

THE INDIAN CHILD WELFARE ACT AND MINOR GUARDIANSHIPS



WHAT IS ICWA?

ICWA and WICWA were enacted to remedy the historical and persistent state-sponsored destruction of Native families and communities. These are baseline protections, passed as a step toward rectifying the horrific wrongs of widespread removal of Native children from their families and states' consistent failure to provide due process to tribes. The acts provide specific protections for Native children in child welfare proceedings and are aimed at preserving the children's relationships with their families, Native communities, and identities. The acts also require states to send notice to tribes so that tribes may exercise their independent rights and interests to protect their children and, in turn, the continuing existence of tribes as thriving communities for generations to come.

Matter of Dependency of Z.J.G., 196 Wn. 2d 152, 157, 471 P.3d 853, 856 (2020)

OVERVIEW OF STATUTES AND REGULATIONS

- **ICWA:** Established in 1978, provides minimum federal standards before Indian Children may be removed from their families and placed in foster care or adoptive homes. 25 U.S.C. § 1902.
- **WICWA:** Established in 2011, meant to clarify existing law and codify existing policies and practices in Washington Indian Child Welfare practice. RCW 13.38.020
- **Barring specific differences in statutory language, ICWA and WICWA should be read coextensively.** In the Matter of the Adoption of T.A.W., 186 Wn.2d 828, 383 P3d 492 (2016).
- **But where federal or state law (which includes laws other than ICWA and WICWA) provide greater protections, that federal or state law shall apply.** 25 U.S.C. § 1921; RCW 13.38.030;

WHEN DOES ICWA APPLY?

- The ICWA applies to any “child custody proceeding” which a state court knows, or has reason to know, involves an “Indian child.” The term “child custody proceeding” is defined to include four types of proceedings potentially affecting an Indian child's custodial relationship with its parents or Indian custodian:
 - (i) “foster care placement” which shall mean any action removing an Indian child from its 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;**
 - (ii) “termination of parental rights” which shall mean any action resulting in the termination of the parent-child relationship;
 - (iii) “preadoptive placement” which shall mean 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; and
 - (iv) “adoptive placement” which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

WHY DOES ICWA APPLY TO TITLE II GUARDIANSHIPS?

The ICWA does not expressly include guardianship placements but has been applied to guardianship actions under the foster care placement subdivision.

- **Does ICWA Apply to this proceeding?**

- Yes, if this a child-custody proceeding or emergency proceeding.

- Child-Custody Proceeding

- For purposes of ICWA, a child-custody proceeding is not:

- In Tribal court;
 - A criminal case unless involving a status offense (e.g. truancy);
 - A family law matter between parents not resulting in termination of parental rights; or
 - A voluntary placement where the child will be returned at the parent's request.

- For purposes of ICWA, a child custody proceeding is:

- A involuntary proceeding;
 - A voluntary proceeding that could prohibit a parent regaining custody upon request; or
 - A proceeding involving a status offense if any part of it would result in the need for out-of-home placement.

25 CFR § 23.103

- Examples of child-custody proceedings in Washington include dependencies, terminations, adoptions, guardianships, non-parental custody actions, and CHINS actions.



APPLICABILITY TO SPECIFIC CASES

- **Does ICWA apply to this child?**

- Yes, if the child is an Indian child.
- An Indian child means any unmarried person who is under age 18 and is either:
 - A member or citizen of a federally recognized Indian Tribe; or
 - Eligible for membership or citizenship in a federally recognized Indian Tribe, with a biological parent who is already a member of a federally recognized Tribe

25 CFR §23.107

- When you know, you know!
- But what if you don't know? Do you at least have *reason to know*?

ICWA CASE LAW IN WASHINGTON REQUIRES AN EXTREMELY BROAD APPLICATION

During a child custody proceeding, if a court has a “**reason to know**” that the child at issue is an Indian child, it must apply the protections of ICWA and WICWA. 25 U.S.C. § 1912(a); RCW 13.38.070(1); 25 C.F.R. § 23.107(b)(2). The “reason to know” finding performs a critical gatekeeping function. It ensures that the court applies the heightened ICWA and WICWA standards early on in any proceeding and ensures that tribes receive adequate notice of the proceeding in order to protect their children and the tribes’ sovereign interests.

“REASON TO KNOW”

We hold that a trial court has “reason to know” that a child is an Indian child when a participant in the proceeding indicates that the child has tribal heritage.

We respect that tribes determine membership exclusively, and state courts cannot establish who is or is not eligible for tribal membership on their own.

Further, we follow the canon of construction for interpreting statutes that deal with issues affecting Native people and tribes, which requires that we construe these statutes in favor of the tribes. Finally, we are bound by the statutory language and implementing regulations of ICWA and WICWA, and we interpret these acts to serve their underlying purposes. Given these guiding principles, we hold that **an indication of tribal heritage** is sufficient to satisfy the “reason to know” standard.

Matter of Dependency of Z.J.G., 196 Wn. 2d 152, 158, 471 P.3d 853, 856–57 (2020)

Therefore ICWA applies whenever *any* participant in the proceeding indicates *any* ancestry.

ICWA applies until the *TRIBE* responds that a child is not a member or eligible for membership.

ICWA INQUIRY

1. Is your domicile or residence on a reservation or Alaskan Native Village?
2. Are you a member of a federally recognized Tribe?
3. Do you have reason to know that the other parent or legal custodian is a member of a federally recognized Tribe?
4. Do you have reason to know that your child is a member of, or eligible for membership in, a federally recognized Tribe?
5. Has the child been a ward of a tribal court?
6. Do you or does the child possess an identification card indicating membership in an Indian Tribe?
7. Does the child have tribal heritage or ancestry?

APPLICABILITY

- Courts must make this inquiry at the beginning of every child-custody proceeding.
- The inquiry must be made with every participant of the proceeding.
- Responses must be made on the record.
- If Indian child status is uncertain but there is still reason to know the child is *(or may be)* an Indian child, courts must ensure, by way of report, declaration, or testimony included in the record that due diligence was used to confirm whether the child was Indian child.
- There is an ongoing responsibility by parties to inform courts if new information creates reason to know the child is an Indian child.

25 CFR § 23.107

ICWA INQUIRY CONT.

- There is no requirement that this inquiry must occur at every hearing within each child-custody proceeding.
- But if a new child-custody proceeding commences, the inquiry must be made again.
- Even if the child was not considered an Indian child in the prior child-custody proceeding, courts have a continuing duty to inquire and parties have a continuing duty to advise the court when a child is an Indian child or there is reason to know the child is an Indian child.
- Ultimately, Tribes have final say about membership, citizenship, and eligibility. However, courts are tasked with making the determination for purposes of the child-custody proceeding and must do so with the information on hand. 25 CFR § 23.108.

ICWA IN THE GUARDIANSHIP FORMS

17. → Tribal Heritage ¶

If there is a reason to know that a child has **tribal heritage** (including ancestry or familial political affiliation), the court must treat the child as an Indian child unless and until the affected tribe/s decide otherwise or decline to respond after receiving proper notice. ¶

An **Indian child** is a child who is a member of an Indian tribe, or who is the biological child of an Indian tribe member and eligible for membership. You must try to find out if any child in this case is an Indian child. If so, the federal and state Indian Child Welfare Acts will apply to your case. ¶

Could any of the children be Indian children? (Check all that apply): ¶

→ **No.** ¶

→ None of the children are Indian children. ¶

→ These children are not Indian children (name/s): _____ → _____ ¶

I know this because (explain if the children have no tribal heritage, or if any possible tribal heritage has already been explored and decided in another court proceeding that complied with ICWA): _____ → _____ ¶

_____ → _____ ¶

_____ → _____ ¶

_____ → _____ ¶

→ **Yes or Maybe.** These children are or maybe Indian children. They have or may have heritage from the tribe/s listed below: ¶

Children [¶]	Tribes [¶]
<input type="checkbox"/> All children ¶	<input type="checkbox"/>
<input type="checkbox"/> (name/s): [¶]	
<input type="checkbox"/> All children ¶	<input type="checkbox"/>
<input type="checkbox"/> (name/s): [¶]	

→ I will provide the *Indian Child Welfare Act Notice* (form GDN-M-401) and a ¶

copy of this *Petition* to the tribe/s named above and other necessary people or agencies. ¶

→ **I do not know** if any of the children are Indian children or have tribal heritage. I have done the following things to try to find out: ¶

_____ → _____ ¶

_____ → _____ ¶

_____ → _____ ¶

ICWA APPLIES, NOW WHAT?

ICWA has several heightened protections and obligations

1. Notice
2. Placement Preferences/QEW
3. Active Efforts

NOTICE

- What notice is otherwise required in a child-custody proceeding involving an Indian child?
 - Where the court knows or has *reason to know* the subject child is an Indian child, notice must be sent to the child's:
 - Tribe
 - Parents or Indian custodian
 - Notice should also be sent to the BIA
 - Upon request, the BIA will attempt to locate the parents or Tribe if not known.
 - Notice must be sent by registered or certified mail with return receipt requested. Any responses should be filed for the record.
 - Notice may also be provided personally or electronically, but it does not replace the requirement of registered or certified mail.
- The notice must:
 - be in a clear and understandable language
 - provide the names, birthdates, birthplaces, and Tribal enrollment information for the child, the parents, and any direct lineal ancestors (to the extent known)
 - identify all potential Tribes
 - include a copy of the petition initiating the child-custody proceeding
 - state the date, time, and location for the hearing on the petition
 - provide other information including rights to intervention or transfer, rights to an attorney, and the potential consequences of the proceedings.

NOTICE

- No foster-care-placement or termination-of-parental-rights proceeding may be held until at least 10 days after the parent, Indian custodian, and Tribe's receipt of the required notice.
- A parent, Indian custodian, and Tribe can request an additional 20 days to prepare
- Additional time beyond this may be granted by the Court as needed.
- If a Tribe does not respond or declines to participate in a proceeding, notice must still be sent in subsequent proceedings.
- As feasible, courts are encouraged to let Tribes participate by alternative methods and without the requirement of licensed local counsel.

25 CFR §§23.11, .111, .112, .133

COURT FORMS FOR TITLE II GUARDIANSHIP (GND 401 AND 402)

Superior Court of Washington, County of _____

In the Guardianship of: _____

Respondent/s (minors/children) _____

No. _____

Indian Child Welfare Act Notice (Guardianship) (BIAN) _____

Clerk: Do not file in a public access file. (GR 22(c)(3), 25-CFR 23.11(e)(7))

Indian Child Welfare Act Notice (Guardianship)

To: Parent/s (name/s): _____

Indian Custodian/s, if any (name/s): _____

Designated ICWA Tribal Agent/s (name/s and tribe/s): _____

Regional Director: Portland Regional Director, Bureau of Indian Affairs, 911 NE 11th Avenue, Portland, Oregon 97232

I have filed a *Minor Guardianship Petition* to ask a Washington State Court for guardianship of children who are members of (or may be eligible for membership in) the Indian tribe/s listed above. The Court's decision may affect the rights of the children's parents, Indian custodians, and tribe/s. The children may be taken from their home temporarily or permanently.

The Court is located at: _____

Court's street address _____ Court's phone number _____

Court's mailing address (if different) _____

City _____ State _____ Zip _____

Court Hearing

need the information to exercise rights under 1071. Consider see the notice.

Information

The information below is to help determine the children's Indian status. Petitioner/s must make a good faith effort to provide this information.

1. Information about the person/s asking for custody of the children

Name: _____ Tel. No.: _____

Name: _____ Tel. No.: _____

Address: _____

Lawyer's name (if any): _____

Lawyer's address: _____ Tel. No.: _____

2. Child's information

Child's name: _____

Date of birth: _____ Place of birth: _____

Tribe/s child belongs to (or may belong to): _____

Tribal enrollment # or other tribal ID: _____

[] This child or one of the child's parents or grandparents was adopted. The child or a birth relative may be eligible for tribal membership. (Sections 3 through 5 below ask for information about legal relatives. Provide the same information for birth relatives and attach to this form.)

[] There are (#) _____ other children involved in this case. (For each additional child complete form GDN-M-402, "ICWA Notice - Attachment for Additional Child".)

RCW 11.130.250(1), 13.38.070, 25-CFR § 23.11(e)(7), 25-USC § 1912(a) (06/2022) GDN-M-401

ICWA Notice (Guardianship) p. 2 of 5

NOTICE COMPLICATIONS

- Does ICWA apply? when a parent or participant represents they have ancestry, but can't name a tribe?
 - **YES**
- What Tribes get notification when the parent doesn't know their tribe?
- What Tribes get notification when a parent knows some information (i.e. "Cherokee Ancestry") but still can't name a specific tribe?

WA COURTS SAY:

The BIA recognizes this reality in 25 C.F.R. § 23.111(e), where it anticipates and provides for the scenario when there is a reason to know the child is an Indian child, but the participants do not know which tribe or tribes the child has a political affiliation with. If the identity of “the Tribes in which the Indian child is a member or eligible for membership cannot be ascertained, but there is reason to know the child is an Indian child, notice of the child-custody proceeding must be sent to the appropriate Bureau of Indian Affairs Regional Director.” 25 C.F.R. § 23.111(e). Even if the participants in a proceeding are unable to identify a specific tribe, the court may still have “reason to know” that a child is an Indian child, requiring notice to the regional BIA office. **The BIA** can then utilize its expertise and resources to identify which tribes may need notification. A broad understanding of “reason to know” supports the act's underlying purposes of tribal notice, determination of membership by tribes, and keeping state courts out of that determination. 25 U.S.C. §§ 1901(5), 1912(a); 25 C.F.R. § 23.108(a)-(b).

- Matter of Dependency of Z.J.G., 196 Wn. 2d 152, 180–81, 471 P.3d 853, 867–68 (2020)

25 CFR § 23.11 (C) AND (D) WHICH STATE

- (c) Upon receipt of the notice, the Secretary will make reasonable documented efforts to locate and notify the child's Tribe and the child's parent or Indian custodian. The Secretary will have 15 days, after receipt of the notice, to notify the child's Tribe and parents or Indian custodians and to send a copy of the notice to the court. If within the 15-day period the Secretary is unable to verify that the child meets the criteria of an Indian child as defined in § 23.2, or is unable to locate the parents or Indian custodians, the Secretary will so inform the court and state how much more time, if any, will be needed to complete the verification or the search. The Secretary will complete all research efforts, even if those efforts cannot be completed before the child-custody proceeding begins.
- (d) Upon request from a party to an Indian child-custody proceeding, the Secretary will make a reasonable attempt to identify and locate the child's Tribe, parents, or Indian custodians to assist the party seeking the information.

THE REALITY IS....

- The BIA does NOT just volunteer this information, a specific request for help identifying the tribes pursuant to federal statutes is necessary.
- If a specific request is made, the BIA often will kick it back with lots of questions and requests (most of which is sent in the original notice...)

A family tree that shows who in the family has Tribal membership or citizenship.

Information about the child or family receiving services or funds (such as, per capita, trust funds, etc.) from a Tribal or Indian organization, the BIA, or the Indian Health Services (IHS), or has been involved with a Tribal court. Please list the name of the organization and include the Tribe's name, and/or State in which it is located.

Information about the child or family living or has lived on or near a reservation in the United States, Tribal community, or on Tribal lands.

Copy of Tribal enrollment card, Tribal descendant card, or Certification of Indian Blood (CIB) form, belonging to the child and/or child's parents.

Basic information about the child, including but not limited to:

1. full name and nicknames,
2. date of birth and birthplace,
3. current and previous addresses,
4. names of individuals residing in the same home,
5. school records and medical records; and,
6. any other information which may help identify the child (i.e. correspondence from a Tribe or Tribal organization).

OTHER OPTIONS

Try to get as much clarification during the inquiry as possible

- Can you narrow it down to a specific state or type of ancestry?

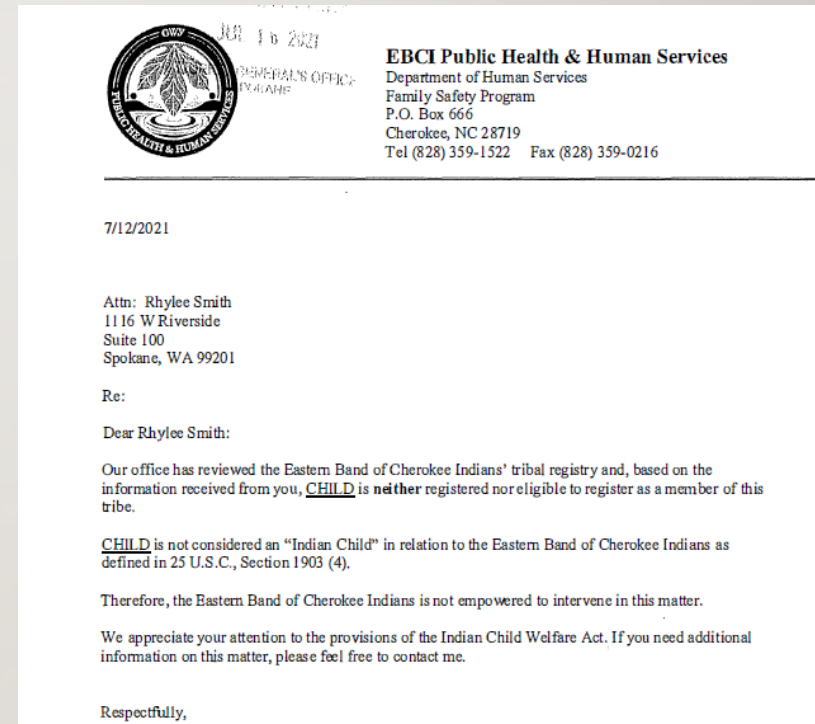
Go to the BIAs website

<https://www.bia.gov/service/tribal-leaders-directory/federally-recognized-tribes>

Some tribal ancestry is relatively easy to discover and from the BIAs website you can locate all three federally recognized Cherokee Tribes and send notice directly to them and the BIA at the same time.

TRIBAL RESPONSES INDICATE CHILD IS NOT ELIGIBLE, IS THIS STILL AN ICWA CASE?

- Once responses have been received, go back on the record to address ICWA
- Re-do the inquiry and inform the court that the proper tribes have been notified and responded, the court can then make a finding ICWA no longer applies.



LITIGATING AN ICWA GUARDIANSHIP CASE- EVIDENTIARY REQUIREMENTS

- Active Efforts***
- Burden of Proof
- Qualified Expert Witness Testimony

EVIDENTIARY REQUIREMENTS- BURDEN OF PROOF

Burden of Proof

- Testimony of at least one qualified expert witness;
- Sufficient evidence to show that continued custody by the parent or Indian custodian would likely result in serious physical or emotional damage to the child


The evidence must also show nexus between the conditions in the home and the likelihood that continued custody would likely result in serious physical or emotional damage to the child

Without the nexus, evidence only showing the existence of:

- Community or family poverty;
- Isolation;
- Single parenthood;
- Custodian age;
- Crowded or inadequate housing;
- Substance abuse; or
- Non-conforming social behavior

Does not by itself constitute the evidence necessary to show continued custody would likely result in serious physical or emotional damage to the child.

25 CFR §23.121(c), (d)



EVIDENTIARY REQUIREMENTS- QEW

- Qualified Expert Witness

- Testimony of at least one qualified expert witness is necessary before a foster-care placement or termination of parental rights can occur;
- Not defined by ICWA
- WICWA defines at RCW 13.38.130(4). Essentially,
 - the witness cannot be the assigned social worker or his/her supervisor;
 - Must be able to assist the court in its determination; and
 - Be either the Tribe's designee, a member of the child's Tribe with pertinent knowledge, a person with substantial experience and knowledge relevant to the inquiry, or a professional person with substantial education and experience in the area of his or her specialty (in that order).

EVIDENTIARY REQUIREMENTS- QEW

The Fed Regs elaborate further:

- The witness must be qualified to testify whether continued custody would likely result in serious physical or emotional damage to the child.
- The witness should be qualified to testify to prevailing social and cultural standards of the child's Tribe, but it is not always necessary. *See also In re Mahaney*, 146 Wn.2d 878, 51 P.3d 776 (2002).
- The child's Tribe may designate the witness, but it should not be the assigned social worker.
- The BIA may be able to assist in locating qualified expert witnesses.

25 CFR §23.122

CONSIDERATIONS FOR LITIGATING AN ICWA GUARDIANSHIP CASE- PLACEMENT PREFERENCES

- ICWA (25 U.S.C. §1915) and WICWA (RCW 13.38.180) both set forth placement preferences. They are very similar, although WICWA has a few additional provisions.
 - Emergency placements, foster care or pre-adoptive placements, and adoptive or other permanent placements
 - In short, the ultimate goal of ICWA and WICWA is to keep Indian children connected with the family, other members of the Tribe, or other Indian families, if the children cannot remain with a parent.
 - If a Tribe has a different order of placement preferences than established by ICWA and WICWA, that placement preference applies.
 - Where appropriate, the placement preferences of the child or the parents must be considered.

25 CFR §23.130

RCW 13.38.180

- (1) When an emergency removal, foster care placement, or preadoptive placement of an Indian child is necessary, a good faith effort will be made to place the Indian child:
 - (a) In the least restrictive setting;
 - (b) Which most approximates a family situation;
 - (c) Which is in reasonable proximity to the Indian child's home; and
 - (d) In which the Indian child's special needs, if any, will be met.

- 2) In any foster care or preadoptive placement, a preference shall be given, in absence of good cause to the contrary, to the child's placement with one of the following:
 - (a) A member of the child's extended family;
 - (b) A foster home licensed, approved, or specified by the child's tribe;
 - (c) An Indian foster home licensed or approved by an authorized non-Indian licensing authority;
 - (d) A child foster care agency approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs;
 - (e) A non-Indian child foster care agency approved by the child's tribe;
 - (f) A non-Indian family that is committed to:
 - (i) Promoting and allowing appropriate extended family visitation;
 - (ii) Establishing, maintaining, and strengthening the child's relationship with his or her tribe or tribes; and
 - (iii) Participating in the cultural and ceremonial events of the child's tribe.


PLACEMENT PREFERENCES

- Placement preferences apply to any out-of-home placement unless there is good cause not to apply those placement preferences.

25 CFR § 23.129

- The party asserting good cause to avoid placement preferences must state them on the record.
- The party asserting good cause to avoid placement preferences should prove such by clear and convincing evidence.
- If good cause is found, it must be in the record or in writing and should be based on one or more of the following considerations:
 - The request of parent(s) if they attest to reviewing the placement options that comply with the order of preference;
 - The request of the child if the child is of sufficient age and capacity to understand the decision;
 - Sibling attachments available only in a particular placement;
 - Extraordinary physical, mental, or emotional needs of the child;
 - The unavailability of a suitable placement within the criteria after a diligent search, where unavailability is within the context of the prevailing social and cultural standards of the Indian community.

25 CFR § 23.132(a)-(c)



PLACEMENT PREFERENCES

- Good cause may not be based:
 - On socioeconomics of the placement; or
 - Solely on ordinary bonding or attachment that flowed from time spend in a non-preferred placement that violated ICWA.

25 CFR § 23.132(d), (e)

ACTIVE EFFORTS

- Active Efforts
 - No foster care placement or termination of parental rights may occur unless active efforts have been made to prevent the breakup of the Indian family but those services have proved unsuccessful.
 - Not defined by ICWA
 - WICWA defines at RCW 13.38.040(1)(a). Essentially, WICWA defines them as timely and diligent efforts that amount to more than just making service referrals.
- BIA: “Affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family”

ACTIVE VS. PASSIVE

“Passive efforts are where a plan is drawn up and the client must develop his or her own resources towards bringing it to fruition. Active efforts, the intent of the drafters of the Act, is where the state caseworker takes the client through the steps of the plan rather than requiring that the plan be performed on its own. For instance, rather than requiring a client to find a job, acquiring new housing, and terminate a relationship with what is perceived to be a boyfriend who is a bad influence, the Indian Child Welfare Act would require that the case worker help the client develop job and parenting skills necessary to retain custody of her child”

—Washington Courts Improvement Training Academy

EXAMPLES OF ACTIVE EFFORTS INCLUDE:

- Conducting a comprehensive assessment of the circumstances of the child's family, with a focus on safe reunification as the most desirable goal;
- Identifying appropriate services and helping the parents overcome barriers, including actively assisting the parents in obtaining such services;
- Identifying, notifying, and inviting representatives of the child's Tribe to participate in providing support and services to the child's family and in family team meetings, permanency planning, and placement resolution;
- Conducting or causing to be conducted a diligent search for the child's extended family, and contacting and consulting with them about support for the child and the parents;
- Offering and employing all culturally appropriate strategies and services provided by the child's Tribe;
- Keeping siblings together if possible;
- Supporting regular visitation in the most natural setting possible;
- Identifying community resources for the parents and/or the child's family and actively assisting them in accessing and utilizing those resources;
- Monitoring progress and participation in services;
- Considering alternatives to address the needs of the parents and/or the child's family if the optimum services do not exist or are unavailable;
- Providing post-reunification services and monitoring.

IMPROPER REMOVAL STANDARD

- If court finds there is not compliance with ICWA:
 - Children could be returned home unless case meets the improper removal standard
- Improper removal standard: Out of home placement maintained if court finds returning the child to the parent or Indian custodian would subject the child **to substantial and immediate danger** or threat of such danger.