Overview of Indian Child Welfare Act
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I. INTRODUCTION:

A. Why Does the ICWA Exist?

Congress passed the Indian Child Welfare Act (hereinafter the ICWA) in 1978 to remedy the problem of the inappropriate removal of Indian children from their families and inappropriate placement of Indian children in non - Indian homes. After ten years of hearings on the issue, Congress believed that this problem was largely by the lack of understanding by state courts and administrative bodies about Indian cultural and social norms.

The ICWA affirms existing tribal authority to handle child protection cases (including child abuse, child neglect, and adoption) involving Indian children and to establish a preference for exclusive tribal jurisdiction over these cases.

The ICWA regulates and sets minimum standards for the handling of those cases remaining in state court and in state child social services agencies. It addresses both the removal of Indian children from their homes and cultural environments, and the placement of Indian children in homes that will protect their right to grow up with knowledge and integration of their Indian heritage. The ICWA makes it more difficult to remove an Indian child from his or her family, and imposes procedural and substantive burdens as a matter of federal law on state entities before a child may be placed in foster care or before termination of parental rights can be made.

Finally, the ICWA recognizes the importance of the Indian child's relationship with his/her tribe. It recognizes that the Indian child's tribe has an interest in the Indian child that is distinct from but on a parity with the interests of the parents.

B. Citations and Source Material on the ICWA

1. The ICWA is codified at 25 U.S.C. 1901 to 1963.

2. Oregon Law expressly incorporates ICWA into the juvenile code. During the 1992 revision of the Oregon Juvenile Code, the Legislature expressly incorporated the provisions of the ICWA through out the juvenile code.

a. Example: The State of Oregon recognizes the value of the ICWA, 25 U.S.C. 1901 to 1923, and, hereby incorporates the policies of that Act. ORS 419B.090B(5).

b. Example: At a shelter care hearing, Oregon Law requires that the court shall determine whether the child is an Indian child. ORS 419B.185(e).

3. The State Office of Services for Children and Families (DHS) has incorporated the ICWA into its administrative rules, *See eg*, Chapter 43, Division 25, 412-26-005 et seq.

4. Basic sources for interpretation of the ICWA include: H.R. Rep. N. 1386, 95th Cong., 2d. Sess. (1978), reprinted in 1978 U.S. Code Cong. & Ad News 7350; Part III, Department of the Interior, Bureau of Indian Affairs; Fed. Reg. 67,584 (Nov. 26, 1979); and S. Rep. No. 597, 95th Cong., 1st Sess. (1977).

5. *OSB Juvenile Law Manual*, (McFarlane, Welch and Koch, editors, 1995 Revision) "the Indian Child Welfare Act" by Craig Dorsay, Ch. 13.

6. *ABA Indian Child Welfare Act Handbook, Legal Guide,* B.J. Jones (1995).

7. JCIP Juvenile Court Dependency Benchbook on Oregon Judicial Department's web page: www.ojd.state.or.us

8. National Indian Child Welfare Association : NICWA provides public policy, research and advocacy; information and training on Indian child welfare; and community development services. NICWA's web page is www.NICWA.org

II. INDIAN CHILD'S TRIBE: ITS ROLE AND HOW TO CONTACT A

TRIBE

A. Child's Relationship to his/her Tribe.

A key component of the ICWA is the recognition that an Indian child has the right to maintain and or develop his or her relationship to the child's tribe and that Indian tribes have an important interest in its children. Thus, the ICWA provides that the Indian child's tribe must be included in any child custody proceedings covered by its provisions.

B. Indian Tribes

There are approximately 564 federally recognized Indian tribes and Alaskan Native Villages in the United States, including nine federally recognized Indian tribes in the State of Oregon. Each tribe and village establishes and maintains tribal enrollment records of tribal members and makes determinations regarding an individual's membership in that particular tribe or village. Additionally, individual tribes and villages may be able to assist with expert witnesses required under the provisions of the ICWA.

1. Location and Telephone Numbers for Indian Tribes
General information about the location of Indian tribes as well as telephone numbers and addresses can be obtained from the Department of Interior, Bureau of Indian Affairs.

a. The Department of Interior is required annually publishes a list of federally recognized Indian tribes in the Federal Register and the list is entitled to judicial notice on the status of a particular tribe. The most recent list was published on August 11, 2009. The citation is 74 Fed. Reg. 40218-40223 (August 11, 2009).

b. The federal regulations implementing the ICWA provide that Indian tribes may designate an agent other than the tribal chair for service of notice of ICWA proceedings. *25 CFR 23.12.* The most recent list was published by the Bureau of Indian Affairs on April 28, 2009 The citation is 74 Fed. Reg. 19326-19370 (August 28, 2009).

c. The Oregon State Bar Membership Directory lists all the addresses and contact information for Tribal Courts located in Oregon. OSB Bar 2010 Membership Directory at page 26.

2. Eligibility for Membership or Enrollment

Each tribe decides its own criteria for membership or enrollment. Enrollment is not always required in order to be considered a member of a tribe but is a common evidentiary means of establishing Indian status.

Generally, a decision by a tribe that a child is eligible for or enrolled as a member of the tribe is not reviewable by state courts.

You must contact particular tribe to obtain information on enrollment and membership.

C. DHS ICWA Manager

The DHS has a point person for DHS cases involving Indian children and families --the ICWA manager -- at the Central Office in Salem. Each branch office of the DHS has a designated ICWA liaison.

III. APPLICATION OF THE ACT-- WHEN DOES IT APPLY

The application of the ICWA depends on two factors:

(1) the proceeding must be a child custody proceeding as defined by the Act; and

(2) the child must be an Indian child as defined by the Act.

A. Child Custody Proceeding

1. Specifically covers foster care placements, termination of parental rights, pre-adoptive placements, and adoption proceedings.

2. Foster care placement includes any action removing an Indian child from its parents 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. 25 U.S.C. § 1903(1)(I).

a. Note broad definition of foster care placements

b. Guardianships covered

3. Act excludes certain proceedings: delinquency proceedings, divorce proceedings, and educational placement of Indian children. 25 U.S.C. §1903(1)(I).

B. Indian Child

1. Act sets out three criteria for application of the ICWA to child:

a. The child must be unmarried;

b. The child must be under 18 years of age; and,

c. The child must be a member of an Indian tribe or eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. 25 U.S.C. §1903(4).

2. Act does not cover children of Canadian Indians, members of Indian tribes not recognized by federal government, or a child who does not meet criteria for membership in any one tribe.

3. Federal law provides that Indian tribes have authority to determine whether a specific child is a member of that tribe. Tribal determination of membership is conclusive. *In re Junious M.*, 193 Cal. Rptr. 40, 144 Cal. App3d 786 (1983).

a. Tribe should be consulted as to whether or not child is a member of specific Tribe.

b. If Tribe is unknown, Bureau of Indian Affairs may be able to assist. *See* , Section IIB, *supra*.

4. Enrollment is most common but not only way to determine membership in a tribe. A child may be a member of tribe without being formally enrolled. *Nelson v Hunter*, 132 Or App 361, 364, 888 P2d 124 (1995).

5. State law and BIA interpretation of the ICWA require the court to inquire if the child in a child custody proceeding is covered by the ICWA. And if the Court knows or has reason to know that an Indian child is involved, the Court shall enter an order directing DHS to notify the Indian child's tribe of the proceeding and of its right to intervene. O.R.S. 419B.315. *See also, O.A.R.* 412-26-035.

5. You must have competent evidence of child's enrollment or eligibility for enrollment. *Quinn v Walters* , 320 Or 233 (1994).

a. Oregon Evidence Code provides for self-authentication of documents with official seals of federally recognized Indian tribal governments or political subdivision, department, officer or agency thereof, and a signature of attestation or execution. *OEC 902(11)(a).*

b. Oral testimony of person with knowledge of the membership requirements of an Indian tribe is sufficient evidence to prove that a child is eligible for membership in an Indian tribe. *State ex rel v Tucker*, 76 Or App 546, 655 P2d 208 (1985), *rev. denied*, 300 Or 605 (1986).

C. ICWA expands persons who have standing in child custody proceedings involving Indian children.

1. Extended Family within Indian cultures share equal responsibility for raising an Indian child. ICWA recognizes this fact by providing standing to Indian extended family party status in dependency proceedings, 25 U.S.C. 1911(c) and creating placement preferences to family members when an Indian child is removed from the physical custody of his/her parent.

2. Indian custodians. ICWA provides that Indian custodian have equal standing of a parent in situations where Indian people who are caretakers of Indian child according to tribal custom or law. "Indian custodian" is defined as "any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child" 25 U.S.C. 1903(6).

3. Indian Parents: Definition includes both Indian and non Indian biological parent. It also:

a. Defines the parent of an Indian child to include any unwed father who has acknowledged or established paternity to the child.

b. Acknowledgment or establishment of paternity can be under tribal or state law. If under tribal law, it doesn't t necessarily need to conform with state procedural requirements.

c. Definition of parent includes an Indian adoptive parent of a child but not an non-Indian adoptive parent.

IV. JURISDICTION: WHICH COURT HAS IT?

A. Exclusive Jurisdiction:

ICWA provides that Indian tribes have exclusive jurisdiction over child custody proceedings involving Indian children who reside or are domiciled on an Indian reservation. 25 U.S.C. 1911(a); *Mississippi Band of Choctaw Indians v Holyfield*, 490 U.S. 30, 104 L. Ed. 2d 29, 109 S. Ct. 1597 (1989).

1. A recent decision by the Ninth Circuit Court of Appeals clarifies the application of this provision of the ICWA in states subject to Public Law 280. In *Doe v Mann*, 415 F3d 1038 (2005), the court held that in states subject to Public Law 280, states and tribes have concurrent jurisdiction over dependency cases arising on Indian reservations.

2. Public Law 280 is a federal statute which granted specific states jurisdiction over criminal and some civil matters arising in Indian country. Oregon is one of the states which was granted such jurisdiction. There are three Indian tribes which are not subject to PL 280 in Oregon—the Confederated Tribes of Warm Springs, Confederated Tribes of Umatilla Indians and the Burns Paiute Tribe.

B. Transfer Jurisdiction

1. Tribes and States have concurrent jurisdiction over an Indian child domiciled off reservation. ICWA codifies preference that when possible, child custody proceedings involving Indian children should be heard in tribal courts. 25 U.S.C. 1911(b). *Holyfield*, 104 L.Ed2d at p. 39.

2. Section 1911(b) provides that upon petition of the Tribe, parents, or child, a child custody proceeding involving an Indian child in state court shall be transferred to the appropriate tribal court unless:

a. Either parent objects to transfer;

1) Courts have used forum non conveniens doctrine of state law and held that case would be transferred over

parents objections when the transfer is in the best interest of the child.

b. Good Cause to the contrary exists. The BIA guidelines set out basis for good cause not to transfer:

1) That evidence cannot be presented in tribal court because of the burden on the parties to the case;

2) The proceeding is at an advanced stage when the petition to transfer is made;

3) The child is over 5 years of age and has never had any contact with an Indian community; or,

4) That the tribe to which transfer is contemplated does not have an operating tribal court. But the socio-economic adequacy of the tribal social services or judicial systems are not valid reasons not to transfer.

c. Burden of proof is on the party objecting to the transfer.

d. The Oregon Court of Appeals upheld a trial court's decision that there was good cause to deny the Tribe's motion to transfer the case to tribal court because of the Tribe's motion was filed during the termination of parental rights trial in April 2000 and the Tribe had been participating the case since October 1998. *State ex rel DHS v. Lucas*, 177 Or App 318, 33 P3d 1001 (2001). The Court of Appeals noted the BIA guidelines and commentary supported denying motions to transfers when the motion was filed at an advanced stage of the proceeding. In its opinion, the Court specifically cited the commentary accompanying the guidelines on the disruptive effect on the adjudicative process. 177 Or App at 324.

C. Emergency Removal: 25 U.S.C. §1922

1. Requires that the child be in the danger of immediate physical injury. 25 U.S.C. §1922. If removal or placement is based upon emotional or psychological harm to the child, custody of child must be returned to Indian parent or custodian until jurisdiction can be established.

2. Emergency Removal must be terminated if :

a. Court or state authorities determine that return of the child is appropriate; or

b. Child custody proceeding is initiated; or,

c. Transfer of the child to the jurisdiction of the appropriate Indian tribe. *Id.*

3. Emergency Custody must not continue for more than 90 days. BIA Guidelines, B.7.(d)., 44 Fed. Reg. 67,589-67,590.

4. Applies to Indian child domiciled on reservation but who are temporarily located off - reservation as well as Indian child domiciled off-reservation. *State ex rel Juv. Dept. v. Charles,* 70 Or App. 10, 688 P.2d 1354, *rev. denied*, 312 Or 150 (1984).

5. Notice requirements of the ICWA are not applicable to emergency removal. Id.

V. ADJUDICATION OF INVOLUNTARY DEPENDENCY PROCEEDINGS
UNDER THE ICWA-- Substantive and Procedural Requirements

A. Notice :

Notice of child custody proceeding involving an Indian child must be given to the Indian child's parents or Indian custodian, and to the Indian child's tribe.

1. ICWA provides that proceeding cannot occur until at least ten days after receipt of notice has occurred. 25 U.S.C. §1912

2. Party may request additional twenty days. *Id.*

3. Notice must include the following information:

a. Party's right to intervene;

b. The party 's right to appointment of counsel; and,

c. The party's right to request mandatory extension of time.

4. Failure to provide notice can lead to invalidation of proceeding. 25 U.S.C. §1914.

B. Burden of Proof

ICWA requires state to demonstrate:

1. Active efforts have been made to provide remedial and rehabilitative efforts to the family and that these efforts will not lead to reunification of the family; and,

2. Continued care and custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical harm to the child.

a. In termination of parental rights cases, the standard of proof for the attempts to provide remedial and rehabilitative services is beyond a reasonable doubt. *In the Matter of Appeal of Pima Juvenile County Juvenile Action,* 635 P.2d 187 (Ariz. Ct App 1981) cert denied, 455 U.S. 1007 (1982); *State Department of Social Services v Morgan*, 364 N.W. 2d 754, 758 (Mich. Ct. App. 1985).

b. In foster care placements, the standard of proof for the attempts to provide remedial and rehabilitative services is clear and convincing evidence.

3. When Burden must be met

a. Act states that the efforts have to be made prior to the removal of the child.

4. Typically, by the time that the notice of the ICWA proceeding is sent, the party seeking to remove the child has decided that the services will not succeed in keeping the family together. Thus, the showing that these services have been made but proven unsuccessful prior to the removal of the child can be shown at the hearing on the merits of the foster care placement or parental rights. *State ex rel Juvenile Dept. v Charles*, 688 P 2d 1354, n. 107 (Ore. Ct. App 1984).

C. ICWA Requires Showing of Active Efforts to Prevent Removal of Indian child.

State law requires reasonable efforts.

1. Indian Child Welfare Act requires <u>active</u> efforts not reasonable efforts prior to removing a child from his/her home.

a. Section 1912 (d) of the Act requires that prior to removing an Indian child from their home, the party seeking such removal must show the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have been unsuccessful.

b. Applies to both foster care placements and termination of parental rights.

2. State law requires that to meet the burden of proof under this section, the state must explicitly show that efforts have not only been made but that these efforts have been unsuccessful. ORS 419B.340(5).

3. Meaning of Active Efforts

The term active implies something more than merely identifying the needs of the family. It contemplates that the needs are identified and then real attempts are made to provide needed services to assist the family in maintaining the child in the home.

a. Distinguish term is "active" from state laws which typically require public or private agencies to resort to remedial measures prior to initiating placement or termination proceedings.

b. ICWA imposes additional requirement to cases involving Indian children.

ICWA language is clear that this requirement must be meet before the court can order placement of child outside of his/her parent's or Indian custodian's home.

c. Bureau of Indian Affairs Guidelines

Guidelines state that any party petitioning a state court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court prior to the commencement of the proceeding active efforts have been made to alleviate the need to remove the Indian child from his/her parents or Indian custodians. *44 Fed Reg 67592, Efforts to Alleviate Need to Remove Child From Parents or Indian Custodians. D.2.*

1) The Guidelines also provides that the Active efforts shall take into account the prevailing social and cultural conditions and the way of life of the Indian child's tribe to help the family successfully function as a home for the child. *Id.*

2) Involve and use the available resources of the extended family, the tribe, Indian social services agencies and individual Indian care givers. *Id.*

a) Individual care givers means medicine men other members of the child's tribe who may have developed special skills that can be used to help the child's family succeed. *Id.*

d. Caselaw interpreting the active efforts requirement of Section 1912 (d)

1). The Oregon Court of Appeals in its decision in *State ex rel Juvenile Department v Charles*, 688 P2d 1352 (Ore. Ct. App 1984) provides a good analysis of Section 1912(d). In this case, the state pointed to testimony peppered throughout the hearing that indicated that some remedial efforts were made which were arguably unsuccessful and argued that this complied with Section 1912(d). The Oregon Court of Appeals rejected this argument and held that "the diffuse evidence to which the state points does not amount to the affirmative showing contemplated by Congress when it enacted Section 1912(d). An explicit showing of remedial and rehabilitative efforts and the success of such efforts must be made to meet the burden of section 1912(d)." 688 P2d at 1359.

Court addressed the timing of the showing of success or failure of remedial and rehabilitative efforts and found that the words used by the Act "to effect" refer to a legal proceeding and that therefore the showing required by Section 1912 (d) need only be made in a hearing on the merits of foster care placement or parental rights termination. *Id.* at 1358.

Court found that the intent of Section 1912 (d) was to fulfill the goal of preventing the break-up of Indian families by mandating application remedial and rehabilitative measures designed to prevent the breakup of Indian families. Id. at 1358- 1359. And that the language of this section is unequivocal. The state **shall** satisfy the court that..."(Emphasis added).

2) Other Jurisdictions decisions interpret ting active efforts:

The Alaska Supreme Court in its decision *A.M. v. Alaska,* 945 P.2d 296, 306 (Alaska 1997) on the definition of active efforts under the ICWA wrote:

" [W]e cited the distinction between "active efforts" and "passive efforts" drawn by Craig J. Dorsay, *The Indian Child Welfare Act and Laws Affecting Indian Juveniles Manual* 157-58 (1984). According to Dorsay, passive efforts entail merely drawing up a reunification plan and requiring the "client" to use "his or her own resources to[ ] bring [ ] it to fruition." Dorsay at 157-58. Active efforts, on the other hand, include "tak[ing] the client through the steps of the plan rather than requiring the plan be performed on its own." *Id.*

Along this same line, the Maryland Court of Special Appeals in *In re Nicole B and Max B*, --A.2d.--, 2007 WL 1953437 (Md.App. July 2007), in decision remanding the case to the trial court to consider whether active efforts had been made noted:

"We do not know exactly what additional services the Department could have provided. It may have been able to identify funds to help pay for the "Another Way" methadone treatment, or offer other assistance to Ms. B. to deal with her substance abuse problem. Quite possibly, the "active efforts" standard, under these circumstances, would require the Department to do more than just recommend a program. The "active efforts" standard may also have required that the Department facilitate Ms. B.'s visitations with her children, which she said she could not make because she "was hiding" in her house, possibly due to her panic disorder, by having a social worker accompany her when she leaves her home for the visits. "

In re Welfare of Children of S. W. 727 N.W.2d 144, 150 (Minn. Ct. App. 2007); *In re A.N.,* 106 P.3d 556, 560 (Mont. 2005)(Ct held the term "active efforts, by definition, implies heightened responsibility compared to passive efforts. Giving the parent a treatment plan and waiting for him to complete it would constitute passive efforts.)

C. Requirement of Testimony from Qualified Expert Witness Prior to Ordering Foster Care or Termination of Parental Rights

1. Foster care placement provision requires that "No foster care placement may be ordered in absence of a determination, supported by clear and convincing evidence, including the testimony of qualified expert witnesses, 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" 25 U.S.C. §1912 (e). *See also*, ORS 419B.340(5).

2. Termination of parental rights provision requires: "No termination of parental rights may be ordered in absence of a determination, supported by evidence beyond a reasonable doubt, including the testimony of qualified expert witnesses, 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. 25 U.S.C. 1912 (f), *See also*, ORS 419B.500. *See also*, OAR 412-26-055, and Bureau of Indian Affairs Guidelines 44 Fed. Reg. at 67592.

3. Burden of proof in involuntary proceedings is to show the existence of particular conditions in the home that are likely to result in serious emotional or physical harm to the child.

4. Two questions that are involved in meeting this burden:

a. whether it is likely that the conduct of the parent will result in serious emotional or physical harm to the child; and

b. if such conduct will cause such harm, whether the parents can be persuaded to modify their conduct. *Id.*

5. Who Has The Burden: Caselaw

In order to meet the standard of proof for foster care placement or termination of parental rights, the moving party needs to present testimony of expert witnesses who possess special knowledge of the social and cultural aspects of Indian life. 25 U.S.C. 1912 (e) and (e); *In re J.R.H.*, 258 N.W.2d 311, 321 (Iowa 1982); *D.A.W. v State,* 699 P.2d 340 (Alaska 1985); *But see, State ex rel Juv. Dept.v Charles,* 688 P.2d 1354, 1359 (Or.Ct. App. 1984)(Ct. noted in dicta that there may be instances in which the state could make such a showing by merely presenting physical evidence or lay testimony)

a. State will fail to meet its burden of proof where the state presents no expert testimony and any qualified testimony is offered to the contrary. *State ex rel. Juv. Dept. v Charles*, 688 P.2d at 1360, n. 107.(Reliance on social workers who are

unfamiliar with Indian cultures represent the very problem Congress attempted to solve with passage of the ICWA);

b. Limited exception is in instances in which cultural factors are not implicated. *See, State ex rel. Juvenile Dept. v Tucker*, 710 P.2d 793 (Or. Ct. App. 1985) (In *Tucker*, the Court of Appeals found that the mother was so severely retarded that her parental rights would have been terminated under any standards, and therefore there was no need for an expert to testify about cultural implications of termination.)

6. Who is an Expert Witness for Purposes of ICWA?

a. Expert Witness is not defined by the ICWA Legislative history indicates that Congress intended "qualified expert witness" to refer to an expert with particular and significant knowledge of and sensitivity to Indian culture."

1) The intent of the ICWA is to have an expert with particular and significant knowledge of and sensitivity to Indian culture. See, H.R. 1386.

2) "qualified expert witness" means that the witness needs to have expertise beyond the normal social worker qualifications. *H.R. 1386, supra* at 22. *See also, State ex rel Juvenile Dept. v Charles*, 70 Or App 10 (1984)(State failed to met the burden for foster care by presenting testimony of two experienced social workers who testified in support of foster care and who did not possess specialized knowledge of social or cultural aspects of Indian life.) *See also, State ex rel Juvenile Dept. v Woodruff,* 108 Or App 353 (1991).

b. Oregon Administrative Rules provides that to qualify as an expert witness, a witness most likely will be:

1) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organizations and child rearing practices;

2) A lay person having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural

standards and child rearing practices within Indian child's tribe;

3) A professional person having substantial education and experience in the area of his or her specialty along with substantial knowledge of prevailing social and cultural standards and child rearing practices within Indian child's tribe; OAR 412-26-055(3) *See also,* 44 Fed. Reg. at 67593.

because it is not within their cultural and historical experience and that the Tribes' practice is to have the child raised within its community. The individual would also know that the Tribes' languages do not include words or phrases that are the equivalent of termination of parental rights.

VI. ICWA ISSUES IN PERMANENCY HEARINGS: FINDINGS REQUIRED

1. If case plan at the permanency hearing is reunification, the court is required to determine whether DHS has made active effort to make it possible for the ward to safely return home. ORS 419B.476(2)(a).

2. If the case plan has changed from reunification to some other permanent plan since the last review hearing, the court may determine whether DHS has made active efforts to make it possible for the ward to safely return home. ORS 419B.476(4)(a)

3. The court is required to follow the placement preferences of the ICWA. 419B.476 (6).

4. Burden of proof is on the Agency to show that these efforts have been made.

VII. AFSA and ICWA IN TERMINATION OF PARENTAL RIGHTS PROCEEDINGS

Indian children will frequently fall within one of the exceptions to AFSA's termination of parental rights filing requirements because:

1. ICWA provides that placement with child's extended family is a preferred placement. Thus, an Indian child may fall within the "relative exception" to the termination requirement.

2. The higher evidentiary standard applicable to TPRs under ICWA may be a compelling reason not to file a TPR

3. The agency's failure to adequately utilize appropriate tribal, extended family and community resources can constitute a failure to provide active efforts as required by the ICWA and thus trigger the "failure to provide services" exception to the TPR.

VIII. PLACEMENT

The ICWA sets out placement for Indian child to protect the child's Indian heritage. The placement preferences must be followed absent good cause to contrary. The United States Supreme Court in *Holyfield* noted that Section 1915 of the ICWA was the most important substantive provision imposed on state courts. 104 L.Ed.2d at p. 38.

A. Adoptive Placement, 25 U.S.C. 1915(a). In order of priority:
   1. A member of the child's extended family;
      a. Extended family included Indian and non Indian family members. *See* 25 U.S.C. 1903(2).
      b. Note broad definition of extended family

   2. Other member's of the Indian child's tribe;

   3. Other Indian families.

B. Foster Care Placement, 25 U.S.C. 1915(b), in order of priority.
   1. A member of the Indian child's family;
      a. Oregon has adopted a statutory provision for foster care payments to relatives of Indian children so that Indian children can be placed in Indian homes pursuant to the ICWA.

   2. a foster home licensed, approved, or specified by the Indian child's tribe;
      a. Tribally licensed foster home do not need to meet the licensing or certification standards of state foster homes in order for state courts to place Indian child in such homes. 40 Op. Atty. Gen. 461 (1979).

   3. an Indian foster home licensed or approved by the state; or,

4. an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs.

C. Modification of Placement Preferences

1. Child's Indian tribe can establish a different preference. Agency and state court must follow it so long as the placement is the least restrictive setting appropriate to meet the Indian child's needs.

2. Good Cause to the Contrary provision applies. It may include

a. The request of the parents or child of sufficient age. This is not a parental veto of placement designated by Tribe.

b. The extraordinary needs of the child as established by qualified expert witnesses, meaning extraordinary physical or medical requirements; BIA Guidelines §F3. Commentary, 44 Fed. Reg. 67,594.

1) A child's need for highly specialized treatment services that are unavailable in the community where the families who meet the preference criteria live may constitute good cause.

2) The argument that bonding of an Indian child to his/her non-Indian caregiver or that the non-Indian placement affords the Indian child access to better schooling or sporting activities for the most part has been rejected by the courts. *See eg., Matter of Custody of S.E.G.,* 521 NW2d 357 (Minn. 1994)

c. The unavailability of homes meeting the preference criteria after a diligent search has been made.

Diligent search at a minimum means contact with the child's tribal social service program, a search of all county or state listings of available Indian homes and contact nationally known Indian programs with placement resources. *BIA Guidelines, §F.3. Commentary*, 44 Fed. Reg 67,595.

d. Burden to show good cause is on the party asking the court not to follow the placement preference.

BIA's Guidelines, §F.3(b), 44 Fed. Reg. 67,594.

e. Burden must be met by clear and convincing evidence. *Matter of Custody of S.E.G., 507 NW2d at 878, 878 (Minn. App 1993) rev'd on other grounds,* 521 NW2d 357 (Minn. 1994).