

DEPARTMENT OF HUMAN SERVICES
OFFICE OF CHILD WELFARE PROGRAMS

CHAPTER 413
DIVISION 115

APPLICATION OF THE INDIAN CHILD WELFARE ACT (ICWA)

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413-115-0000

Definitions

(Amended 08/06/17)

Unless the context indicates otherwise, the following definitions apply to OAR chapter 413, division 115.

- (1) "Active efforts" means affirmative, active, proactive, thorough, and timely efforts intended primarily to maintain or reunite an *Indian child* with his or her family. Active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan.
- (2) "Adoption" means a legal or administrative process that establishes a permanent legal parent-child relationship between a child and an adult who is not already the child's legal parent and terminates the legal parent-child relationship between the adopted child and any former parent.
- (3) "Adoptive placement" means the permanent placement of an *Indian child* for *adoption*, including any action resulting in a final decree of *adoption*.
- (4) "BIA" means the U.S. Department of the Interior, Bureau of Indian Affairs.
- (5) "Child" means a person under 18 years of age.
- (6) "Child-custody proceeding" includes any action, other than an *emergency proceeding*, that may culminate in one of the following outcomes: a *foster-care placement*, the *termination of parental rights*, a pre-adoptive placement, or an *adoptive placement*. An action that may culminate in one of these four outcomes is considered a separate "child-custody proceeding" from an action that may culminate in a different one of these four outcomes. There may be several child-custody proceedings involving any given *Indian child*. Within each "child-custody proceeding", there may be several hearings. If a *child* is placed in foster care or another out-of-home placement as a result of a *status offense*, that *status offense* proceeding is a "child-custody proceeding".
- (7) "Continued custody" means physical *custody*, legal *custody*, or both, under any applicable tribal law or tribal custom or state law that a *parent* or *Indian custodian* already has or had at any point in the past. The biological mother of a child has had custody of a child.
- (8) "CPS assessment" means a child protective services assessment, which is an investigation into a report of child abuse or neglect pursuant to ORS 419B.020 that includes activities and interventions to identify and analyze threats to child safety, determine if there is reasonable cause to believe child abuse or neglect occurred, and assure child safety through protective action plans, initial safety plans, or ongoing safety planning.
- (9) "Department" means the Department of Human Services, Child Welfare.

- (10) "Domicile" means:
- (a) For a *parent* or *Indian custodian*, the place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere.
 - (b) For an *Indian child*, the "domicile" of the Indian child's parents or *Indian custodian* or *guardian*, or in the case of an *Indian child* whose parents are not married to each other, the "domicile" of the Indian child's custodial *parent*.
- (11) "Emergency proceeding" means any court action that involves an *emergency removal* or emergency placement of an *Indian child*. An "emergency proceeding" is not a *child-custody proceeding*.
- (12) "Emergency removal" means a removal of an *Indian child* that occurs because removal is necessary to prevent *imminent physical damage or harm* to the *child*.
- (13) "Entity" means any organization or agency including, but not limited to a private child placing agency, that is separate and independent of the Department, performs functions pursuant to a contract or subcontract with the Department, and receives federal funds.
- (14) "Extended family member" is defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, is a person who has reached age 18 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.
- (15) "Foster-care placement" means 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*, but where parental rights have not been terminated.
- (16) "Grandparent" for purposes of notification, visitation, contact, or communication ordered by the court under ORS 419B.876 means the legal parent of the child or young adult's legal parent, regardless of whether the parental rights of the child or young adult's legal parent have been terminated under ORS 419B.500 to 419B.524.
- (17) "Guardian" means an individual who has been granted guardianship of a *child* through a judgment of the court.
- (18) "ICWA" or "the Act" means the Indian Child Welfare Act of 1978, 25 U.S.C. §§1901-63.
- (19) "Imminent physical damage or harm" means impending and certain physical harm will occur to the Indian child unless a *protective action plan* can be put in place or an *emergency removal* is initiated.
- (20) "Indian" means any person who is a member of or eligible for membership in an *Indian*

tribe or who is an Alaskan native and a member of a Regional Corporation as defined in 43 U.S.C. § 1606.

- (21) "Indian child" means any unmarried person who is under age 18 and either:
- (a) Is a member or citizen of an Indian tribe; or
 - (b) Is eligible for membership or citizenship in an Indian tribe and is the biological child of a member or citizen of an Indian tribe.
- (22) "Indian custodian" means any *Indian* who has legal *custody* of an *Indian child* under applicable tribal law or custom or under applicable state law, or to whom temporary physical care, *custody*, and control has been transferred by the *parent* of such *child*.
- (23) "Indian foster home" means a *substitute care* placement where at least one of the licensed or approved foster parents is an *Indian*.
- (24) "Indian organization" means any group, association, partnership, corporation, or legal entity owned or controlled by Indians or a majority of whose members are Indians, such as an Indian Child Welfare Committee.
- (25) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaska Native village as defined in 43 U.S.C. § 1602.
- (26) "Initial safety plan" means a documented set of actions or interventions sufficient to protect a *child* from *imminent physical damage or harm* in order to allow for completion of the *CPS assessment*.
- (27) "Involuntary proceeding" means a *child-custody proceeding* in which the *parent* does not consent of his or her free will to the foster-care, pre-adoptive, or *adoptive placement* or *termination of parental rights* or in which the parent consents to the foster-care, preadoptive, or adoptive placement under threat of removal of the child by a state court or agency.
- (28) "Parent" means the biological or adoptive mother or the legal father of the *child*. A legal father is a man who has adopted the *child* or whose paternity has been established or declared under ORS 109.070, ORS 416.400 to 416.610, or by a juvenile court. In cases involving an *Indian child* under the *ICWA*, parent means any biological parent of an Indian child, or any Indian who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include an unwed biological father where paternity has not been acknowledged or established. "Parent" also includes a putative father who has demonstrated a direct and significant commitment to the *child* by assuming or attempting to assume responsibilities normally associated with parenthood, unless a court finds that the putative father is not the legal father.

- (30) "Protective action plan" means an immediate, same day, short-term plan, lasting a maximum of ten calendar days, sufficient to protect a *child* from *imminent physical damage or harm*.
- (31) "QEW" means qualified expert witness. A qualified expert witness is a person who is qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. A person may be designated by the Indian child's Tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.
- (32) "Reservation" means Indian country as defined in 18 U.S.C. §1151, and any lands not covered under such section, title to which is either 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.
- (33) "Sibling" means one of two or more children or young adults who are related, or would be related but for a termination or other disruption of parental rights, in one of the following ways:
- (a) By blood or *adoption* through a common *parent*.
 - (b) Through the marriage of the legal or biological parents of the children or young adults.
 - (c) Through a legal or biological *parent* who is the registered domestic partner of the legal or biological *parent* of the children or young adults.
- (34) "Status offense" means an offense 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, runaway, beyond control).
- (35) "Substitute care" means the out-of-home placement of a *child* or *young adult* who is in the *custody* and care of the Department.
- (36) "Substitute caregiver" means a relative caregiver, foster parent, or provider authorized to provide care to a *child* or *young adult* in the legal or physical custody of the Department.
- (37) "Termination of parental rights" means any action which results in the termination of the parent-child relationship.
- (38) "Tribal Affairs Unit" means designated staff who monitor Department policy and procedures for compliance with the *ICWA*, investigate complaints of non-compliance from tribes, provide consultation to caseworkers and Department staff regarding related law and administrative rules, and provide *ICWA* materials and training.

- (39) "Tribal court" means the court which holds jurisdiction over Indian child-custody proceedings and is either a Court of Indian Offenses, a court established and operated under code or custom of an *Indian tribe*, or any other administrative body of a tribe which is vested with authority over child-custody proceedings. Tribal court may also include a tribal council, if so designated by the tribe.
- (40) "Upon demand" means that the *parent* or *Indian custodian* can regain *custody* simply upon verbal request, without any formalities or contingencies.
- (41) "Voluntary placement agreement" means a binding, written agreement between the Department and the *parent* or *Indian custodian* of a minor *child* that does not transfer legal *custody* to the Department but that specifies, at a minimum, the legal status of the *child* and the rights and obligations of the *parent* or *Indian custodian*, the *child* and the Department while the *child* is in placement.
- (42) "Young adult" means a person aged 18 through 20 years.

Stat. Auth.: ORS 418.005

Stats. Implemented: ORS 418.005, 418.625

413-115-0010

History, Purpose, and Applicability

(Amended 08/06/17)

- (1) History and Purpose.
- (a) On November 8, 1978, utilizing its power over Indian affairs and its "responsibility for the protection and preservation of Indian tribes and their resources," while acknowledging "that there is no resource more vital to the continued existence and integrity of Indian tribes than their children," Congress enacted the Indian Child Welfare Act (the Act or *ICWA*). The Act was passed because Congress found that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children" by courts and welfare departments and placed in non-Indian foster homes and institutions. In 2016, the Bureau of Indian Affairs (BIA) revisited the *ICWA* and added a subpart to the regulations to improve *ICWA* implementation (see 25 C.F.R § 23).
- (b) The Act sets forth that it is the policy of this nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families.
- (c) Further, the Department has the responsibility to ensure that *active efforts* must be made to:
- (A) Prevent the removal of such children; and

- (B) If removal becomes necessary:
 - (i) Take remedial actions to promote timely return; and
 - (ii) Place such children in foster or adoptive homes that comply with the placement preferences of the *ICWA*.

(2) Applicability and Limitations.

- (a) The provisions of the *ICWA* apply when an *Indian child* is the subject of:
 - (A) A child-custody proceeding;
 - (B) An involuntary proceeding;
 - (C) A voluntary placement agreement, consent to termination of parental rights or voluntary relinquishment;
 - (D) A proceeding involving a *status offense* if any part of the proceeding results in the need for out-of-home placement of the *child*, including a foster care, pre-adoptive, or *adoptive placement* or *termination of parental rights*; or
 - (E) An emergency proceeding.
- (b) If the *ICWA* applies during a proceeding, it will not cease to apply simply because the child reaches 18 during the pendency of the proceeding.
- (c) The *ICWA* does not apply to:
 - (A) A *tribal court* proceeding.
 - (B) A proceeding regarding a criminal act that is not a *status offense*.
 - (C) An award of *custody* of the *Indian child* to one of the parents including, but not limited to, an award in a divorce proceeding.
- (d) Cultural Heritage Protection. In instances where the *ICWA* does not apply, but the *child* is biologically an *Indian* or considered to be an *Indian* by the Indian community, the Department must respect the child's right to participate in the culture of origin in case planning. Participation in the culture includes the language, customary beliefs, social norms, and material traits including, but not limited to, the dress, food, music, and dance of a racial, religious, or social group that are transmitted from one generation to another.
- (e) The Act does not cover the full range of procedures involved in a juvenile court proceeding; where it is silent, the usual state court procedure applies. Under

constitutional law, the Act takes precedence where it conflicts with state law. When federal or state law affords a higher standard of protection than the ICWA, the higher standard applies.

Stat. Auth.: ORS 418.005

Stats. Implemented: ORS 418.005

413-115-0020

Department Authority

(Amended 08/06/17)

Once it is found that an *Indian child* is involved, and the tribe or tribes who have an interest have been determined, the authority of the Department must be established. In some instances, the Department will have no authority to become involved in a case.

- (1) **Exclusive Tribal Jurisdiction.** Indian tribes have exclusive jurisdiction over child-custody proceedings involving children who reside or whose domicile is on a reservation. The only exception is where Congress has transferred jurisdiction over family welfare matters to a state and the tribe in that state has not completed the administrative process to reassume exclusive jurisdiction.
- (2) **Tribal Court Ward.** The Department has no authority in cases involving an Indian child who is a ward of a tribal court, except for an emergency removal, as described in section (3) of this rule.
- (3) **Emergency Removal—Limited Authority.** Notwithstanding sections (1) and (2) of this rule, if an Indian child who resides or whose domicile is on any reservation is located off the reservation and removal is necessary to prevent imminent physical damage or harm, the Department has the authority to take physical custody regardless of whether the child is a ward of a tribal court or the tribe has exclusive jurisdiction.

Stat. Auth.: ORS 418.005, 418.627

Stats. Implemented: ORS 418.005, 419B.100, 419B.118

413-115-0030

Tribal Membership and Enrollment

(Amended 08/06/17)

- (1) **Tribal Determination of Membership or Eligibility for Membership.**
 - (a) The determination of whether the *child* is a member of a tribe (or eligible for membership), is solely within the jurisdiction of the tribe, except as otherwise provided in tribal or federal law.

- (b) The determination of whether a biological *parent* is a member of a tribe is solely within the jurisdiction of the tribe, except as otherwise provided by tribal or federal law.
 - (c) When the *Indian child* is a member or eligible for membership in only one tribe, that tribe must be designated as the Indian child's tribe.
 - (d) When the *Indian child* meets the definition of *Indian child* through more than one tribe, deference should be given to the tribe in which the *Indian child* is already a member, unless otherwise agreed to by the tribe or tribes.
 - (e) When the *Indian child* meets the definition of *Indian child* through more than one tribe because the *child* is a member in more than one tribe, or the *child* is not a member of but is eligible for membership in more than one tribe, the court must provide an opportunity for the tribes to determine which tribe should be designated as the Indian child's tribe in any *involuntary proceeding*.
 - (f) When the tribes are unable to reach an agreement, the court designates the *Indian tribe* with which the *Indian child* has the more significant contacts as the child's tribe, for purposes of the *ICWA*. That determination does not constitute a determination for any other purposes.
- (2) Department Responsibilities.
- (a) When a *child* may be a member or enrolled or eligible for membership or enrollment in a tribe, the Department must follow all notification requirements in OAR 413-115-0050 and notice requirements in OAR 413-115-0120.
 - (b) The Department must assist the *parent* or *Indian custodian* in completing and submitting information to the tribe(s) to determine membership or enrollment in the tribe(s).
 - (c) When a *child* may be a member of or enrolled in, or eligible for membership or enrollment in, more than one tribe, the Department must gather and document information to assist the court in making a determination for purposes of the Act. The information, if available, must include, but is not limited to:
 - (A) The parents' preference for the membership or enrollment of the *child*.
 - (B) The length of past *domicile* or residence on or near the *reservation* of each tribe.
 - (C) Tribal membership or enrollment of the child's custodial *parent* or *Indian custodian*.
 - (D) Interest asserted by each tribe in the *child-custody proceeding*.

- (E) Whether there has been a previous adjudication with respect to the *child* by a court of one of the tribes.
 - (F) Self-identification of the *child* if the *child* is of sufficient age and capacity to meaningfully self-identify.
- (d) When the Department receives tribal confirmation regarding the status of a child's membership or enrollment or eligibility for membership or enrollment, the Department must:
- (A) Document in the Department's information system either:
 - (i) The determination by the tribe of the child's membership or enrollment or eligibility for membership or enrollment; or
 - (ii) The determination by the tribe declaring the *child* is ineligible for membership or enrollment.
 - (B) Submit any and all confirmation from the tribe(s) regarding the child's membership or enrollment status at subsequent court hearings.
- (e) The Department must:
- (A) Identify and work with all of the tribes of which the Department knows or has reason to know the *child* may be a member (or eligible for membership); and
 - (B) Treat the *child* as an *Indian child* when there is reason to know the *child* may be an *Indian child* unless it is determined by the court that the *child* does not meet the definition of an *Indian child*.

Stat. Auth.: ORS 418.005

Stats. Implemented: ORS 418.005

413-115-0040

Notification to the Tribe of Initial Contact; Inquiry and Actions to Determine a Child's Tribal Membership or Enrollment Under the ICWA

(Amended 08/06/17)

- (1) When the Department receives screening information under OAR 413-015-0205, the screener must inquire whether the *child* is an *Indian child*. If the screener receives information that the *child* may be an *Indian child*, and the tribe(s) is named, the screener must send a copy of the screening report to the tribe(s) within 24 hours after the screening decision is complete.

- (2) When a decision is made to open a *CPS assessment* pursuant to OAR 413-015-0210 or a case for family support services, the CPS worker must inquire into whether the *child* is an *Indian child*, and must work with the child's parents or *Indian custodian*, and if the parents or *Indian custodian* are not available, any available *extended family member*, to gather detailed information regarding:
 - (a) Tribal membership or enrollment;
 - (b) Whether the *child* is a ward of a *tribal court*; or
 - (c) The *child* or the child's parents' or Indian custodian's *domicile*.
- (3) If at any time during an open child welfare case the Department receives information that the *child* is or may be an *Indian child* under the *ICWA*, the Department must work with the child's parents or *Indian custodian* to gather detailed information regarding tribal membership or enrollment.
- (4) When information regarding potential tribal membership or enrollment is received under subsection (1), (2) or (3) of this rule and the provisions of the *ICWA* apply, the Department must:
 - (a) Within one business day of receiving information regarding tribal membership or enrollment, document the information on a form approved by the Department; and
 - (b) Submit written notification of initial contact and inquiry regarding the child's membership or enrollment eligibility to the tribe(s) in which the *child* is or may be a member or is enrolled or may be eligible for membership or enrollment.
 - (A) Oregon tribes. Notification of initial contact and inquiry must be sent to the appropriate tribe(s) within one business day of receiving the information regarding tribal membership.
 - (B) Out-of-state tribes. The search for the appropriate tribal contact(s) must be initiated within two business days of receiving the information regarding tribal membership. Notification of initial contact and inquiry must be sent to the appropriate tribe(s) within five business days of receiving the information regarding tribal membership.
 - (c) Inquiry submitted under subsection (4)(b) of this rule must include all of the following information, if known:
 - (A) The name, birthdate and birthplace of the *child*.
 - (B) The child's *domicile*.
 - (C) Whether the *child* is a ward of a *tribal court*.

- (D) The name of each *Indian tribe* in which the *child* is a member (or may be eligible for membership or enrollment if a biological *parent* is a member).
 - (E) All known names (including maiden, married, former or aliases) of the parents, the parents' birthdates and birthplaces, and tribal enrollment numbers.
- (5) When additional consultation is needed, the caseworker or Department staff may contact the *Tribal Affairs Unit*.
 - (6) The Department must document each action to determine the child's Tribal membership or enrollment status in the Department's information system within five business days of the assessment being complete.
 - (7) The Department must continue to inquire to obtain a child's status regarding tribal membership or eligibility for membership or enrollment until the documented determination required under OAR 413-115-0030 is completed.
 - (8) When the Department receives confirmation that the *child* is a member or enrolled or eligible for membership or enrollment, the case must be managed according to the provisions of the *ICWA* and OAR 413-115-0030(2).

Stat. Auth.: ORS 418.005

Stats. Implemented: ORS 418.005

413-115-0050

Notification to the Tribe of Placement or Change in Placement

(Amended 08/06/17)

- (1) When the Department knows or has reason to know the *child* is an *Indian child*, the Department must ensure that notification is provided to the child's tribe or tribes as soon as possible and within 24 hours of knowing when any of the following actions may occur:
 - (a) An *emergency removal*;
 - (b) An involuntary placement. Notification of an involuntary placement under this rule is separate from notice required under OAR 413-115-0120;
 - (c) A change in placement; or
 - (d) A *voluntary placement agreement* has been requested by the parent or Indian custodian.
- (2) Notification of any action in section (1) must include the following information, if known:

- (a) The name, birthdate and birthplace of the child.
 - (b) The name of the child's parents.
 - (c) Which action under section (1) of this rule is occurring.
- (3) Notification pursuant to this rule may be provided in person, telephonically or electronically, and must be documented in the Department's information system.

Stat. Auth.: ORS 418.005

Stats. Implemented: ORS 418.005, 419B.878

413-115-0060

Active Efforts

(Amended 08/06/17)

- (1) *Active efforts* must begin when the Department has reason to know the *child* may be an *Indian child*, and that there is a possibility the *Indian child* might be removed from the home of the parents or *Indian custodian*. The *ICWA* then applies to any *emergency proceeding* or child custody proceeding, until it is determined by the court that the *child* does not meet the definition of *Indian child*. *Active efforts* must:
- (a) Involve assisting the *parent* or parents or *Indian custodian* through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan;
 - (b) Be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe whenever possible;
 - (c) Be conducted in partnership with the *Indian child* and the Indian child's parents, Indian custodians, extended family members and the tribe whenever possible;
 - (d) Be tailored to the facts and circumstances of the case; and
 - (e) Be designed to ameliorate the need for removal.
- (2) During a *CPS assessment* and prior to a determination that the *child* must be removed from the home of the parents or *Indian custodian*, the Department must engage in *active efforts* and offer services of a remedial nature designed to rehabilitate and prevent the breakup of the Indian family. These *active efforts* must include efforts to:
- (a) Counsel and modify the behavior of the parents or *Indian custodian*.
 - (b) Ameliorate any *imminent physical damage or harm*.

- (3) The Department must involve the Indian child's extended family members, tribe(s), and tribal organizations at the earliest possible point during the assessment to reduce the potential for cultural bias when evaluating home and family conditions and making decisions affecting Indian children and families.
- (4) In order to demonstrate that *active efforts* have been made, the Department must, at a minimum:
 - (a) Assure that due consideration has been given to the cultural needs and values of the family and that resources have been diligently sought to provide services to the family.
 - (b) Collaborate with the *parent*, parents or *Indian custodian*, the tribe, and the *Indian child*, if the *child* is competent, when formulating the case plan.
 - (c) Actively assist and engage with the *parent*, parents or *Indian custodian* in achieving the case plan objectives and work with the *parent*, parents, or *Indian custodian* to engage them in remedial services and rehabilitation programs to prevent the breakup, or support the reunification of the family.
 - (d) Contact the tribe, potential service providers within the child's tribal community and other community resources to identify placement resources and culturally appropriate services.
 - (e) Contact and consult with the Indian child's extended family members and the tribe, to determine whether additional support for the *Indian child* and the Indian child's parents is available from any *extended family member*.
 - (f) Tailor the case plan to the facts and circumstances of the case.
 - (g) Document the *active efforts* in the Department's information system.

Stat. Auth.: ORS 418.005

Stats. Implemented: ORS 418.005, 419B.185, 419B. 340

413-115-0070

Emergency Removal and Return Upon Demand

(Amended 08/06/17)

- (1) During a *CPS assessment*, the Department may take emergency protective *custody* of any *Indian child*, whether or not the child's *domicile* or residence is on a *reservation*, and regardless of the jurisdiction held by the child's tribe, if the following criteria are met:
 - (a) The *child* is not located on a *reservation* where the tribe has exclusive jurisdiction over child custody matters;

- (b) Removal is necessary to prevent *imminent physical damage or harm* to the *child*; and
 - (c) The Department cannot develop a *protective action plan* under OAR 413-015-0432 in which the *Indian child* remains in the home, or an in-home *initial safety plan* per the requirements of OAR 413-015-0437, meeting the requirements of OAR 413-015-0432 to ensure child safety.
- (2) If there is reason to know the *child* may be an *Indian child*, and in order to determine if the tribe has exclusive jurisdiction, Department staff must immediately inquire as to the child's residence or *domicile*, since the *child* may be a resident of or domiciled on a *reservation* but is temporarily off the *reservation*.
 - (3) When *emergency removal* is necessary, the Department must consult with the tribe and notify the *Tribal Affairs Unit* as soon as possible, and in no case more than 24 hours after the *emergency removal*.
 - (4) If there is reason to know the *child* is an *Indian child*, *active efforts* must be made to place the *child* during emergency protective *custody* in a setting which follows the placement priorities established by the *ICWA* or the tribe and set forth in OAR 413-115-0090.
 - (5) If there is reason to know the *child* is an *Indian child*, and the *child* is placed in emergency protective *custody* or the *child* cannot be returned to the child's parents *upon demand* during a *protective action plan* the Department must comply with the following:
 - (a) Treat the *child* as an *Indian child*.
 - (b) Complete and document all practicable actions to confirm whether the *child* is an *Indian child* under OAR 413-115-0030(2).
 - (c) Immediately notify the child's tribe pursuant to OAR 413-115-0050, the parents, the *Indian custodian* and if known, the grandparents, of the removal of the *child* and document the notification in the Department's information system.
 - (d) Comply with OAR 413-115-0120.
 - (e) Continually assess whether the removal and placement continues to be necessary to prevent *imminent physical damage or harm* to the *child*.
 - (6) Emergency protective *custody* can be terminated by one or more of the following actions:
 - (a) Initiation of a *child-custody proceeding* subject to the provisions of the *ICWA*.
 - (b) Transfer of the case to the jurisdiction of the appropriate tribe.

- (c) Returning the *child* to the *parent* or *Indian custodian*.
- (7) If an *Indian child* is removed pursuant to a *protective action plan* or *emergency removal* and cannot be returned to the *parent* or *Indian custodian* or the case is not transferred to the jurisdiction of the tribe, under ORS 419B.183 the Department must request that the court hold a hearing within 24 hours—excluding Saturdays, Sundays and judicial holidays—to request temporary *custody* of the child.
- (8) A petition and accompanying documents filed pursuant to section (7) of this rule must contain the following information, if known, in addition to any information required by state law:
- (a) The name, age, and last known address of the *Indian child*.
 - (b) The name and address of the child's parents and Indian custodians, if any.
 - (c) The steps taken to provide notice to the child's parents, custodians, and tribe about the court hearing.
 - (d) If the child's parents and Indian custodians are unknown, a detailed explanation of what efforts have been made to locate and contact them, including contact with the appropriate *BIA* Regional Director.
 - (e) The residence and the *domicile* of the *Indian child*.
 - (f) If either the residence or the *domicile* of the *Indian child* is believed to be on a *reservation* or in an Alaska Native village, the name of the tribe affiliated with that *reservation* or village.
 - (g) The tribal affiliation of the *child* and of the parents or Indian custodians.
 - (h) A specific and detailed account of the circumstances that led the agency responsible for the *emergency removal* of the *child* to take that action.
 - (i) A statement of the threat of *imminent physical damage or harm* to the *child* and any evidence that the *emergency removal* or placement continues to be necessary to prevent *imminent physical damage or harm* to the *child*.
 - (j) A statement of the active efforts that have been taken to assist the parents or Indian custodians so the *Indian child* may safely be returned to their *custody*.
 - (k) If it is believed that a child's *domicile* or residence is 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 contact the tribe and transfer the *child* to the tribe's jurisdiction.

- (9) Where the danger to the *Indian child* persists and the child's tribe does not have exclusive jurisdiction and will not request transfer of the case to its court, the Department must initiate a child custody proceeding and, in consultation with the child's parents and tribe, if known, explore available placement resources which meet the placement preferences in OAR 413-115-0090, unless such placement has already occurred.

Stat. Auth.: ORS 418.005, 419B.171

Stats. Implemented: ORS 418.005, 418.015, 419B.150, 419B.183

413-115-0080

Required Documentation Prior to a Non-Emergency Removal

(Technical effective 1/08/18)

Except during an *emergency removal* described in OAR 413-115-0070, prior to removal of the *child* from a *parent* or *Indian custodian* and filing a petition, the Department must document:

- (1) The causal relationship between the particular conduct of the *parent* or *Indian custodian* or conditions in the home and the serious emotional or physical damage which is likely to result to the *child*.
- (2) If it is likely that such harm will occur, that active efforts have been made to counsel and modify the behavior of the *parent* or *Indian custodian* or the conditions in the home.
- (3) Why those active efforts have not been successful.

Stat. Auth.: ORS 418.005

Stats. Implemented: ORS 418.005

413-115-0090

Placement of Indian Children

(Amended 08/06/17)

- (1) The Department must conduct a search for an appropriate placement, which includes, at a minimum:
 - (a) Contact with the appropriate representative from the child's tribe;
 - (b) A search for Oregon *Indian foster home* availability;
 - (c) Contact with any *Indian tribe* and *Indian organization* that may have a viable placement resource; and
 - (d) Extended family to the sixth degree of consanguinity.

- (2) Foster-care placement preferences.
- (a) In determining the appropriate placement for an *Indian child*, the Department must contact the child's tribe to determine if the tribe has established, by resolution, an order of placement preference or has placement resources different from those described in this rule.
 - (b) If the Indian child's tribe has established by resolution a different order of placement preference than that specified in subsection (c) of this section for Indian children of the tribe, the tribe's placement preferences apply, so long as the placement is the least-restrictive setting appropriate to the particular needs of the *Indian child*, as provided in subsection (d) of this section.
 - (c) If the child's tribe has not established by resolution a different order of preference, and the court has not determined on the record that there is good cause to depart from the *ICWA* prescribed placement preferences, preference must be given, in descending order as listed below, to placement of the *child* with:
 - (A) An extended family member of the Indian child;
 - (B) A foster home that is licensed, certified, approved, or specified by the Indian child's tribe;
 - (C) An *Indian foster home* licensed, certified, or approved by an authorized non-Indian licensing authority; or
 - (D) 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.
 - (d) The *child* must be placed in the least restrictive setting that:
 - (A) Most approximates a family, taking into consideration *sibling* attachment;
 - (B) Allows the Indian child's special needs (if any) to be met; and
 - (C) Is in reasonable proximity to the Indian child's home, an *extended family member*, or siblings.
 - (e) The Department must inform the *substitute caregiver* that the *child* is an *Indian child*.
- (3) Adoptive Placements.
- (a) In determining the appropriate *adoptive placement* for an *Indian child*, the Department must contact the child's tribe to determine if the tribe has established, by resolution, an order of placement preference or has placement resources

different from those described in this section for Indian children of the tribe.

- (b) If the Indian child's tribe has established by resolution a different order of placement preference than that specified in subsection (c) of this section, the tribe's placement preferences apply for Indian children of the tribe.
 - (c) If the child's tribe has not established by resolution a different order of preference, and the court has not determined on the record that there is good cause to depart from the ICWA prescribed placement preferences, preference must be given, in descending order as listed below, to *adoptive placement* of the *child* with:
 - (A) An extended family member of the Indian child;
 - (B) Other members of the Indian child's tribe; or
 - (C) Other *Indian* families.
- (4) Change of Placement.
- (a) When an *Indian child* is moved from one placement setting to another or if the foster family moves, the placement preferences outlined in this rule must be followed for each subsequent placement, unless the *child* is returned to the *parent* or *Indian custodian* from whose *custody* the *child* was originally removed.
 - (b) The Department must notify the *parent*, *Indian custodian*, and the child's tribe in writing prior to a change in placement or before the foster family moves, as required in OAR 413-115-0050.
 - (c) The Department must inform the *substitute caregiver* that the *child* is an *Indian child*.
- (5) Records of Placement.
- (a) The Department must maintain a written record of each placement for each *Indian child*.
 - (b) The Department must document, in detail, in the Department's information system, the efforts to comply with the order of placement preferences established by the tribe.
 - (c) When the Department departs from the order of placement preferences established by the tribe, the Department bears the burden of providing to the court, by clear and convincing evidence, that there is good cause to depart from the order of placement preferences established by the tribe.

- (d) Upon the request of the Indian child's tribe or the Department of the Interior, the Department must make available the record of every foster care, pre-adoptive, and *adoptive placement* of an *Indian child* for which the Department has records.

Stat. Auth.: ORS 418.005

Stats. Implemented: ORS 418.005, 419.627, 419B.171, 419B.192

413-115-0100

Voluntary Placement Agreements and Voluntary Custody Agreements

(Amended 08/06/17)

- (1) The Department may enter into a *voluntary placement agreement* with the consent of a *parent* or *Indian custodian* of any *Indian child*, if:
 - (a) Pursuant to ORS 418.312 and OAR 413-020-0070, the sole reason for placing the *child* in a child-caring agency, foster home, group home, or institutional child-care setting is the need to obtain services for the child's emotional, behavioral, or mental disorder or developmental or physical disability;
 - (b) The *child* is more than ten days old;
 - (c) The voluntary consent is executed in writing and recorded before a judge in the appropriate jurisdiction; and
 - (d) The written consent is accompanied by the court's certification that the terms and consequences of the consent were fully explained in detail on the record and that certification complies with section (2) of this rule.
- (2) Court Hearing on Consent. The Department must request a court hearing to obtain consent from the *parent* or *Indian custodian* for the *voluntary placement agreement*. The Department must ensure that the court certifies on the record that the terms and consequences of the consent for the *voluntary placement agreement* were:
 - (a) Explained on the record, in detail, in English (or the language of the *parent* or *Indian custodian*, if English is not the primary language); and
 - (b) Fully understood by the *parent* or *Indian custodian*.
- (3) The signed *voluntary placement agreement* consent must, at a minimum, contain:
 - (a) The name and birthdate of the *Indian child*.
 - (b) The name of the child's tribe.
 - (c) The child's and parents' enrollment numbers, if known, or other indication of the child's membership in the tribe.

- (d) The name and address, and other identifying information of the consenting *parent* or *Indian custodian*.
 - (e) The name and address of the prospective foster parents, if known.
 - (f) The name and address of the person, *entity* or Department, if any, who arranged the placement.
 - (g) If there were any conditions to the consent, the conditions must be clearly set out.
- (4) The Department must place the *Indian child* into a *substitute care* setting which follows the placement preferences outlined in OAR 413-115-0090(2), unless the court has determined on the record that good cause exists to not apply those placement preferences. If the *Indian child* is moved to another placement while in *substitute care*, the placement preferences in OAR 413-115-0090(2) continue to apply.
- (5) Request for Anonymity. A request for anonymity does not relieve the Department from any duty of compliance with the *ICWA*, including the obligation to verify whether the *child* is an *Indian child*, and compliance with OAR 413-115-0090.
- (6) Ending a voluntary placement agreement.
- (a) The *parent* or *Indian custodian* may withdraw consent to the *voluntary placement agreement* at any time.
 - (b) To withdraw consent, the *parent* or *Indian custodian* must:
 - (A) Provide written notice to the Department;
 - (B) File a written document with the court; or
 - (C) Otherwise testify before the court.
 - (c) When a *parent* or *Indian custodian* withdraws consent to a voluntary *foster-care placement*, the Department must arrange the return of the *Indian child* to that *parent* or *Indian custodian* as soon as practicable.
- (7) For voluntary custody agreements, refer to OAR 413-020-0005 through 413-020-0050.

Stat. Auth.: ORS 418.005

Stats. Implemented: ORS 418.005, 418.015

413-115-0110

Consent to Termination of Parental Rights and Voluntary Relinquishment of Parental Rights

(Amended 08/06/17)

- (1) The Department may accept consent for *termination of parental rights* or voluntary relinquishment of parental rights from the *parent* of an *Indian child* if:
 - (a) The Department is pursuing *adoption*;
 - (b) The *child* is more than ten days old;
 - (c) The voluntary consent is executed in writing and recorded before a judge in the appropriate jurisdiction; and
 - (d) The judge certifies in writing that the terms and consequences of the consent were fully explained in detail on the record and that certification complies with section (2) of this rule.
- (2) Court Hearing on Consent. The Department must obtain consent from the *parent* for the *termination of parental rights* or voluntary relinquishment of parental rights in court. For the consent to be valid, the court must certify on the record that the terms and consequences of the consent to *termination of parental rights* or voluntary relinquishment of parental rights were:
 - (a) Explained in detail, in English (or the language of the *parent*, if English is not the primary language); and
 - (b) Fully understood by the *parent*.
- (3) The signed consent to *termination of parental rights* or voluntary relinquishment of parental rights must, at a minimum, contain:
 - (a) The name and birthdate of the *Indian child*;
 - (b) The name of the child's tribe;
 - (c) The child's and parents' enrollment numbers, if known, or other indication of the child's membership in the tribe; and
 - (d) The name and address, and other identifying information of the consenting *parent*.
- (4) Request for Anonymity. A parent's request for anonymity does not relieve the Department from any duty of compliance with the *ICWA*, including the obligation to verify whether the *child* is an *Indian child*.

(5) Withdrawal of Consent.

- (a) Termination of parental rights. The *parent* may withdraw consent to the *termination of parental rights* of an Indian child for any reason at any time prior to the entry of the final order for *termination of parental rights*, and have the *child* returned as soon as practicable.
- (b) Voluntary relinquishment of parental rights. The *parent* may withdraw consent to a voluntary relinquishment of parental rights of an *Indian child* for any reason at any time prior to the entry the decree of *adoption*, and have the *child* returned as soon as practicable.
- (c) If the *parent* withdraws consent to the *termination of parental rights* or voluntary relinquishment of parental rights, and the Department believes the *child* should not be returned to the *custody* of the *parent* because of an imminent threat of physical damage or harm to the *child*, the Department may initiate a *child custody proceeding* to petition the court to retain *custody* of the *child*.

Stat. Auth.: ORS 418.005

Stats. Implemented: ORS 418.005, 419B.498, 419B.500, 419B.521, 419B.529

413-115-0120

Notice Required Prior to a Child Custody Proceeding or Court Hearing

(Amended 08/06/17)

- (1) Notice must be provided for each child custody proceeding where the Department knows or has reason to know the child is an Indian child.
- (2) The Department must send notice for a child custody proceeding to:
 - (a) The *parent* or parents;
 - (b) The *grandparent* or grandparents;
 - (c) The *Indian custodian* (if applicable);
 - (d) The Indian child's tribe or tribes (or the tribes in which the *child* is eligible for membership if a biological *parent* is a member);
 - (e) Any other party to the case; and
 - (f) The Portland Regional Director, *BIA* , only if the identity or location of a potentially interested *Indian* party to the proceeding cannot be determined, in which case the *BIA* has fifteen days to locate and notify that party.

- (3) Except for an emergency removal made pursuant to OAR *413-115-0070*, the Department may not request a child custody proceeding regarding an Indian child until the following time frames have been met:
 - (a) Not less than ten days after receipt of notice by any the recipients in (2)(a)-(e) of this rule;
 - (b) Not less than thirty days after receipt of notice by any of the recipients in (2)(a)-(e) of this rule, if an additional twenty days has been requested the *parent, Indian custodian*, Indian child's tribe or the *BIA*; or
 - (c) Not less than fifteen days after receipt of the notice by the appropriate regional *BIA* director.
- (4) Notice for each child custody proceeding must be provided to a tribe even if the tribe has not intervened, or has declined jurisdiction. If a tribe has declined jurisdiction, the tribe maintains the right to participate as an interested party or to intervene at any point in the case.
- (5) Service of notice for a child custody proceeding.
 - (a) The Department must provide notice of a *child-custody proceeding* by registered or certified mail, with return receipt requested.
 - (b) In addition to providing notice of a *child-custody proceeding* by registered or certified mail, the Department may provide personal service, electronic service, or call the noticed party.
- (6) Content of notice for a child custody proceeding. Notice must contain, at a minimum:
 - (a) The name, birthdate, and birthplace of the *child*;
 - (b) The name of each *Indian tribe* in which the *child* is a member (or may be eligible for membership or enrollment if a biological *parent* is a member);
 - (c) All known names (including maiden, married, former or aliases) of the parents, the parents' birthdates and birthplaces, and tribal enrollment numbers, if known;
 - (d) If known, the names, birthdates, birthplaces, and tribal enrollment information of other direct lineal ancestors of the *child*, such as a *grandparent*.
 - (e) A copy of the petition, complaint, or other document by which the proceeding was initiated;
 - (f) If a hearing has been scheduled, information on the date, time, and location of the hearing;

- (g) The name of the petitioner and the name and address of the petitioner's attorney, if any;
 - (h) A statement setting forth the right of any *parent*, *Indian custodian* or the Indian child's tribe, if not already a party, to intervene and participate in the proceeding;
 - (i) A statement that if the *parent* or *Indian custodian* is unable to afford counsel, counsel may be appointed by the court to represent them;
 - (j) A statement of the right of the *parent* or *Indian custodian* and the Indian child's tribe to have, upon request, twenty additional days to prepare for the *child-custody proceeding*;
 - (k) The location, mailing address, and telephone number of the court;
 - (l) Information related to all parties to the hearing and individuals notified under this section;
 - (m) A statement of the right of the *parent* or *Indian custodian* or the Indian child's tribe to petition the court to transfer the *child-custody proceeding* to the Indian child's *tribal court* pursuant to 25 U.S.C 1911 and 25 C.F.R. §23.115.
 - (n) The potential legal consequences of the *child-custody proceeding* on future custodial rights of the *parent* or *Indian custodian*; and
 - (o) A statement that the notified party must keep the information contained in the notice confidential and may only reveal it to individuals who need the information to exercise their rights under the Act.
- (7) Copies of notice for a child custody proceeding.
- (a) To the *BIA*. The Department must provide a copy of the notices under this rule to the appropriate regional director of the *BIA*. The copy must include all the information in section (6) of this rule. A copy of these notices may be provided by personal service, registered or certified mail, with return receipt requested.
 - (b) To the court. The Department must file with the court a copy of each notice sent pursuant to this rule together with any return receipts or other proofs of service.
- (8) Notice required prior to each court hearing.
- (a) Notice of any court hearing subsequent to the initiation of a child custody proceeding must be provided to the child's tribe or tribes.
 - (b) Notice for a court hearing described in (a) of this section must include the date, time and location of the hearing.

- (c) Notice for a court hearing described in (a) of this section may be provided in person, telephonically or electronically.

Stat. Auth.: ORS 418.005

Stats. Implemented: ORS 418.005, 419B.875, 419B.878, 419B.923

413-115-0130

Standards of Evidence and Minimum Qualifications for a Qualified Expert Witness

(Amended 08/06/17)

- (1) Clear and Convincing.
 - (a) *Foster-care placement.* Except during an *emergency proceeding*, when requesting court authorization for the placement of an *Indian child* in foster care, the Department must demonstrate, by clear and convincing evidence, that continued custody of the *child* with the *parent* or *Indian custodian* is likely to result in serious emotional or physical damage to the *child*. The Department's presentation of evidence must include the testimony of at least one QEW, as defined in section (3) of this rule.
 - (b) Guardianship finalization pursuant to ORS 419B.366. When requesting court appointment of a *guardian* pursuant to ORS 419B.366, the Department must demonstrate, by clear and convincing evidence, that *continued custody* of the *child* with the *parent* or *Indian custodian* is likely to result in serious emotional or physical damage to the *child*. The Department's presentation of evidence must include the testimony of at least one QEW, as defined in section (3) of this rule.
- (2) Beyond a Reasonable Doubt.
 - (a) Guardianship finalization pursuant to ORS 419B.365. When requesting court appointment of a *guardian* pursuant to ORS 419B.365, the Department must demonstrate, by evidence beyond a reasonable doubt, that *continued custody* of the *child* with the *parent* or *Indian custodian* is likely to result in serious emotional or physical damage to the *child*. The Department's presentation of evidence must include the testimony of at least one QEW, as defined in section (3) of this rule.
 - (b) *Termination of Parental Rights.* When requesting judicial *termination of parental rights*, the Department must prove, beyond a reasonable doubt, 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*. The Department's presentation of evidence must include the testimony of at least one *QEW*, as defined in section (3) of this rule.

- (3) Qualified Expert Witness (*QEW*).
- (a) A *QEW* must be qualified to testify regarding whether the child's *continued custody* by the *parent* or *Indian custodian* is likely to result in serious emotional or physical damage to the child.
 - (b) The Department must work with the Indian child's tribe to determine who should be designated to testify as a *QEW*. If the Indian child's tribe declines or is unable to designate a *QEW*, the Department will identify a *QEW*.
 - (c) Department staff may not serve as a *QEW* in any child custody proceeding.

Stat. Auth.: ORS 418.005

Stats. Implemented: ORS 418.005, 419B.185, 419B.365, 419B.366, 419B.521

413-115-0140

Tribal-State Agreement

(Amended 08/06/17)

These rules may be superseded for a particular tribe by a written, signed agreement between the state and that tribe. Such agreement must be retained by the *Tribal Affairs Unit* and produced upon request.

Stat. Auth.: ORS 418.005

Stats. Implemented: ORS 418.005

413-115-0150

Full Faith and Credit

(Amended 08/06/17)

The United States, every state, every territory or possession of the United States, and every *Indian tribe* shall give full faith and credit to the public acts, records and judicial proceedings of any *Indian tribe* regarding any *Indian child-custody proceeding* to the same extent that such entities give full faith and credit to Indian tribes.

Stat. Auth.: ORS 418.005

Stats. Implemented: ORS 418.005, 419B.100