

## JUDICIAL DETERMINATION OF ICWA APPLICABILITY

An "Indian child" means any unmarried person who is under 18 years of age and who is either:

- (a) A member of an Indian tribe; or
- (b) Eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe (25 U.S.C. § 1903(4) and Mont. Code Ann. § 41-3-102(12)(a)(b))

### Does the participant know or have reason to know that the child is an Indian child? (25 CFR § 23.107)

- Ask EVERY party/attendee at hearings
- See 25 C.F.R. § 23.2107(c) for conducting the inquiry
- At the commencement of EVERY proceeding
- Responses from parties, attorneys, and attendees (family members, etc.) will be noted on the record
- Subsequent inquiry at each hearing/TPR!

IF YES OR UNKNOWN:	IF NO:
<ul style="list-style-type: none"> <li><input type="checkbox"/> Has CFS used <b>due diligence</b> to identify and work with all Tribes of which there is reason to know the child may be a member (or eligible for membership and a biological parent is a member of an Indian Tribe)? (25 CFR § 23.107 (b)(1))</li> <li><input type="checkbox"/> <b>FINDING ON THE RECORD:</b> The Department HAS/HAS NOT used due diligence to identify and work with all Tribes of which there is reason to know the child may be a member or eligible for membership.</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> <b>FINDING ON THE RECORD:</b> Including the open court discussion, the Court has no evidence that any participant knows or has reason to know the child is an "Indian child" and therefore, <b><i>the ICWA does not apply to the proceeding.</i></b></li> <li><input type="checkbox"/> <b>Provide subsequent notification instruction:</b> Parties are ordered to inform the court if they subsequently receive information that provides reason to know the child is an Indian child. (25 CFR § 23.107)</li> </ul>

### Has the State filed documentation indicating a Tribal determination of membership or eligibility of membership? (25 CFR § 23.108(c))

IF YES:	IF UNKNOWN:
<ul style="list-style-type: none"> <li><input type="checkbox"/> <b>FINDING ON THE RECORD:</b> The child is an Indian child because he/she is a member/eligible for membership with the _____ Tribe/s based on the _____ (refer to Tribal documentation filed with the Court). <b><i>Therefore, the ICWA applies to this proceeding.</i></b></li> <li><b>OR</b></li> <li><input type="checkbox"/> The child is not an Indian child (neither a member nor eligible for membership based on _____ (refer to Tribal documentation filed with the court). <b><i>Therefore, the ICWA does not apply to this proceeding; AND</i></b></li> <li><input type="checkbox"/> Should any participant or party to this proceeding subsequently receive information that the youth may be an Indian child, such information shall be immediately filed with the Court and served upon all parties.</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> <b>FINDING ON THE RECORD:</b> There is reason to know the child is an Indian child (a member; or eligible for membership in the _____ Tribe/s) and a biological parent is a member of an Indian Tribe), but there is insufficient evidence to confirm the child's status at this time. <b><i>Therefore, the ICWA applies to this proceeding unless and until the Court determines on the record, and based on Tribal documentation, that the child does not meet the definition of an Indian child.</i></b></li> </ul>

**TIP:** State court may not substitute its own judgment for a parent/child's membership in a Tribe/s.  
(25 CFR § 23.108(b))

**NOTICE/PROOF OF SERVICE FOR FOSTER CARE PLACEMENT AND TPR HEARINGS  
(INCLUDING SHOW CAUSE/TIA, ADJUDICATION, TLC/XTLC, GUARDIANSHIP, LTC AND TPR HEARINGS)**

- Has the State sent proper notice? (25 USC § 1912(a), 25 CFR §§ 23.11, 23.111) to:
  - Tribes** by *certified or registered mail* at all foster care placement and TPR hearings
  - Parents** by *personal service* at Show Cause and TPR/G'ship hearings
  - Indian Custodian**, if applicable, by *personal service* at Show Cause and TPR/G'ship hearings
  - BIA** (Regional Director) by *certified or registered mail* at Show Cause and TPR hearings
  
- Is the proof contained in the record?
  - Are **return receipts** filed with the Court.
  - Have at least **10 days** passed since party received notice?

IF YES:	IF NO:
<input type="checkbox"/> Is the parent/s, Tribe or Indian Custodian requesting an additional 20 days? <ul style="list-style-type: none"> <li><input type="checkbox"/> <b>IF NO:</b> Court can proceed.</li> <li><input type="checkbox"/> <b>IF YES:</b> Court must continue the proceeding.</li> </ul>	<input type="checkbox"/> Court must continue the proceeding.

**PLACEMENT PREFERENCES AT FOSTER CARE PLACEMENT  
(INCLUDING SHOW CAUSE/TIA, ADJUDICATION, TLC/XTLC, PERMANENCY PLAN, GUARDIANSHIP, LTC AND TPR HEARINGS)**

**25 U.S.C. § 1915(b): Foster Care or Preadoptive Placements**

**Criteria** (§ 25 C.F.R. 23.131(a))

1. Most approximates a family, taking into consideration siblings attachment;
2. Allows the Indian child's special needs (if any) to be met; and
3. Is in reasonable proximity to the Indian child's home, extended family, or siblings.

**Preferences:**

1. A member of the Indian child's extended family;
2. A foster home licensed, approved, or specified by the Indian child's tribe;
3. An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
4. An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

- Does the child's Tribe have a different order of preference than the preferences provided in ICWA?
- Did CFS *diligently search for family and other placements* meeting the placement preferences of the ICWA (or the Tribe's order)? (25 USC § 1915, 25 CFR § 23.131)

**Is the child's placement consistent with the placement preferences of the ICWA (or Tribe's order)?**

<b>IF YES:</b>	<b>IF NO:</b>
<input type="checkbox"/> <b>FINDING ON THE RECORD:</b> Placement is consistent with the placement preferences as set forth in 25 USC § 1915 of the ICWA (or in the Tribe's Order).	<input type="checkbox"/> Has the party asserting <i>good cause to depart</i> from the placement preferences documented, in writing, or orally for the court and parties, the reason why the child is not in an ICWA preferred placement? See 25 CFR §§ 23.132(c) and (d) for list of potential factors supporting good cause  <input type="checkbox"/> <b>FINDING ON THE RECORD:</b> There IS/IS NOT clear and convincing evidence that good cause exists to depart from the placement preferences based upon _____.
<p><b>TIPS:</b></p> <ul style="list-style-type: none"> <li>• Ask ICWA Agent or Tribal attorney whether Tribe has its own placement preferences.</li> <li>• Placement in a home where another Indian child resides or is placed, whether or not a sibling, is not a PP absent other factors (e.g. Indian home licensed by the State). A Sibling does not constitute a PP unless the sibling is an adult. See BIA Guidelines, H.2</li> <li>• Placement in a non-kinship foster home where another Indian child has been adopted or is in foster care is not a PP unless one of the caregivers is a member of a federally recognized Tribe.</li> <li>• Do not assume a Tribe will approve a non-preferred placement simply because it has approved that home in another child's case.</li> <li>• Always ask the Tribe's position on placement and seek consensus.</li> <li>• <b>Placement preferences are different for adoption proceedings! See 25 USC § 1915(a)</b></li> </ul>	

**ACTIVE EFFORTS AT FOSTER CARE PLACEMENT  
(INCLUDING SHOW CAUSE/TIA, ADJUDICATION, TLC/XTLC, PERMANENCY PLAN, GUARDIANSHIP, AND  
TPR HEARINGS)**

**“Active efforts”** are affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family.

- What efforts has CFS made to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family? (25 USC § 1912(d), 25 CFR § 23.2)
- FINDING ON THE RECORD:** The Department HAS/HAS NOT used active efforts to prevent the break-up of the Indian family and those efforts have/have not been successful.

Burdens of proof:

- Clear and Convincing Evidence for foster placement proceedings
- Beyond a Reasonable Doubt when terminating parental rights

**QUALIFIED EXPERT WITNESS TESTIMONY  
(INCLUDING SHOW CAUSE/TIA, ADJUDICATION, TLC/XTLC, PERMANENCY PLAN, GUARDIANSHIP, LTC  
AND TPR HEARINGS)**

- Does the witness meet QEW criteria? (25 C.F.R. § 23.122)
- Has the QEW testified as to whether the child/ren would be at serious risk of emotional or physical harm if returned to the care of the parent/s? (25 USC §§ 1912 (e) and (f); 25 CFR § 23.121)
- FINDING ON THE RECORD:** There IS/IS NOT sufficient evidence, including the testimony of the QEW, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
- Burdens of proof:
  - Clear and Convincing Evidence for foster care placement proceeding
  - Beyond a Reasonable Doubt when terminating parental rights

TIPS:

- The QEW is not an expert on the ICWA and should not testify to legal conclusions, but rather is an expert on the child rearing customs and traditions of the child’s Tribe/s.
- The State Court’s determination 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 does not have to be based entirely upon the QEW testimony. *See* 25 USC §§ 1912 (e) and (f) requiring the finding “include” the testimony.
- Consider a standing order that allows QEWs to testify by alternative methods (telephonic or video) *See* 25 C.F.R. § 23.133