members and tribes, such as participation by telephone, videoconferencing, or other methods.</p>	
<p><b>B.7. Emergency Removal of an Indian Child</b>                  (a) Whenever an Indian child is removed from the physical custody of the child’s parents or Indian custodians pursuant to the emergency removal or custody provisions of state law, the agency responsible for the removal action shall immediately cause an inquiry to be made as to the residence and domicile of the child.                  (b) When a court order authorizing continued emergency physical custody is sought, the petition for that order shall be accompanied by an affidavit containing the following information:                  (i) the name, age and last known address of the Indian child                  (ii) The name and address of the child’s parents and Indian custodians, if any. If such persons are unknown, a detailed explanation of what efforts have been made to locate them shall be included.                  (iii) Facts necessary to determine the residence and the domicile of the Indian child and whether either the residence or domicile is</p>	<p><b>B.8. What is the process for the emergency removal of an Indian child?</b>                  (a) The emergency removal and emergency placement of an Indian child in a foster home or institution under applicable State law is allowed only as necessary to prevent imminent physical damage or harm to the child. This requirement applies to all Indian children regardless of whether they are domiciled or reside on a reservation. This does not, however, authorize a State to remove a child from a reservation where a tribe exercises exclusive jurisdiction.                  (b) Any emergency removal or emergency placement of any Indian child under State law must be as short as possible. Each involved agency or court must:                  (1) Diligently investigate and document whether the removal or placement is proper and continues to be necessary to prevent imminent physical damage or harm to the child;                  (2) Promptly hold a hearing to hear evidence and evaluate whether the removal or placement continues to be necessary whenever new information is received or assertions are made that the emergency situation has ended; and                  (3) Immediately terminate the emergency removal or placement once the court possesses sufficient evidence to</p>	<p>This section also clarifies how guidelines apply if the child is transferred interstate. The updated guidelines expand upon the emergency procedure provisions in light of evidence that some States routinely rely upon emergency removals and placements in a manner that bypasses implementation of ICWA. <i>See Oglala Sioux Tribe v. Hunnik</i>, Case No. 5:13-cv-05020-JLV, <i>Amicus Brief of the United States</i>, at *5-6 (D.S.D. Aug. 14, 2014) (involving allegations that: (1) Defendants are conducting perfunctory 48-hour hearings that do not adequately gather or evaluate information necessary to determine whether emergency removals or placements should be terminated, and that the orders issued at the end of the 48-hour hearing do not adequately instruct State officials to return the child to the home as soon as the emergency has ended; (2) Defendants are violating the Due Process Clause by preventing parents from</p>

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<p>on an Indian reservation. If either the residence or domicile is believed to be on an Indian reservation, the name of the reservation shall be stated.</p> <p>(iv) The tribal affiliation of the child and of the parents and/or Indian custodians</p> <p>(v) A specific and detailed account of the circumstances that lead the agency responsible for the emergency removal of the child to take that action.</p> <p>(vi) If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, a statement of efforts that have been made and are being made to transfer the child to the tribe's jurisdiction</p> <p>(vii) A statement of the specific actions that have been taken to assist the parents or Indian custodians so the child may safely be returned to their custody.</p> <p>(c) If the Indian child is not restored to the parents or Indian custodians or jurisdiction is not transferred to the tribe, the agency responsible for the child's removal must promptly commence a state court proceeding for foster care placement. If the child resides or is domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, such placement must terminate as soon as the imminent physical damage or harm to the child which resulted in the emergency removal no longer exists or as soon as the tribe exercises jurisdiction over the case—whichever is earlier.</p> <p>(d) Absent extraordinary circumstances, temporary emergency custody shall not be continued for more than 90 days without a</p>	<p>determine that the emergency has ended.</p> <p>(c) If the agency that conducts an emergency removal of a child whom the agency knows or has reason to know is an Indian child, the agency must:</p> <p>(1) Treat the child as an Indian child until the court determines that the child is not an Indian child;</p> <p>(2) Conduct active efforts to prevent the breakup of the Indian family as early as possible, including, if possible, before removal of the child;</p> <p>(3) Immediately take and document all practical steps to confirm whether the child is an Indian child and to verify the Indian child's tribe;</p> <p>(4) Immediately notify the child's parents or Indian custodians and Indian tribe of the removal of the child;</p> <p>(5) Take all practical steps to notify the child's parents or Indian custodians and Indian tribe about any hearings regarding the emergency removal or emergency placement of the child; and</p> <p>(6) Maintain records that detail the steps taken to provide any required notifications under section B.6 of these guidelines.</p> <p>(d) A petition for a court order authorizing emergency removal or continued emergency physical custody must be accompanied by an affidavit containing the following information:</p> <p>(1) The name, age and last known address of the Indian child;</p> <p>(2) The name and address of the child's parents and Indian custodians, if any;</p> <p>(3) If such persons are unknown, a detailed explanation of what efforts have been made to locate them, including notice to the appropriate Bureau of Indian Affairs Regional Director (see <a href="http://www.bia.gov">www.bia.gov</a>);</p> <p>(4) Facts necessary to determine the residence and the domicile of the Indian child;</p> <p>(5) If either the residence or domicile is believed to be on an Indian reservation, the name of the reservation;</p>	<p>testifying, presenting evidence, or cross-examining the State's witnesses at the 48-hour hearing; and (3) parents are not being provided adequate notice or the opportunity to be represented by appointed counsel and that the State courts are issuing orders to remove Indian children from their homes without basing those orders on evidence adduced in the hearing). Because ICWA was intended to help prevent the breakup of Indian families; therefore, emergency removals and emergency placements of Indian children should be severely limited, applying only in circumstances involving imminent physical damage or harm. The updated section B clarifies that the guidelines for emergency removal or placement apply regardless of whether the Indian child is a resident of or domiciled on a reservation. This section also explicitly states the standard for determining whether emergency removal or emergency placement is appropriate— <i>i.e.</i>, whether it is necessary to prevent imminent physical damage or harm to the child—and provides examples. The guidelines clearly state that the emergency removal/placement must be as short as possible, and provides guidance on how to ensure it is as short as possible. It also shortens the time period for temporary custody without a hearing or extraordinary circumstances from 90 days to 30 days. This shortened timeframe promotes ICWA's important goal of</p>
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<p>determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness that the custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.</p>	<p>(6) The tribal affiliation of the child and of the parents and/or Indian custodians;                  (7) A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action;                  (8) If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, a statement of efforts that have been made and are being made to transfer the child to the tribe's jurisdiction;                  (9) A statement of the specific active efforts that have been taken to assist the parents or Indian custodians so the child may safely be returned to their custody; and                  (10) A statement of the imminent physical damage or harm expected and any evidence that the removal or emergency custody continues to be necessary to prevent such imminent physical damage or harm to the child.                  (e) At any court hearing regarding the emergency removal or emergency placement of an Indian child, the court must determine whether the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child. The court should accept and evaluate all information relevant to the agency's determination provided by the child, the child's parents, the child's Indian custodians, the child's tribe or any participants in the hearing.                  (f) Temporary emergency custody should not be continued for more than 30 days. Temporary emergency custody may be continued for more than 30 days only if:                  (1) A hearing, noticed in accordance with these guidelines, is held and results in a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness, that custody of the child by the parent or Indian custodian is likely to result in imminent physical damage or harm to the child; or                  (2) Extraordinary circumstances exist.                  (g) The emergency removal or placement must terminate as</p>	<p>preventing the breakup of Indian families.</p>
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	<p>soon as the imminent physical damage or harm to the child which resulted in the emergency removal or placement no longer exists, or, if applicable, as soon as the tribe exercises jurisdiction over the case, whichever is earlier.</p> <p>(h) Once an agency or court has terminated the emergency removal or placement, it must expeditiously:</p> <p>(1) Return the child to the parent or Indian custodian within one business day; or</p> <p>(2) Transfer the child to the jurisdiction of the appropriate Indian tribe if the child is a ward of a tribal court or a resident of or domiciled on a reservation; or</p> <p>(3) Initiate a child custody proceeding subject to the provisions of the Act and these guidelines.</p> <p>(i) The court should allow, if it possesses the capability, alternative methods of participation in State court proceedings by family members and tribes, such as participation by telephone, videoconferencing, or other methods.</p>	
<p><b>B.8. Improper Removal from Custody</b></p> <p>(a) If, in the course of any Indian child custody proceeding, the court has reason to believe that the child who is the subject of the proceeding may have been improperly removed from the custody of his or her parent or Indian custodian or that the child has been improperly retained after a visit or other temporary relinquishment of custody, and that the petitioner is responsible for such removal or retention, the court shall immediately stay the proceedings until a determination can be made on the question of improper removal or retention.</p> <p>(b) If the court finds that the petitioner is responsible for an improper removal or retention, the child shall be immediately</p>	<p><b>B.9. What are the procedures for determining improper removal?</b></p> <p>(a) If, in the course of any Indian child custody proceeding, any party asserts or the court has reason to believe that the Indian child may have been improperly removed from the custody of his or her parent or Indian custodian, or that the Indian child has been improperly retained, such as after a visit or other temporary relinquishment of custody, the court must immediately stay the proceeding until a determination can be made on the question of improper removal or retention, and such determination must be conducted expeditiously.</p> <p>(b) If the court finds that the Indian child was improperly removed or retained, the court must terminate the proceeding and the child must be returned immediately to his or her parents or Indian custodian, unless returning the</p>	<p>These two versions are for the most part identical, but there again is an emphasis on expediency in almost every aspect of the proceedings.</p>

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<p>returned to his or her parents or Indian custodian.</p>	<p>child to his parent or custodian would subject the child to imminent physical damage or harm.</p>	
<p><b>SECTION C – REQUESTS FOR TRANSFER TO TRIBAL COURT</b></p>		
<p><b>C.1. Petitions under 25 U.S.C. §1911(b) for transfer of proceeding</b>                  Either parent, the Indian custodian or the Indian child’s tribe may, orally or in writing, request the court to transfer the Indian child custody proceeding to the tribal court of the child’s tribe. The request shall be made promptly after receiving notice of the proceeding. If the request is made orally it shall be reduced to writing by the court and made a part of the record.</p>	<p><b>C.1. How are petitions for transfer of proceeding made?</b>                  (a) Either parent, the Indian custodian, or the Indian child’s tribe may request, orally on the record or in writing, that the State court transfer each distinct Indian child custody proceeding to the tribal court of the child’s tribe.                  (b) The right to request a transfer occurs with each proceeding. For example, a parent may request a transfer to tribal court during the first proceeding for foster placement and/or at a proceeding to determine whether to continue foster placement, and/or at a later proceeding, for example at a hearing for termination of parental rights.                  (c) The right to request a transfer is available at any stage of an Indian child custody proceeding, including during any period of emergency removal.                  (d) The court should allow, if possible, alternative methods of participation in State court proceedings by family members and tribes, such as participation by telephone, videoconferencing, or other methods.</p>	<p>The updated section C deletes the requirement that requests to transfer to tribal court be made “promptly after receiving notice of the proceeding” because there is no such requirement in ICWA. Instead, the updated guidelines clarify that the right to transfer is available at any stage of a proceeding, including during an emergency removal. The updated section C also clarifies that the right to request a transfer occurs with each distinct proceeding. ICWA contains no restriction on the right to request a transfer occurring at the first, last, or any specific child custody proceeding. A tribe may decide that transfer is not appropriate until it reaches the stage where parental termination is being determined.</p>
<p><b>C.2. Criteria and Procedures for Ruling on 25 U.S.C. §1911(b) Transfer Petitions</b>                  (a) Upon request of a petition to transfer by a parent, Indian custodian or the Indian child’s tribe, the court must transfer unless either parent objects to such transfer, the tribal court declines jurisdiction, or the court determines that good cause to the contrary exists for denying transfer.                  (b) If the court believes or any party asserts that</p>	<p><b>C.2. What are the criteria and procedures for ruling on transfer petitions?</b>                  (a) Upon receipt of a petition to transfer by a parent, Indian custodian or the Indian child’s tribe, the State court must transfer the case unless any of the following criteria are met:                  (1) Either parent objects to such transfer;                  (2) The tribal court declines the transfer; or                  (3) The court determines that good cause exists for denying the transfer.                  (b) To minimize delay, the court should expeditiously provide</p>	<p>The reasons for State court transfer are the same. However, the 2015 version moved all the good cause for transfer language and requirements to section C.3.</p>

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<p>good cause to the contrary exists, the reasons for such belief or assertion shall be stated in writing and made available to the parties who are petitioning transfer. The petitioners shall have the opportunity to provide the court with their views on whether or not good cause to deny transfer exists.</p>	<p>all records related to the proceeding to the tribal court.</p>	
<p><b>C.3. Determination of Good Cause to the Contrary.</b></p> <p>(a) Good cause not to transfer the proceeding exists if the Indian child’s tribe does not have a tribal court as defined by the Act to which the case can be transferred.</p> <p>(b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:</p> <p style="padding-left: 20px;">(i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.</p> <p style="padding-left: 20px;">(ii) The Indian child is over twelve years of age and objects to the transfer.</p> <p style="padding-left: 20px;">(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.</p> <p style="padding-left: 20px;">(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child’s tribe or members of the child’s tribe.</p> <p>(c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.</p>	<p><b>C.3. How is a determination of “good cause” made?</b></p> <p>a) If the State court believes, or any party asserts, that good cause not to transfer exists, the reasons for such belief or assertion must be stated on the record or in writing and made available to the parties who are petitioning for transfer.</p> <p>(b) Any party to the proceeding must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists.</p> <p>(c) In determining whether good cause exists, the court may not consider whether the case is at an advanced stage or whether transfer would result in a change in the placement of the child because the Act created concurrent, but presumptively, tribal jurisdiction over proceedings involving children not residing or domiciled on the reservation, and seeks to protect, not only the rights of the Indian child as an Indian, but the rights of Indian communities and tribes in retaining Indian children. Thus, whenever a parent or tribe seeks to transfer the case it is presumptively in the best interest of the Indian child, consistent with the Act, to transfer the case to the jurisdiction of the Indian tribe.</p> <p>(d) In addition, in determining whether there is good cause to deny the transfer, the court may not consider:</p> <p style="padding-left: 20px;">(1) The Indian child’s contacts with the tribe or reservation;</p> <p style="padding-left: 20px;">(2) Socio-economic conditions or any perceived inadequacy of tribal or Bureau of Indian Affairs social services or judicial systems; or</p>	<p>The updated section C also updates the “good cause” factors for denying transfer to tribal court. The updated criteria are more general; in summary, good cause may be found if either parent objects, the tribal court declines, or the State court otherwise determines that good cause exists. The updated guidelines specifically omit some of the factors that were the basis for finding that “good cause” exists under the 1979 guidelines. One such factor that should no longer be considered is whether the proceeding was at an advanced stage. There may be valid reasons for waiting to transfer a proceeding until it reaches an advanced stage. Another factor that should no longer be considered is the level of contacts the child has had with the tribe—this factor unnecessarily introduces an outsider’s evaluation of the child’s relationship with the tribe and cannot sensibly be applied to infants.</p> <p>The updated guidelines also specify that it is inappropriate to conduct an independent analysis, inconsistent with ICWA’s placement preferences, of the “best interest” of an Indian child. The provisions of ICWA create a presumption</p>

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<p>(d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer.</p>	<p>(3) The tribal court’s prospective placement for the Indian child. (e) The burden of establishing good cause not to transfer is on the party opposing the transfer.</p>	<p>that ICWA’s placement preferences are in the best interests of Indian children; therefore, an independent analysis of “best interest” would undermine Congress’s findings. Finally, the updated guidelines provide that the tribal court’s prospective placement of an Indian child should not be considered, because it invites speculation regarding the tribal court’s findings and conclusions and, therefore, undermines the independence of tribal court decision making.</p>
<p><b>C.4. Tribal Court Declination of Transfer</b> (a) A tribal court to which transfer is requested may decline to accept such transfer. (b) Upon receipt of a transfer petition the state court shall notify the tribal court in writing of the proposed transfer. The notice shall state how long the tribal court has to make its decision. The tribal court shall have at least twenty days from the receipt of notice of a proposed transfer to decide whether to decline the transfer. The tribal court may inform the state court of its decision to decline either orally or in writing. (c) Parties shall file with the tribal court any arguments they wish to make either for or against tribal declination of transfer. Such arguments shall be made orally in open court or in written pleadings that are served on all other parties. (d) If the case is transferred the state court shall provide the tribal court with all available information on the case.</p>	<p><b>C.4. What Happens When a Petition for Transfer is Made?</b> (a) Upon receipt of a transfer petition the State court must promptly notify the tribal court in writing of the transfer petition and request a response regarding whether the tribal court wishes to decline the transfer. The notice should specify how much time the tribal court has to make its decision; provided that the tribal court has at least 20 days from the receipt of notice of a transfer petition to decide whether to accept or decline the transfer. (b) The tribal court should inform the State court of its decision to accept or decline jurisdiction within the time required or may request additional time; provided that the reasons for additional time are explained. (c) If the tribal court accepts the transfer, the State court should promptly provide the tribal court with all court records.</p>	<p>No substantial changes were made.</p>
<p><b>SECTION D – ADJUDICATION OF INVOLUNTARY PLACEMENTS, ADOPTIONS,</b></p>		

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<b>OR TERMINATIONS OR TERMINATIONS OF PARENTAL RIGHTS</b>		
<p><b>D.1. Access to Reports</b> Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child has the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based. No decision of the court shall be based on any report or other document not filed with the court.</p>	<p><b>D.1. Who Has Access to Reports or Records?</b> (a) The court must inform each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child of his or her right to timely examination of all reports or other documents filed with the court and all files upon which any decision with respect to such action may be based. (b) Decisions of the court may be based only upon reports, documents or testimony presented on the record.</p>	<p>The updated Section D establishes that parties have the right to examine records and reports in a timely manner; this ensures that parents/Indian custodians and tribes have the opportunity to examine information necessary to protect their rights under ICWA.</p>
<p><b>D.2. Efforts To Alleviate Need To Remove Child From Parents or Indian Custodians</b> Any party petitioning a state court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to the commencement of the proceeding active efforts have been made to alleviate the need to remove the Indian child from his or her parents or Indian custodians. These efforts shall take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers.</p>	<p><b>D.2. What Steps Must a Party Take to Petition a State Court for Certain Actions Involving an Indian Child?</b> (a) Any party petitioning a State court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to, and until the commencement of, the proceeding, active efforts have been made to avoid the need to remove the Indian child from his or her parents or Indian custodians and show that those efforts have been unsuccessful. (b) Active efforts must be documented in detail and, to the extent possible, should involve and use the available resources of the extended family, the child's Indian tribe, Indian social service agencies and individual Indian care givers.</p>	<p>This updated section also expands significantly on how to comply with the Act's "active efforts" requirement. Specifically, the updated guidelines: 1. Require demonstration that "active efforts" were made, not only "prior to" the commencement of the proceeding, but also "until" the commencement of the proceeding; 2. Require documentation of what "active efforts" were made; and 3. Require a showing that active efforts have been unsuccessful.</p>
<p><b>D.3. Standards of Evidence</b> (a) The court may not issue an order effecting a foster care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody with the child's parents of Indian custodian is likely to result in serious emotional or physical damage to the child. (b) The court may not order a termination of</p>	<p><b>D.3. What are the Applicable Standards of Evidence?</b> (a) The court may not issue an order effecting a foster care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody with the child's parents or Indian custodian is likely to result in serious harm to the child. (b) The court may not order a termination of parental rights unless the court's order is supported by evidence beyond a reasonable doubt, supported by the testimony of one or</p>	<p>No substantial changes were made.</p>

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<p>parental rights unless the court’s order is supported by evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.</p> <p>(c) Evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or non-conforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding. The evidence must show the causal relationship between the conditions that exist and the damage is likely to result.</p>	<p>more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious harm to the child.</p> <p>(c) Clear and convincing evidence must show a causal relationship between the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding. Evidence that shows only the existence of community or family poverty or isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child.</p>	
<p><b>D.4. Qualified Expert Witnesses</b></p> <p>(a) Removal of an Indian child from his or her family must be based on competent testimony from one or more experts qualified to speak specifically to the issue of whether continued custody by the parents or Indian custodians is likely to result in serious physical or emotional damage to the child.</p> <p>(b) Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:</p> <p>(i) A member of the Indian child’s tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.</p> <p>(ii) A lay expert witness having substantial</p>	<p><b>D.4. Who may serve as a qualified expert witness?</b></p> <p>(a) A qualified expert witness should have specific knowledge of the Indian tribe’s culture and customs.</p> <p>(b) Persons with the following characteristics, in descending order, are presumed to meet the requirements for a qualified expert witness:</p> <p>(1) A member of the Indian child’s tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.</p> <p>(2) A member of another tribe who is recognized to be a qualified expert witness by the Indian child’s tribe based on their knowledge of the delivery of child and family services to Indians and the Indian child’s tribe.</p> <p>(3) A layperson who is recognized by the Indian child’s tribe as having substantial experience in the delivery of child and family services to Indians, and knowledge of prevailing</p>	<p>The updated section D also provides guidance regarding how to identify an appropriate “qualified expert witness.” Commenters indicated that some States rely on witnesses’ qualifications as child care specialists, or on other areas of expertise, but do not require any expert knowledge related to the tribal community. The updated guidelines establish a preferential order for witnesses who are experts in the culture and customs of the Indian child’s tribe. This will ensure that the expert witness with the most knowledge of the Indian child’s tribe is given priority.</p>

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<p>experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.</p> <p>(iii) A professional person having substantial education and experience in the area of his or her specialty.</p> <p>(c) The court or any party may request the assistance of the Indian child's tribe or the Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.</p>	<p>social and cultural standards and childrearing practices within the Indian child's tribe.</p> <p>(4) A professional person having substantial education and experience in the area of his or her specialty who can demonstrate knowledge of the prevailing social and cultural standards and childrearing practices within the Indian child's tribe.</p> <p>(c) The court or any party may request the assistance of the Indian child's tribe or the Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.</p>	
<p><b>SECTION E - VOLUNTARY PROCEEDINGS</b></p>		
<p><b>E.1. Execution of Consent</b></p> <p>To be valid, consent to a voluntary termination of parental rights or adoption must be executed in writing and recorded before a judge or magistrate of a court of competent jurisdiction. A certificate of the court must accompany any consent and must certify that the terms and consequences of the consent were explained in detail and in the language of the parent or Indian custodian, if English is not the primary language, and were fully understood by the parent or Indian custodian. Execution of consent need not be in open court where confidentiality is requested or indicated.</p>	<p><b>E.1. What actions must an agency and State court undertake in voluntary proceedings?</b></p> <p>(a) Agencies and State courts must ask whether a child is an Indian child in any voluntary proceeding under sections B.2. to B.4. of these guidelines.</p> <p>(b) Agencies and State courts should provide the Indian tribe with notice of the voluntary child custody proceedings, including applicable pleadings or executed consents, and their right to intervene under section B.6. of these guidelines.</p> <p><b>E.2. How is consent to termination of parental rights, foster care placement or adoption obtained?</b></p> <p>(a) A voluntary termination of parental rights, foster care placement or adoption must be executed in writing and recorded before a court of competent jurisdiction.</p> <p>(b) Prior to accepting the consent, the court must explain the consequences of the consent in detail, such as any conditions or timing limitations for withdrawal of consent and, if applicable, the point at which such consent is irrevocable.</p> <p>(c) A certificate of the court must accompany a written consent and must certify that the terms and consequences of</p>	<p>ICWA applies to voluntary proceedings that operate to prohibit an Indian child's parent or Indian custodian from regaining custody of the child upon demand; nevertheless, evidence suggests that ICWA is sometimes ignored or intentionally bypassed in voluntary proceedings. The updated section E clarifies that, even in voluntary proceedings, it is necessary to determine whether ICWA applies, and to comply with ICWA's provisions.</p> <p>To ensure that parents and Indian custodians understand the significance of their consent, the updated section E requires the consent document to identify any conditions to the consent and requires the court to explain the consequences of the consent before its execution. It also addresses steps for withdrawal of consent.</p>

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	<p>the consent were explained in detail in the language of the parent or Indian custodian, if English is not the primary language, and were fully understood by the parent or Indian custodian.</p> <p>(d) Execution of consent need not be made in open court where confidentiality is requested or indicated.</p> <p>(e) A consent given prior to or within 10 days after birth of the Indian child is not valid.</p>	<p>The updated section E further restates the statutory restriction that a consent given prior to or within 10 days after birth of an Indian child is not valid.</p>
<p><b>E.2. Consent of Consent Document</b></p> <p>(a) The consent document shall contain the name and birthdate of the Indian child, the name of the Indian tribe, any identifying number or other indication of the child's membership in the tribe, if any, and the name and address of the consenting parent or Indian custodian.</p> <p>(b) A consent to foster care placement shall contain, in addition to the information specified in (a), the name and address of the person or entity by or through whom the placement was arranged, if any, or the name and address of the prospective foster parents, if known at the time.</p> <p>(c) A consent to termination of parental rights or adoption shall contain, in addition to the information specified in (a), the name and address of the person or entity by or through whom any preadoptive or adoptive placement has been or is to be arranged.</p>	<p><b>E.3. What information should a consent document contain?</b></p> <p>(a) The consent document must contain the name and birthdate of the Indian child, the name of the Indian child's tribe, identifying tribal enrollment number, if any, or other indication of the child's membership in the tribe, and the name and address of the consenting parent or Indian custodian. If there are any conditions to the consent, the consent document must clearly set out the conditions.</p> <p>(b) A consent to foster care placement should contain, in addition to the information specified in subsection (a), the name and address of the person or entity by or through whom the placement was arranged, if any, or the name and address of the prospective foster parents, if known at the time.</p>	<p>No substantial changes were made.</p>
<p><b>E.3. Withdrawal of Consent to Placement</b></p> <p>Where a parent or Indian custodian has consented to a foster care placement under state law, such consent may be withdrawn at any time by filing, in the court where consent was executed and filed, an instrument executed by the parent or Indian custodian. When a parent or Indian custodian withdraws consent to foster</p>	<p><b>E.4. How is withdrawal of consent achieved in a voluntary foster care placement?</b></p> <p>(a) Withdrawal of consent must be filed in the same court where the consent document was executed.</p> <p>(b) When a parent or Indian custodian withdraws consent to foster care placement, the child must be returned to that parent or Indian custodian immediately.</p>	<p>No substantial changes were made.</p>

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<p>care placement, the child shall as soon as is practicable be returned to that parent or Indian custodian.</p>		
<p><b>E.4. Withdrawal of Consent to Adoption</b> A consent to termination of parental rights or adoption may be withdrawn by the parent at any time prior to entry of a <i>final decree of voluntary termination or adoption</i> by filing in the court where the consent is filed an instrument executed under oath by the parent stipulating his or her intention to withdraw such consent. The clerk of the court where the withdrawal of consent is filed shall promptly notify the party by or through whom any preadoptive or adoptive placement has been arranged of such filing and that party shall insure the return of the child to the parent as soon as practicable.</p>	<p><b>E.5. How is withdrawal of consent to a voluntary adoption achieved?</b> (a) A consent to termination of parental rights or adoption may be withdrawn by the parent at any time prior to entry of a final decree of voluntary termination or adoption, whichever occurs later. To withdraw consent, the parent must file, in the court where the consent is filed, an instrument executed under oath asserting his or her intention to withdraw such consent. (b) The clerk of the court in which the withdrawal of consent is filed must promptly notify the party by or through whom any preadoptive or adoptive placement has been arranged of such filing and the child must be returned to the parent or Indian custodian as soon as practicable.</p>	<p>No substantial changes were made.</p>
<p><b>SECTION F - DISPOSITIONS</b></p>		
<p>This version does not have as expansive of rules for when the placement preferences apply in the first place.</p>	<p><b>F.1. When do the placement preferences apply?</b> (a) In any preadoptive, adoptive or foster care placement of an Indian child, the Act's placement preferences apply; except that, if the Indian child's tribe has established by resolution a different order of preference than that specified in the Act, the agency or court effecting the placement must follow the tribe's placement preferences. (b) The agency seeking a preadoptive, adoptive or foster care placement of an Indian child must always follow the placement preferences. If the agency determines that any of the preferences cannot be met, the agency must demonstrate through clear and convincing evidence that a diligent search has been conducted to seek out and identify placement options that would satisfy the placement preferences specified in sections F.2. or F.3. of these guidelines, and explain why the preferences could not be met. A search should include notification about the</p>	<p>The updated guidelines provide more information regarding when and how to apply ICWA's placement preferences for foster and adoptive placements. In some cases, agencies fail to conduct any investigation of whether placements that conform to ICWA's placement preferences are available.</p> <p>The agency bears the burden of proof if it departs from any of the placement preferences and must demonstrate that it conducted a diligent search to identify placement options that satisfy the placement preferences, including notification to the child's parents or Indian custodians, extended family, tribe, and</p>

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	<p>placement hearing and an explanation of the actions that must be taken to propose an alternative placement to:</p> <ul style="list-style-type: none"> <li>(1) The Indian child’s parents or Indian custodians;</li> <li>(2) All of the known, or reasonably identifiable, members of the Indian child’s extended family members;</li> <li>(3) The Indian child’s tribe;</li> <li>(4) In the case of a foster care or preadoptive placement: <ul style="list-style-type: none"> <li>(i) All foster homes licensed, approved, or specified by the Indian child’s tribe; and</li> <li>(ii) All Indian foster homes located in the Indian child’s State of domicile that are licensed or approved by any authorized non-Indian licensing authority.</li> </ul> </li> <li>(c) Where there is a request for anonymity, the court should consider whether additional confidentiality protections are warranted, but a request for anonymity does not relieve the agency or the court of the obligation to comply with the placement preferences.</li> <li>(d) Departure from the placement preferences may occur only after the court has made a determination that good cause exists to place the Indian child with someone who is not listed in the placement preferences.</li> <li>(e) Documentation of each preadoptive, adoptive or foster care placement of an Indian child under State law must be provided to the State for maintenance at the agency. Such documentation must include, at a minimum: the petition or complaint; all substantive orders entered in the proceeding; the complete record of, and basis for, the placement determination; and, if the placement deviates from the placement preferences, a detailed explanation of all efforts to comply with the placement preferences and the court order authorizing departure from the placement preferences.</li> </ul>	<p>others.</p>
<p><b>F.1. Adoptive Placements</b>  (a) In any adoptive placement of an Indian child under state law preference must be given (in the</p>	<p><b>F.2. What placement preferences apply in adoptive placements?</b>  (a) In any adoptive placement of an Indian child under State</p>	

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<p>order listed below) absent good cause to the contrary, to placement of the child with:</p> <ul style="list-style-type: none"> <li>(i) A member of the child’s extended family;</li> <li>(ii) Other members of the Indian child’s tribe;</li> </ul> <p>or</p> <ul style="list-style-type: none"> <li>(iii) Other Indian families, including families of single parents.</li> </ul> <p>(b) The Indian child’s tribe may establish a different order of preference by resolution. That order of preference must be followed so long as placement is the least restrictive setting appropriate to the child’s needs.</p> <p>(c) Unless a consenting parent evidences a desire for anonymity, the court or agency shall notify the child’s extended family and the Indian child’s tribe that their members will be given preference in the adoption decision.</p>	<p>law, preference must be given in descending order, as listed below, to placement of the child with:</p> <ul style="list-style-type: none"> <li>(1) A member of the child’s extended family;</li> <li>(2) Other members of the Indian child’s tribe; or</li> <li>(3) Other Indian families, including families of unwed individuals.</li> </ul> <p>(b) The court should, where appropriate, also consider the preference of the Indian child or parent.</p>	
<p><b>F.2. Foster Care or Preadoptive Placements</b> In any foster care or preadoptive placement of an Indian child:</p> <p>(a) The child must be placed in the least restrictive setting which</p> <ul style="list-style-type: none"> <li>(i) most approximates a family;</li> <li>(ii) in which his or her special needs may be met; and</li> <li>(iii) which is in reasonable proximity to his or her home.</li> </ul> <p>(b) Preference must be given in the following order, absent good cause to the contrary, to placement with:</p> <ul style="list-style-type: none"> <li>(i) A member of the Indian child’s extended family;</li> <li>(ii) A foster home, licensed, approved or specified by the Indian child’s tribe, whether on or off the reservation;</li> </ul>	<p><b>F.3. What placement preferences apply in foster care of preadoptive placements?</b> In any foster care or preadoptive placement of an Indian child:</p> <p>(a) The child must be placed in the least restrictive setting that:</p> <ul style="list-style-type: none"> <li>(1) Most approximates a family;</li> <li>(2) Allows his or her special needs to be met; and</li> <li>(3) Is in reasonable proximity to his or her home, extended family, and/or siblings.</li> </ul> <p>(b) Preference must be given, in descending order as listed below, to placement of the child with:</p> <ul style="list-style-type: none"> <li>(1) A member of the Indian child’s extended family;</li> <li>(2) A foster home, licensed, approved or specified by the Indian child’s tribe, whether on or off the reservation;</li> <li>(3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or</li> <li>(4) An institution for children approved by an Indian tribe or</li> </ul>	<p>The language in subsection (c) from the 1979 version has been moved to F.1. (a).</p>

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<p>(iii) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or</p> <p>(iv) An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs.</p> <p>(c) The Indian child's tribe may establish a different order of preference by resolution, and that order of preference shall be followed so long as the criteria enumerated in subsection (a) are met.</p>	<p>operated by an Indian organization which has a program suitable to meet the child's needs.</p>	
<p><b>F.3. Good Cause to Modify Preferences</b></p> <p>(a) For purposes of foster care, preadoptive or adoptive placement, a determination of good cause not to follow the order of preference set out above shall be based on one or more of the following considerations:</p> <p>(i) The request of the biological parents or the child when the child is of sufficient age.</p> <p>(ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.</p> <p>(iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.</p> <p>(b) The burden of establishing the existence of good cause not to follow the order of preferences established in subsection (b) shall be on the party urging that the preferences not be followed.</p>	<p><b>F.4. How is a determination for "good cause" to depart from the placement preferences made?</b></p> <p>(a) If any party asserts that good cause not to follow the placement preferences exists, the reasons for such belief or assertion must be stated on the record or in writing and made available to the parties to the proceeding and the Indian child's tribe.</p> <p>(b) The party seeking departure from the preferences bears the burden of proving by clear and convincing evidence the existence of "good cause" to deviate from the placement preferences.</p> <p>(c) A determination of good cause to depart from the placement preferences must be based on one or more of the following considerations:</p> <p>(1) The request of the parents, if both parents attest that they have reviewed the placement options that comply with the order of preference.</p> <p>(2) The request of the child, if the child is able to understand and comprehend the decision that is being made.</p> <p>(3) The extraordinary physical or emotional needs of the child, such as specialized treatment services that may be unavailable in the community where families who meet the criteria live, as established by testimony of a qualified expert</p>	<p>The court determines whether "good cause" to deviate from the placement preferences exists before departing from the placement preferences.</p> <p>The updated section F also adds provisions to ensure that "good cause" determinations are explained to all parties and documented.</p> <p>Evidence suggests that "good cause" has been liberally relied upon to deviate from the placement preferences in the past. Commenters noted that, in some cases, a State court departed from the placement preferences because an Indian child has spent significant time in a family's care, despite the fact that the placement was made in violation of ICWA. The guidelines attempt to prevent such circumstances from arising by encouraging early compliance with ICWA (see sections A and B, in particular). The guidelines also specify in section F that "good cause" does not include normal bonding or attachment that</p>

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	<p>witness; provided that extraordinary physical or emotional needs of the child does not include ordinary bonding or attachment that may have occurred as a result of a placement or the fact that the child has, for an extended amount of time, been in another placement that does not comply with the Act. The good cause determination does not include an independent consideration of the best interest of the Indian child because the preferences reflect the best interests of an Indian child in light of the purposes of the Act.</p> <p>(4) The unavailability of a placement after a showing by the applicable agency in accordance with section F.1., and a determination by the court that active efforts have been made to find placements meeting the preference criteria, but none have been located. For purposes of this analysis, a placement may not be considered unavailable if the placement conforms to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.</p> <p>(d) The court should consider only whether a placement in accordance with the preferences meets the physical, mental and emotional needs of the child; and may not depart from the preferences based on the socio- economic status of any placement relative to another placement.</p>	<p>may have resulted from a placement that failed to comply with the Act.</p> <p>As in other parts of the guidelines, this section clarifies that an independent consideration of the child's "best interest" is inappropriate for this determination because Congress has already addressed the child's best interest in ICWA. Because ICWA does not allow for consideration of socio- economic status in the placement preferences, this section also now clarifies that the court may not depart from the preferences based on the socio- economic status of one placement relative to another, except in extreme circumstances.</p>
<p><b>SECTION G – POST-TRIAL RIGHTS</b></p>		
<p><b>G.1. Petition To Vacate Adoption</b></p> <p>(a) Within two years after a final decree of adoption of any Indian child by a state court, or within any longer period of time permitted by the law of the state, a parent who executed a consent to termination of paternal rights or adoption of that child may petition the court in which the final adoption decree was entered to vacate the decree and revoke the consent on the</p>	<p><b>G.1. What is the procedure for petitioning to vacate an adoption?</b></p> <p>(a) Within two years after a final decree of adoption of any Indian child by a State court, or within any longer period of time permitted by the law of the State, a parent who executed a consent to termination of paternal rights or adoption of that child may petition the court in which the final adoption decree was entered to vacate the decree and revoke the consent on the grounds that consent was</p>	

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<p>grounds that such consent was obtained by fraud or duress.</p> <p>(b) Upon the filing of such petition, the court shall give notice to all parties to the adoption proceedings and shall proceed to hold a hearing on the petition. Where the court finds that the parent’s consent was obtained through fraud or duress, it must vacate the decree of adoption and order the consent revoked and order the child returned to the parent.</p>	<p>obtained by fraud or duress, or that the proceeding failed to comply with ICWA.</p> <p>(b) Upon the filing of such petition, the court must give notice to all parties to the adoption proceedings and the Indian child’s tribe.</p> <p>(c) The court must hold a hearing on the petition.</p> <p>(d) Where the court finds that the parent’s consent was obtained through fraud or duress, the court must vacate the decree of adoption, order the consent revoked and order that the child be returned to the parent.</p>	
<p>The 1979 version does not have this specific invalidating language.</p>	<p><b>G.2. Who can make a petition to invalidate an action?</b></p> <p>(a) Any of the following may petition any court of competent jurisdiction to invalidate an action for foster care placement or termination of parental rights where it is alleged that the Act has been violated:</p> <ul style="list-style-type: none"> <li>(1) An Indian child who is the subject of any action for foster care placement or termination of parental rights;</li> <li>(2) A parent or Indian custodian from whose custody such child was removed; and</li> <li>(3) The Indian child’s tribe.</li> </ul> <p>(b) Upon a showing that an action for foster care placement or termination of parental rights violated any provision of 25 U.S.C. 1911, 1912, or 1913, the court must determine whether it is appropriate to invalidate the action.</p> <p>(c) There is no requirement that the particular party’s rights under the Act be violated to petition for invalidation; rather, any party may challenge the action based on violations in implementing the Act during the course of the child custody proceeding. For example, it is acceptable for the tribe to petition to invalidate an action because it violated the rights of a parent, or for a parent to petition to invalidate an action because the action violated the statutory rights of the tribe. ICWA is designed to provide rights to ensure that tribes, parents, and children are protected. In light of Congressional findings in ICWA, it is presumed that the Indian child is</p>	<p>ICWA is intended to protect the rights, not only of Indian children, parents and Indian custodians, but also of Indian tribes. The updated guidelines establish that an Indian child, parent or Indian custodian, or tribe may petition to invalidate an action if the Act or guidelines have been violated, regardless of which party’s rights were violated. This approach promotes compliance with ICWA and reflects that ICWA is intended to protect the rights of each of these parties.</p>

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	<p>disadvantaged if any of those rights are violated.                  (d) The court should allow, if it possesses the capability, alternative methods of participation in State court proceedings by family members and tribes, such as participation by telephone, videoconferencing, or other methods.</p>	
<p><b>G.2. Adult Adoptee Rights</b>                  (a) Upon application by an Indian individual who has reached 18 who was the subject of an adoptive placement, the court which entered the final decree must inform such individual of the tribal affiliations, if any of the individual's biological parents and provide such other information necessary to protect any rights flowing from the individual's tribal relationship.                  (b) The section applies regardless of whether or not the original adoption was subject to the provisions of the Act.                  (c) Where state law prohibits revelation of the identity of the biological parent, assistance of the Bureau of Indian Affairs shall be sought where necessary to help an adoptee who is eligible for membership in a tribe establish that right without breaching the confidentiality of the record.</p>	<p><b>G.3. What are the rights of adult adoptees?</b>                  (a) Upon application by an Indian individual who has reached age 18 who was the subject of an adoptive placement, the court that entered the final decree must inform such individual of the tribal affiliations, if any, of the individual's biological parents and provide such other information necessary to protect any rights, which may include tribal membership, resulting from the individual's tribal relationship.                  (b) This section should be applied regardless of whether the original adoption was subject to the provisions of the Act.                  (c) Where State law prohibits revelation of the identity of the biological parent, assistance of the Bureau of Indian Affairs should be sought to help an adoptee who is eligible for membership in a tribe to become a tribal member without breaching the Privacy Act or confidentiality of the record.                  (d) In States where adoptions remain closed, the relevant agency should, at a minimum, communicate directly with the tribe's enrollment office and provide the information necessary to facilitate the establishment of the adoptee's tribal membership.                  (e) Agencies should work with the tribe to identify at least one tribal designee familiar with 25 U.S.C. 1917 to assist adult adoptees statewide with the process of reconnecting with their tribes and to provide information to State judges about this provision on an annual basis.</p>	<p>Adults who had been adopted by non-Indian families and seek to reconnect with their tribes often face significant hurdles in obtaining needed information. The updated guidelines attempt to protect those adults' rights to obtain information about their tribal relationship by specifying that, even in States where adoptions remain closed, the relevant agency should facilitate communication directly with the tribe's enrollment office.</p> <p>The guidelines also recommend that courts work with tribes to identify tribal designees who can assist adult adoptees to connect with their tribes.</p>
<p><b>G.3. Notice of Change in Child's Status</b>                  (a) Whenever a final decree of adoption of an Indian child has been vacated or set aside, or the</p>	<p><b>G.4. When must notice of a change in child's status be given?</b>                  (a) Notice by the court, or an agency authorized by the court,</p>	<p>The requirement to maintain records applies to both voluntary and involuntary proceedings. (See also Section G.6. and its</p>

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<p>adoptive parent has voluntarily consented to the termination of his or her parental rights to the child, or whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive placement, or adoptive placement, notice by the court or an agency authorized by the court shall be given to the child's biological parents or prior Indian custodians. Such notice shall inform the recipient of his or her right to petition for return of custody of the child.</p> <p>(b) A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice filed with the court. Such waiver may be revoked at any time by filing with the court written notice of revocation, but such revocation would not affect any proceeding which occurred before the filing of the notice of revocation.</p>	<p>must be given to the child's biological parents or prior Indian custodians and the Indian child's tribe whenever:</p> <p>(1) A final decree of adoption of an Indian child has been vacated or set aside; or</p> <p>(2) The adoptive parent has voluntarily consented to the termination of his or her parental rights to the child; or</p> <p>(3) Whenever an Indian child is removed from a foster care home or institution to another foster care placement, preadoptive placement, or adoptive placement.</p> <p>(b) The notice must inform the recipient of the right to petition for return of custody of the child.</p> <p>(c) A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice filed with the court. The waiver may be revoked at any time by filing with the court a written notice of revocation. A revocation of the right to receive notice does not affect any proceeding which occurred before the filing of the notice of revocation.</p>	<p>explanation).</p>
<p>The 1979 version does not have this section.</p>	<p><b>G.5. What information must States furnish to the Bureau of Indian Affairs?</b></p> <p>(a) Any state entering a final adoption decree or order must furnish a copy of the decree or order to the Bureau of Indian Affairs, Chief, Division of Human Services, 1849 C Street NW., Mail Stop 4513 MIB, Washington, DC 20240, along with the following information:</p> <p>(1) Birth name of the child, tribal affiliation and name of the child after adoption;</p> <p>(2) Names and addresses of the biological parents;</p> <p>(3) Names and addresses of the adoptive parents;</p> <p>(4) Name and contact information for any agency having files or information relating to the adoption;</p> <p>(5) Any affidavit signed by the biological parent or parents asking that their identity remain confidential; and</p> <p>(6) Any information relating to the enrollment or eligibility</p>	<p>This section appears to have been added to provide additional information on what information needs to be sent to the BIA in addition to where to send that information.</p>

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	<p>for enrollment of the adopted child.                  (b) Confidentiality of such information must be maintained and is not subject to the Freedom of Information Act, 5 U.S.C. 552, as amended.</p>	
<p><b>G.4. Maintenance of Records</b>                  The state shall establish a single location where all records of every foster care, preadoptive placement and adoptive placement of Indian children by courts of that state will be available within seven days of a request by an Indian child’s tribe or the Secretary. The records shall contain, at a minimum, the petition or complaint, all substantive orders entered in the proceeding, and the complete record of the placement determination.</p>	<p><b>G.6. How must the State maintain records?</b>                  (a) The State must establish a single location where all records of every voluntary or involuntary foster care, preadoptive placement and adoptive placement of Indian children by courts of that State will be available within seven days of a request by an Indian child’s tribe or the Secretary.                  (b) The records must contain, at a minimum, the petition or complaint, all substantive orders entered in the proceeding, and the complete record of the placement determination.</p>	<p>Finally, the updated guidelines clarify that the requirement to maintain records on foster care, preadoptive placement and adoptive placements applies not only in involuntary proceedings, but also in voluntary proceedings. (See also the changes to Section G.4.)</p>