



A SURVEY AND ANALYSIS OF TRIBAL-STATE INDIAN CHILD WELFARE ACT AGREEMENTS

Including Promising Practices
June 2017

by Shannon Keller O'Loughlin, Esq.
for



In partnership with



A SURVEY AND ANALYSIS OF TRIBAL-STATE INDIAN CHILD WELFARE ACT AGREEMENTS Including Promising Practices June 2017

By Shannon Keller O'Loughlin, Esq.

The Association on American Indian Affairs is the oldest not-for-profit organization that serves American Indian youth and education, environmental and cultural preservation, and tribal sovereignty. The Association is governed by an all Indian Board of Directors from all regions of Indian Country that works in close cooperation with Native Americans, Tribes and other organizations that have similar missions. AAIA began its active involvement in Indian child welfare issues in 1967 and its research and advocacy directly led to the enactment of the Indian Child Welfare Act of 1978. AAIA has worked throughout the years to ensure appropriate implementation of the ICWA through litigation, advocacy and training. AAIA activities have included participation in the *Adoptive Couple v. Baby Girl* and *Mississippi Band of Choctaw Indians v. Holyfield* Supreme Court cases, working to develop tribal-state agreements and state legislation in a number of states, and contributing to an ICWA guidebook published by the Native American Rights Fund, as well as other guidance documents on Title IV-E, ICWA and juvenile justice.

Casey Family Programs provided the funding for this project and is the nation's largest operating foundation focused entirely on foster care and improving the child welfare system. Casey Family provides technical assistance and resources for tribal child welfare systems and seeks to improve services for American Indian and Alaska Native children and families.

Author **Shannon Keller O'Loughlin** is a citizen of the Choctaw Nation of Oklahoma and an attorney working on behalf of the Association on American Indian Affairs. The author would like to thank Jack Trope, Kimberly Dutcher and Faith Roessel for their assistance with editing and review. This work could not have been accomplished without the many people who cooperated in the development of this work, primarily tribal leaders and tribal and state child welfare staff who helped us gather and understand this information, and who spend countless hours handling the administration of their Indian Child Welfare Act programs in order to protect the health and safety of our future generations. Special thanks to Casey Family Programs and colleagues in the non-profit and child welfare communities who assisted with this research and care deeply about these issues.

Table of Contents

I.	INTRODUCTION	1
II.	SUMMARY OF ICWA TRIBAL-STATE AGREEMENTS	5
A.	Arizona	5
B.	Colorado	6
C.	Connecticut	7
D.	Maine	7
E.	Michigan.....	8
F.	Minnesota.....	9
G.	New Mexico	10
H.	Texas.....	10
I.	Utah	11
J.	Washington.....	12
K.	Other State Documents Mentioning ICWA.....	16
1.	Alaska	16
2.	California.....	16
3.	Idaho	17
4.	Kansas.....	17
5.	Louisiana	17
6.	Nebraska.....	18
7.	New York	18
8.	Wisconsin.....	19
9.	Wyoming.....	19
III.	PREAMBLE AND STATED PURPOSES	20
IV.	RECOGNITION OF TRIBAL SOVEREIGNTY WITHIN ICWA AGREEMENTS	23
A.	Express Recognition of Tribal Sovereignty	23
B.	Waivers of Sovereign Immunity.....	24
C.	Higher Standards than ICWA.....	25
D.	Application of Federal and State Laws.....	26
E.	Full Faith and Credit	27
F.	Resolution of Disputes	28
V.	DEFINITIONS	31
A.	Acknowledged Father.....	32
B.	Active efforts	33
C.	Best Interests	36

D.	Case Plan.....	37
E.	Child Custody Proceeding.....	38
F.	Citizen.....	39
G.	Consultation	40
H.	Courtesy Supervision	40
I.	Descendant Child	40
J.	Disrupted and Dissolved Adoption	40
K.	Domicile	41
L.	Extended Family	41
M.	Good Cause	42
N.	Indian Child	43
O.	Reservation.....	44
P.	Termination of Parental Rights	45
Q.	Tribal Home.....	46
VI.	JURISDICTION.....	47
A.	Exclusive jurisdiction	47
B.	Concurrent Jurisdiction.....	51
1.	Transfer	52
2.	Intervention.....	56
VII.	CHILD WELFARE PROCEEDINGS.....	58
A.	Determination of Who is an "Indian Child".....	58
B.	Types of Proceedings and Procedures Involved	60
1.	Involuntary Proceedings	61
2.	Voluntary Proceedings.....	68
3.	Emergency Proceedings	70
4.	Other Proceedings	72
VIII.	PLACEMENT PREFERENCES	74
A.	Adoptive Placement Preferences	74
B.	Foster Care or Pre-Adoptive Placement Preferences.....	75
C.	Tribal Order of Preference	76
D.	Good Cause to Depart from Placement Preferences.....	78
E.	Tribal and State Cooperation to Seek Placement	81
F.	Licensing and Recruitment of Foster Home Providers.....	81
G.	Record of Placement	84
H.	Interstate Placements.....	84

IX. DIVISION OF RIGHTS AND RESPONSIBILITIES BETWEEN THE TRIBE AND STATE	87
A. Referral and Investigation	87
B. Referral of a Non-Indian Child	89
C. Case Management	89
1. Which Party Provides Services to the Indian Child and Indian Family	91
2. Which Party Provides Funding for Services	92
3. Staffing.....	94
4. Group Coordination Meetings.....	94
D. Training	95
E. Incorporation of Culture and Values.....	97
F. Application to Private Agencies Licensed by the State	97
X. OTHER GENERAL OR STANDARDIZED TERMS OF THE AGREEMENT	99
A. Construction of the Agreement	99
B. Provisions to Amend or Terminate the Agreement.....	99
XI. PROMISING PRACTICES.....	102
A. Introduction and Purposes or Preamble Section	103
B. Recognition of Tribal Sovereignty within ICWA Agreements	105
1. Express Recognition of Tribal Sovereignty	106
2. Waivers of Sovereign Immunity	106
3. Higher Standards.....	106
4. Full Faith and Credit.....	106
5. Resolution of Disputes.....	107
C. Definitions.....	108
D. Jurisdiction	111
1. Good Cause Not to Transfer	113
2. Tribal Court Declines Jurisdiction	113
3. Intervention.....	113
E. Child Welfare Proceedings	114
1. General Provisions Applicable to Emergency, Voluntary and Involuntary Proceedings	114
2. Provisions that Apply to Involuntary Proceedings Only	120
3. Provisions that Apply to Voluntary Proceedings Only	134
4. Other Promising Practices That Apply More Broadly	143
F. Documentation of Notice	145
G. Placement Preferences	146

1.	Tribal Order of Preference	149
2.	Good Cause to Depart from Placement Preferences	149
3.	Tribal and State Cooperation to Seek Placement.....	152
4.	Licensing and Recruitment of Foster Home Providers	156
5.	Record of Placement.....	158
6.	Interstate Placements	159
H.	Division of Roles and Responsibilities between the Tribe and State.....	161
1.	What Happens When a Referral is Received.....	161
2.	Case Management.....	163
3.	Providing Services to the Indian Child and Indian Family	165
4.	Services Provided for an Adoptive Placement	167
5.	Providing Services to the Non-Indian Child.....	169
6.	Funding for Services.....	169
7.	Staffing.....	171
8.	Group Coordination Meetings.....	172
9.	Training	172
10.	Incorporation of Culture and Values	175
11.	Application to Private Agencies Licensed by the State.....	175
I.	Other General or Standardized Terms of the Agreement	176
1.	Construction and Interpretation of the Agreement	176
2.	Provisions to Amend, Modify or Terminate the Agreement.....	177

I. INTRODUCTION

The Indian Child Welfare Act (ICWA or the Act), 25 U.S.C. §§ 1901-1963, is designed to protect the best interests of Indian children by preserving the connection between the Indian child and the Indian family, which includes the extended family, tribal community and tribal government. Enacted in 1978, the Act is supported by congressional findings linking the Act to the federal government's special fiduciary relationship to protect American Indian tribes' continuing viability and integrity:

Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources. ... [T]here is no resource that is more vital to the existence and integrity of Indian tribes than their children. 25 U.S.C. § 1901.

Prior to the Act, the integrity of the Indian family was being devastated by state and locally sanctioned child welfare and adoption agencies who were removing Indian children from their families at an alarming and disproportionate rate. The Association on American Indian Affairs (AAIA) completed two studies in 1969 and 1974 exposing that 25-35% of all Indian children had been separated from their families and placed in foster homes, adoptive homes or institutions, and 90% of those placements were in non-Indian homes.¹

ICWA was created in response to these statistics and related testimony heard by Congress to direct and guide certain decision-making activities that occur during Indian child custody proceedings in a state court in order to protect the relationship between the Indian child and Indian family, and preserve a tribe's effective exercise of its pre-existing inherent tribal authority. ICWA alone, however, does not mandate the necessary coordination and relationships between state and tribal child welfare offices that are necessary to carry out efforts that support ICWA proceedings.

To develop the necessary coordination and relationships between tribes and states, ICWA section 1919 specifically provides authorization for tribes and states to enter into agreements regarding the care and custody of Indian children:

(a) States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide

¹ H.R. Rep. No. 95-1386, p. 9 (1978), which can be found at <http://www.narf.org/nill/documents/icwa/federal/lh/hr1386.pdf> (last viewed on December 21, 2016).

for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise. 25 U.S.C. § 1919.

Section 1919 of ICWA does not limit tribes and states, but instead uses broad language, such as "respecting care and custody of Indian children" and "may," to allow a tribe and state flexibility to best address their mutual needs.

Though some Tribal-State ICWA Agreements that are a part of this report simply mirror various provisions of ICWA, what is significant about the analysis of the Agreements is whether tribal and state parties have chosen to develop their relationship beyond the minimum requirements of ICWA and define their activities beyond the state court proceedings.

On balance, these activities between tribal and state child welfare offices are just as significant as what happens in the Indian child custody proceeding because these activities not only lead to the initiation of the Indian child custody proceeding in state court, but also may have a determinative effect on the proceeding. These activities include how the staff of the tribal and state child welfare offices: initiate the first contact with the Indian family; provide notice to the parties involved; investigate allegations of abuse or neglect; recruit and license placements; and provide case management and culturally appropriate services to support the Indian child and Indian family. Without a Tribal-State ICWA Agreement, important cooperation and collaboration that should occur between tribal and state child welfare staff may not take place, potentially undermining ICWA's protective provisions and intent to maintain the Indian child with his or her family and tribal community.

The scope of what a Tribal-State ICWA Agreement can do to truly support the Indian child and Indian family is immense and incalculable. **Yet, 39 years after ICWA's enactment, of the 567 federally recognized tribes to date, there are currently only 39 Tribal-State ICWA agreements involving 37 tribes and 10 states.**² In other words, only 6.5% of all federally recognized tribes have developed ICWA Agreements with states. The efforts and resources spent by tribes, states, Congress and other interested

² In the period between March 2015 and December 2016, research and outreach to all 50 states and various tribes found 39 Tribal-State ICWA Agreements representing 37 Indian Nations and 10 states.

parties in developing ICWA to include section 1919 authorizing Tribal-State ICWA Agreements is evidence of the importance and value of a Tribal-State Agreement. The Bureau of Indian Affairs also strongly recommends mutually developed Tribal-State ICWA Agreements that establish the parties' specific processes for following the mandates of ICWA.³ However, the original intent of section 1919 to support a cooperative working relationship between Indian tribes and states for the benefit of Indian children and families remains an unfulfilled priority and underutilized mechanism.

This report provides a perspective of the landscape of the 39 ICWA Tribal-State Agreements existing during 2015 and 2016. The purpose of this report is to provide a detailed analysis of these current ICWA Tribal-State Agreements. The analysis does not include an exhaustive account of the interface between state child welfare laws as those laws relate (or fail to relate) to ICWA.

Section II will list each Agreement organized by state and provide a summary of any unique provisions or information concerning a particular Agreement. This Section will also include other ICWA arrangements that are worthy of mention. Sections III through X are organized to group provisions by certain subject matter that is important to an ICWA Tribal-State Agreement, such as "Jurisdiction," "Definitions," and "Child Custody Proceedings," as well as subject matter that is significant for any type of agreement between a tribe and a state, such as "Preamble and Stated Purposes," "Recognition of Tribal Sovereignty," and "Other Standardized Terms" such as termination or modification. In addition, this report provides a separate inventory of "Promising Practices" provisions found in the ICWA Agreements that may be utilized by tribes and states as they look to develop new or renew and update existing Tribal-State ICWA Agreements.

It should be noted that during the development of this report, the Bureau of Indian Affairs (BIA) consulted with tribes and then, for the first time, implemented regulations regarding ICWA. The BIA promulgated these new regulations on June 14, 2016.⁴ These new regulations "apply to any child custody proceeding initiated on or after December 12, 2016, even if the child has already undergone child custody proceedings prior to

³ 25 U.S.C. § 1919; and see *Guidelines for Implementing the Indian Child Welfare Act*, U.S. Department of the Interior, Office of the Assistant Secretary – Indian Affairs, Bureau of Indian Affairs, December 2016, Section A.2, pp. 7-8, which can be found at <https://www.bia.gov/cs/groups/public/documents/text/idc2-056831.pdf> (last visited on December 13, 2016) (Guidelines). These Guidelines replace the 1979 and 2015 versions of the Department of Interior's guidelines.

⁴ The new regulations, at 81 FR 38864 (June 14, 2016) and codified at 25 CFR part 23, can be found at <https://www.indianaffairs.gov/cs/groups/xraca/documents/text/idc1-034264.pdf> (last viewed on December 31, 2016).

that date to which the regulation did not apply.”⁵ In December 2016, the BIA also issued new “Guidelines for Implementing the Indian Child Welfare Act,” which complement the regulations. The Guidelines are not binding law but provide guidance and direction for tribes and states on ICWA matters.

The new regulations have superseded certain provisions or information contained in the current Tribal-State ICWA Agreements. Thus, this report is timely, presenting a perfect opportunity for tribes and states to review and update current Tribal-State Agreements, as well as develop new Agreements that not only fulfill the Act and its regulations, but also to set forward processes that will effectuate the intent of ICWA to protect the Indian child.⁶ Without an ICWA Tribal-State Agreement expressly delegating the vital activities and day-to-day work between state and tribal child welfare staff, the requirements, as well as the intent, of ICWA may be frustrated. Tribal-State ICWA Agreements also support an Indian Nation’s exercise of its inherent sovereign authority to protect the safety and welfare of its people, and the strength and viability of its culture into the future.

⁵ Guidelines, “Purpose of These Guidelines,” p. 4.

⁶ The following articles may also be helpful in the development of a Tribal-State ICWA Agreement:

- Summers, A. & Wood, S. Measuring Compliance with the Indian Child Welfare Act: An Assessment Toolkit. Reno, NV: National Council of Juvenile and Family Court Judges (2014), http://www.ncjfcj.org/sites/default/files/ICWA_Compliance_Toolkit_Final.pdf (last viewed August 27, 2016).
- Wilkins, Andrea. State-Tribal Cooperation and the Indian Child Welfare Act (July 2008), <https://www.ncsl.org/print/statetribe/ICWABrief08.pdf> (last viewed August 1, 2016).
- A Guide to Compliance with the Indian Child Welfare Act, National Indian Child Welfare Association, http://www.nicwa.org/Indian_Child_Welfare_Act/documents/Guide%20to%20ICWA%20Compliance.pdf (last viewed August 27, 2016).

II. SUMMARY OF ICWA TRIBAL-STATE AGREEMENTS

This section lists the 39 Tribal-State ICWA Agreements that are a part of this report and provides any interesting or distinct information about each Agreement. Each Agreement is unique in its content and structure. Some states have one Tribal-State Agreement, which several tribes within that state have entered into, while other states have different Agreements with each tribe within the state.

Only Tribal-State ICWA Agreements will be analyzed as part of this report. Other types of agreements that mention ICWA, such as Social Security Act Title IV-E agreements or an agreement between a tribe and a county or local government that provides services to Indian children, are included at the end of this section (at subsection II.K, below) to provide a broader view of how ICWA is dealt with between some tribes and states outside of a formal Tribal-State ICWA Agreement.

A. Arizona

The Navajo Nation and the State of Arizona have entered into “The Indian Child Welfare Act Intergovernmental Agreement between the State of Arizona through its Department of Child Safety and the Navajo Nation through its Navajo Division of Social Services, Navajo Children and Family Services,” which was executed on December 18, 2014. There are 19 other federally recognized tribes within Arizona⁷ but no other ICWA Agreements in the State.

The Navajo-Arizona Agreement closely mirrors the language of ICWA. The Agreement is generally a good example of a basic ICWA Agreement with a well-organized structure that is easy to follow and understand.

The Agreement has some unique provisions. Where the State has concurrent jurisdiction with the Nation and provides services and is primarily responsible for the Indian child’s care and case management, the terms of the Agreement are sometimes one-sided in favor of the State. For example, the Agreement often provides that the State “may consider” the Nation’s position instead of using cooperative or collaborative language that requires a joint decision-making process between the State and Navajo’s child welfare staff. *See Sections III.H, VII.E, VIII.D, IX.C.* ICWA Agreements using collaborative language establishes a partnership with the tribal and state child welfare staff, and may be better suited to protect the Indian family.

The Navajo Nation is in an interesting and challenging position because they are the

⁷ See <http://arizonaexperience.org/people/indian-tribes-and-communities> (last visited on December 11, 2016).

only Indian Nation a part of this review whose lands are within several state jurisdictions. The Nation therefore has separate, but similar, ICWA Agreements with, not only Arizona, but also with Utah and New Mexico. The Agreements are fairly similar, except that the notice provisions are different and could cause difficulty for tribal ICWA staff. Specifically, the Utah and New Mexico Agreement with the Navajo Nation provide a 24-hour courtesy notice requirement by telephone when the State's child welfare office knows or has reason to know that a child custody proceeding involves a Navajo child; the Arizona Agreement does not provide for this courtesy 24-hour notice and cites only to ICWA section 1912 for notice requirements. *Navajo-UT (IV.C), Navajo-NM (IV.C), and Navajo-AZ (IV).*

B. Colorado

There are two federally recognized tribes within Colorado⁸ and only the Southern Ute Indian Tribe and the State of Colorado have an ICWA Agreement. This Agreement was entered into on July 28, 1981, which makes the Agreement over 35 years old. The Colorado Department of Human Services is in the process of developing new ICWA Tribal-State agreements that incorporate the new ICWA regulations.⁹

The current Agreement fully incorporates ICWA by reference and includes provisions that mirror ICWA regarding notice, transfer of jurisdiction to the Tribe, placement preferences, and record keeping. The County of La Plata in Colorado also has a 2008 agreement with the Southern Ute Indian Tribe.

An interesting aspect of the Southern Ute and Colorado Agreement is that the Tribe and State have a unique process for licensing foster care facilities. The Agreement's provisions acknowledge that the Tribe has the authority to license foster care facilities on the reservation, and stipulates that the Tribe has the authority to license facilities for the purpose of placement of tribal children off the reservation as well. The Agreement further provides that the Tribe and the State will agree to adopt special licensing standards that are applicable both on and off the reservation so that the parties can allow reciprocal use of the facilities. *(V).*

The Agreement also includes an "Interstate Placement" section that permits the Tribe to seek assistance from the State when the Tribe wants to secure out-of-state foster care or adoption placement for an Indian child. *(VI).* The Agreement does not provide any detail as to what the circumstances are when the Tribe would deem out-of-state placement

⁸ See <https://www.cde.state.co.us/sites/default/files/documents/cdereval/download/pdf/race-ethnicity/nativeamericantribesofcolorado.pdf> (last visited on December 11, 2016).

⁹ Conversation with Tiffany Sewell, ICWA Administrator, Colorado Department of Human Services, October 17, 2016.

necessary.

C. Connecticut

Of the two federally recognized tribes in Connecticut, the State has one ICWA Agreement with the Mohegan Tribe of Indians dated September 11, 2006 and entitled “Letter of Understanding between the Mohegan Tribe of Indians of Connecticut and State of Connecticut Department of Children and Families Regarding Mohegan Families and ICWA.”¹⁰ The Agreement is broad and does not handle the subject matter of ICWA comprehensively. An interesting aspect of this Agreement is that it provides collaboration in regard to non-Indian children residing with a Mohegan family. In those cases, the state will have primary jurisdiction of the non-Indian child and agrees to work cooperatively with the Tribe to provide services to the Indian family as a whole if the non-Indian child is a part of the Indian family.

In addition, the Mohegan Tribe and the State have a separate child welfare agreement for non-Mohegan children within the jurisdiction of the Mohegan Reservation.¹¹ This agreement for non-Mohegan children within the Tribe’s jurisdiction involves children of Tribal employees and patrons of the Tribe’s businesses. This agreement compels the Tribe to immediately notify the state if a non-Mohegan child is left alone in a motor vehicle on Tribal property or in a hotel or other area controlled by the Tribe, or in other circumstances that may constitute a risk of injury.

D. Maine

Out of the five federally recognized tribes within Maine, there are two Tribal-State Agreements in the State:¹² An Intergovernmental Agreement with the Houlton Band of Maliseet Indians entered into on September 16, 2002; and a Child Welfare Agreement with the Penobscot Indian Nation dated November 1987.

The Intergovernmental Agreement with the Houlton Band of Maliseet Indians is a very strong agreement in that it recognizes the Tribe’s desire to have its own Tribal Court

¹⁰ There are two federally recognized tribes in Connecticut. See https://www.bia.gov/tribalmmap/DataDotGovSamples/tld_map.html (hereafter, BIA Tribal Map) (last visited December 11, 2016).

¹¹ “The Letter of Understanding Between the Mohegan Tribe of Indians of Connecticut and the State of Connecticut Department of Children and Families Regarding the Safety and Well-Being of the Non-Mohegan Children of Non-Mohegan Employees and the Non-Mohegan Children of Non-Mohegan Patrons of Tribal Businesses on the Mohegan Indian Reservation,” executed on September 11, 2006.

¹² Five federally recognized tribes are within the borders of the State of Maine, as reported in the Bureau of Indian Affairs listing at BIA Tribal Map. Id. The State of Maine states in its Indian Child Welfare Policy that there are only four federally recognized tribes in five locations. See Section III at https://www1.maine.gov/dhhs/ocfs/cw/policy/iii_a_indian_child_welfare_p.htm (last visited on December 11, 2016).

and child welfare system, and expresses the Tribe's dissatisfaction with its historical reliance on the State for casework, foster care licensing, and adjudication of cases in the State court system. Because the Tribe does not have a court system, the Agreement provides that the Tribe will still take exclusive jurisdiction over its children by working with the Penobscot or Passamaquoddy Tribal Courts, and will enter into an agreement with those courts in order to adjudicate child custody proceedings. In addition, the State agrees to provide assistance to the Tribe as it develops its own court system. The Agreement further requires the retroactive application of the terms of the Agreement where notice had not been properly given to the Tribe, including document sharing for those retroactive cases.

The Agreement with the Penobscot Indian Nation is not as strong as the Houlton Band of Maliseet Agreement. The terms of the Penobscot Agreement are not clearly stated and are often presented in incomplete sentences that are difficult to read and understand. The terms of the Agreement relate almost exclusively to case work, and provide few, if any, provisions regarding the Tribe's exclusive jurisdiction, concurrent jurisdiction, transfer or intervention. The Agreement is 30 years old.

E. Michigan

The Saginaw Chippewa Indian Tribe has an "Indian Child Welfare Act Agreement" with the Michigan Department of Human Services that became effective on November 9, 2010. There are 11 other federally recognized tribes in Michigan who do not have ICWA Agreements.¹³ The Michigan Agreement with the Saginaw Chippewa Indian Tribe is a very good Agreement and contains several promising practice provisions that are included in the last section of this report.

The Saginaw Chippewa Agreement with Michigan uses language in which both the State and Tribe agree to work cooperatively or collaboratively. The provisions do not shy away from enumerating the State's obligations to the Indian child and family through provisions to provide services and funding, support recruitment of placements, and provide training.

Michigan has consultation agreements with six other tribes; these consultation agreements' objectives include: "To create a collaborative relationship to improve the enforcement of the Indian Child Welfare Act and child welfare services provided to

¹³ There are 12 federally recognized tribes in the State of Michigan. BIA Tribal Map, note 10. Though it does not replace a Tribal-State Agreement, Michigan does have an expansive state law, the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1, *et. seq.* See comparison chart between ICWA and MIFPA at https://www.michigan.gov/documents/dhs/MIFPA_comparison_chart_416692_7.pdf (last visited December 31, 2016).

federally-recognized Tribal citizens.”¹⁴ However, these consultation agreements cannot be considered ICWA Agreements because they do not provide any protocol or procedures concerning ICWA.

F. Minnesota

There is one Tribal-State ICWA Agreement for Minnesota that has been entered into with eleven Tribes and Bands, which include all the federally recognized tribes in the State. The Agreement is dated February 2007 and includes signatures of the following Tribes:¹⁵

- Prairie Island Mdewakanton;
- Red Lake Nation (signed on February 27, 2007);
- Shakopee Mdewakanton Sioux Community;
- Upper Sioux Community (signed on February 22, 2007);
- Lower Sioux Community;
- White Earth Band of Chippewa;
- Bois Forte Band of Chippewa;
- Fond du Lac Band of Chippewa (signed on February 22, 2007);
- Grand Portage Band of Chippewa (signed on February 22, 2007);
- Leech Lake Band of Ojibwe (signed on February 22, 2007); and
- Mille Lacs Band of Ojibwe.

Of note, the Agreement provides that any party to the Agreement can agree to waive any provision in order to handle issues where one Tribe does not want to be bound by the provision. *(III.L)*.

This Agreement is very similar to the Saginaw Chippewa-Michigan Agreement. Both the Minnesota and Michigan Agreements include similar and very lengthy definitions sections that define terms not included in the Act including “Best Interests of an Indian Child,” “Good Cause Not to Follow the Placement Preferences,” “Good Cause Not to Transfer Jurisdiction to Tribal Court,” and “Termination of Parental Rights.” These definitions are unique as compared to all of the Tribal-State Agreements.¹⁶

¹⁴ For a list of other types of State-Tribal agreements with the State of Michigan, see <http://www.mfia.state.mi.us/olmweb/ex/NA/Public/TAM/000.pdf#pagemode=bookmarks> (last visited on December 11, 2016).

¹⁵ Dates are included where they are provided with the tribal signature in the Agreement.

¹⁶ Minnesota has also codified the Minnesota Indian Family Preservation Act, Minn. Stat. 260 subd. 751, *et seq.*

G. New Mexico

The State of New Mexico has entered into two “Indian Child Welfare Act Intergovernmental Agreements” with the Navajo Nation and the Pueblo of Tesuque, though there are 22 federally recognized tribes in the State.¹⁷ The Navajo Agreement was entered into on May 21, 2007, and the Pueblo of Tesuque Agreement was entered into four years later on May 9, 2011. The Agreements are nearly identical.

Similar to the Navajo-Arizona and Navajo-Utah Agreements, the New Mexico Agreements provide a good basic Agreement that follows the language of ICWA closely. The New Mexico Children, Youth and Families Department is in the process of working with Tribes to develop changes to its policy and the ICWA Agreements to be consistent with the new ICWA regulations.¹⁸ Any New Mexico revised ICWA Agreement is not projected until the spring of 2017.

H. Texas

Of three federally recognized tribes in the State of Texas, the State has entered into two Memoranda of Understanding regarding ICWA: (1) “Memorandum of Understanding between Ysleta Del Sur Pueblo/Tigua Tribe and the Texas Department of Family and Protective Services, Child Protective Services,” dated July 27, 2009; and (2) “Memorandum of Understanding between Alabama-Coushatta Tribe of Texas and the Texas Department of Family and Protective Services Division, Regions 4 and 5,” dated April 21, 2010.¹⁹ The Agreements have only minimal differences. Neither Agreement discusses jurisdiction.

The two Agreements are similar, and are fairly basic. Both Agreements require the Tribes to follow Texas law for their investigative procedures for reporting abuse, neglect and abandonment, whether or not the Tribe has exclusive jurisdiction.²⁰ *Alabama-Coushatta, (II.A.1-3), and Ysleta Del Sur (III.5)*. The Ysleta Agreement provides for coordination between the Pueblo and the State in the development of service plans and generally states that there should be open communication; the Alabama-Coushatta Agreement, in contrast, does not. *See (IV), generally*.

¹⁷ There are 22 federally recognized tribes in the State of New Mexico. BIA Tribal Map, note 10.

¹⁸ Email communication with Bernie Teba, New Mexico Children, Youth and Families Department on November 23, 2016.

¹⁹ There are three federally recognized Tribes within the State of Texas. BIA Tribal Map, note 10.

²⁰ The Alabama and Coushatta Tribes of Texas Restoration Act (P.L. 100-89, 101 Stat. 670, Aug. 18, 1987, codified at 25 U.S.C. § 731 et seq.) and the Ysleta del Sur Pueblo Restoration Act (P. L. 100-89, title I, § 101, 101 Stat. 666, Aug. 18, 1987, codified at 25 U.S.C. § 1300g et seq.) confer state civil and criminal jurisdiction over the Tribes’ reservations.

The Ysleta Agreement is the stronger Agreement of the two by providing case management protocols. However, neither Agreement provides a strong tone of collaboration; the Texas Agreements exclusively provide divisions of labor and do not provide provisions regarding child custody proceedings, jurisdiction, transfer or intervention.

I. Utah

There are six federally recognized tribes in the State of Utah and five of those Tribes have Tribal-State ICWA Agreements:

- (1) Paiute Indian Tribe of Utah: "Memorandum of Understanding between the Paiute Indian Tribe of Utah and The State of Utah, Division of Child and Family Services, dated January 11, 2006.
- (2) Confederated Tribes of the Goshute Indian Reservations: "Memorandum of Understanding for Collaborative-Coordinated Implementation of the Indian Child Welfare Act with the Confederated Tribes of the Goshute Indian Reservations and the Division of Child and Family Services," dated April 24, 2006.
- (3) Northwestern Band of Shoshone Nation: "Memorandum of Understanding for Collaborative-Coordinated Implementation of the Indian Child Welfare Act with the Northwestern Band of Shoshone Nation and the Division of Family and Child Services," dated January 16, 2007.
- (4) Skull Valley Band of Goshute Indians: "Memorandum of Understanding for Collaborative-Coordinated Implementation of the Indian Child Welfare Act with the Skull Valley Band of Goshute Indians and the Utah Division of Child and Family Services," not dated.
- (5) Navajo Nation: "Indian Child Welfare Intergovernmental Agreement between the Utah Department of Human Services, Division of Child and Family Services and the Navajo Nation," dated December 12, 2007.

Each Agreement is similar, except for the Navajo Agreement. Per the terms of the Agreement, the Paiute Indian Tribe is the only Tribe of these five that does not exercise exclusive jurisdiction over ICWA proceedings because, as the Agreement states, the Tribe is subject to Public Law 280 and does not have a tribal court system.²¹ However,

²¹ The Paiute Restoration Act confers state civil and criminal jurisdiction over the Paiute Indian Tribe Reservation. 25 U.S.C. §§ 761-768. Although Utah has asserted jurisdiction under Public Law 280 over all tribes in the State subject to tribal consent, no tribe has consented to the State's Public Law 280 jurisdiction. Utah Code §§ 63-36-9 to 63-36-21, ch. 169, § 1 (1971); see also <https://www.walkingoncommonground.org/state.cfm?state=&topic=25#alpha-UT> (last visited December 11, 2016). Therefore, the Agreement may state incorrectly that it is Public Law 280 that confers jurisdiction to the State of Utah, rather than the Paiute Restoration Act.

the Tribe and the State work together in investigations and the day-to-day relationship between the Tribe and State child welfare staff looks to be a cooperative one.

The Agreement with Paiute, as well as the Confederated Goshute, Northwestern Shoshone and Skull Valley Agreements, are all simple agreements and include provisions about the Tribes' histories, how the State will identify Indian children, notice, foster home licensing and payment, preference placement, active efforts and case conferences. Each of these Agreements is stated in terms of cooperation and collaboration, and clearly enumerates the State's responsibilities. Of these four Agreements, the Skull Valley Agreement provides more detail in many of its provisions.

The Navajo Agreement with Utah is nothing like the other Utah Agreements and is similar to the Navajo-Arizona Agreement and Navajo and Tesuque Pueblo Agreements with New Mexico. The Navajo-Utah Agreement provides more detailed processes than what is provided in the other Utah Agreements. For example, Utah is required to provide a 24-hour courtesy telephone notice to the Navajo Nation when taking protective custody of a Navajo child, when commencing a child custody proceedings or emergency proceeding. The other four Utah Agreements do not include a required time period for courtesy notice, or provide for courtesy notice at all.

J. Washington

Of the 29 federally recognized tribes in the State of Washington, Washington has entered into 13 separate ICWA Agreements and they are listed here, the most recent first.²²

- (1) Jamestown S'Kallam Tribe: Memorandum of Agreement between the Jamestown S'Kallam Tribe and the Washington State Department of Social and Health Services Children's Administration for Sharing Responsibility in Delivering Child Welfare Services to Children of the Jamestown S'Kallam Tribe," dated July 17, 2015. The Agreement includes the following Appendices: Appendix A. Communication Protocols; Appendix B. Points of Contact List – State; Appendix C. Points of Contact List – DSHS/CA – Regions; Appendix D. DSHS State Wide Services; Appendix E. List of Expert Witnesses; Appendix F. Organizational Charts; Appendix G. Information Sharing and Confidentiality; and Appendix H. Tribal Council Resolution.
- (2) Makah Tribe: "Memorandum of Understanding between Makah Tribe and DSHS Children's Administration for Sharing Responsibility in Delivering Child Welfare Services to Children of the Makah," dated May 15, 2015.

²² Twenty-nine federally recognized tribes are located within the State of Washington. BIA Tribal Map, note 10.

- (3) Stillaguamish Tribe of Indians: "Memorandum of Understanding between the Stillaguamish Tribe of Indians and DSHS Children's Administration for Sharing Responsibility in Delivering Child Welfare Services to Children of the Stillaguamish Tribe of Indians," dated December 11, 2014.
- (4) Samish Indian Nation: Memorandum of Understanding between The Samish Indian Nation & DSHS Children's Administration for Sharing Responsibility in Delivering Child Welfare Services to Children of the Samish Tribe," dated June 9, 2014. The Agreement includes Appendices as follows: Appendix A. DSHS/CA Services; Appendix B. Points of Contact; Appendix C. Confidentiality and Disclosure Guide; Appendix D. DSHS/CA and Samish Tribe Organizational Charts; and Appendix E. Samish Tribal Council Resolution.
- (5) Kalispel Tribe of Indians "Working Agreement between the Kalispel Tribe of Indians and Children's Administration Division of Children Family Services," February 2014.
 - This is a short and very basic ICWA Agreement, as compared to the other Washington, as well as other Tribal-State Agreements. This Agreement does not have the regular introductory and purpose sections as found in all the other Washington Agreements. The six-page document provides for referrals and emergency referrals, contacts, investigations, provisions for services and training.
- (6) Lummi Nation: "Memorandum of Agreement between Lummi Nation and Department of Social and Health Services Children's Administration for Sharing Responsibility in Delivering Child Welfare Services to Children of the Lummi Nation," dated February 28, 2014.
- (7) Shoalwater Bay Tribe: "Memorandum of Understanding between Shoalwater Bay Tribe and the Department of Social and Health Services, Children's Administration," dated July 22, 2013. The Agreement provides two attachments: Attachment A, MOU Shoalwater Bay Tribe CPS Protocol; and Attachment B, Local Contacts.
- (8) Snoqualmie Indian Tribe: "Cooperative Agreement between Snoqualmie Indian Tribe and Children's Administration," dated July 19, 2013. Attached to the Agreement are the Tribe's Code called the Tribal Council Act 13.2, Indian Child Welfare; a list of Snoqualmie Tribal Resources; and the State's Children's Administration Services for Region 2.
- (9) Port Gamble S'Klallam Tribe: "Intergovernmental Agreement for Child Welfare Services between the Port Gamble S'Klallam Tribe and the Washington State Department of Social and Health Services," dated October 23, 2012. The Agreement

includes: Exhibit A. Data Security Requirements; Exhibit B. Tribal-State Agreement Regarding Access to Data in FamLink; Exhibit C. ESHS State Wide Services; and Exhibit D. Conflict Resolution Process.

- Port Gamble S'Klallam Tribe has a direct IV-E Agreement with the U.S. Department of Health and Human Services and this Child Welfare Agreement serves to combine several child welfare agreements together and update the Tribe's relationship with the State. Some provisions in the Agreement concern Title IV-E in addition to ICWA.

(10) Suquamish Tribe: "Memorandum of Understanding between the Suquamish Tribe and DSHS Children's Administration for Sharing Responsibility in Delivering Child Welfare Services to Children of the Suquamish Tribe," dated September 26, 2011. The Agreement only includes one attachment: Attachment A, Contacts.

(11) Quinault Indian Nation: "Memorandum of Understanding between Quinault Indian Nation Quinault Family Services and the Division of Children and Family Services Aberdeen Office and Statewide," dated May 24, 2011. Attachments included are: Attachment A, List of services available through the State; Attachment B, Laws governing child welfare services; Attachment C, Tribal and State contact list; Attachment D, Dispute resolution process; and Attachment E. Quinault Indian Nation Title 55 Children's Code.

(12) Tulalip Tribes of Washington: "Memorandum of Understanding between the Tulalip Tribes of Washington and DSHS Children's Administration for Sharing Responsibility in Delivering Child Welfare Services to Children of the Tulalip Tribes," dated April 1, 2011.

(13) Cowlitz Indian Tribe: "Memorandum of Agreement between the Cowlitz Indian Tribe and the Washington State Department of Social and Health Services Children's Administration for Sharing Responsibility in Delivering Child Welfare Services to Children of the Cowlitz Indian Tribe," dated November 28, 2010. This Agreement includes Appendices as follows: Appendix A. Communication Protocols; Appendix B. Points of Contact List State; Appendix C. Points of Contact List DSHS/CA Regions; Appendix D. DSHS State Wide Services; Appendix E. List of Expert Witnesses; Appendix F. Organizational Charts; Appendix G. Information Sharing and Confidentiality (links to webpages); and Appendix H. Tribal Council Resolution.

- At the time of signing this Agreement, the Cowlitz Indian Tribe did not have a court system. The Agreement anticipates that a tribal court system will be established in the future and that the establishment of a tribal court system may require amendment of the Agreement.

All of the Washington ICWA Agreements are different – no two are alike. However the Agreements contain many similarities and seem to be fairly uniform for purposes of implementation. The State provides a template Memorandum of Understanding to help guide the development of these documents and this template can be found on the State’s website along with a listing of these 13 ICWA Agreements.²³ The State’s website indicates that the State reviews its Agreements with Tribes every two years.²⁴

In 1987, two ICWA Tribal-State Agreements were created through joint efforts of Washington State Indian tribes and their legal counsel, the Association on American Indian Affairs, the Bureau of Indian Affairs, the Washington Department of Social and Health Services Division of Children and Family Services (DSHS) and DSHS’s Office of Indian Affairs, as well as the State’s Attorney General’s Office and the Governor’s Office of Indian Affairs.²⁵ These two agreements were approved by Tribes Statewide.²⁶

These 1987 agreements go beyond the terms of the Act²⁷ and were “intended to be a blueprint for the development of policy, local agreements, training, and other necessary activities to be undertaken jointly by the tribes and the Department, for the purpose of carrying into effect on a daily basis the provisions contained herein.”²⁸ Washington law cites to the “tribal-state agreement” in addition to individual agreements between tribes and the State “as persuasive guides in the interpretation and implementation of the federal Indian child welfare act, this chapter, and other relevant state laws.”²⁹ Thus, these agreements can still be considered significant tools for tribes today. Interestingly, the current 13 ICWA Tribal-Washington Agreements, and the current agreement template, do not include many of the important protections offered by the 1987 agreements. This report does not include the 1987 agreements in its analysis, but many of the provisions from those agreements are utilized in Section XI, Promising Practices.

²³ See <https://www.dshs.wa.gov/ca/indian-child-welfare-policies-and-procedures/2-tribalstate-agreements> (last visited December 7, 2016).

²⁴ Id.

²⁵ See <https://www.dshs.wa.gov/sesa/office-indian-policy/indian-policy-advisory-committee-ipac> (last visited December 11, 2016), and Indian Child Welfare Act, Hearings before the Select Committee on Indian Affairs, Senate (ICWA 1987 Hearings), 100th Congress, 1 (November 10, 1987), p. 113, which can be found at <http://www.narf.org/nill/documents/icwa/federal/lh/hear111087/hear111087.pdf> (last visited December 31, 2017).

²⁶ Id.

²⁷ ICWA 1987 Hearings, pp. 39-40 see note 25. The agreements are “the new policy of the State in regards to service provision for Indian children.... This is how, from this day forward, we will treat all Indian children within the State of Washington.” Id.

²⁸ 1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (*I.7*). Washington also has codified the Washington State Indian Child Welfare Act at RCW Chapter 13.38.

²⁹ Revised Code of Washington (RCW) § 13.38.030.

K. Other State Documents Mentioning ICWA

Other states have handled Tribal-State ICWA Agreements differently. Some states replaced their Tribal-State ICWA Agreements with state policy and laws developed in coordination with Tribes, such as in Alaska. In other states only counties have entered into ICWA agreements with Tribes, such as in California and Wisconsin. Some state-tribal relationships regarding ICWA are informal or are only expressed through funding contracts.

Tribal-State Title IV-E Agreements are another way tribes and states insert ICWA into their relationship. For example, Title IV-E Agreements in Alaska, Arizona, California, Michigan, Minnesota, Montana, New York, North Dakota, Oklahoma, Oregon, South Dakota, and Washington all cite to ICWA and provide provisions that support the Indian child and Indian family.³⁰ Below is a non-exhaustive sampling of some other types of state and tribal arrangements that mention ICWA.

1. Alaska

There are 228 federally recognized tribes and villages in Alaska.³¹ In the early 1990s, Alaska had 14 ICWA Tribal Village agreements. These agreements are no longer in place but were reportedly incorporated into the Alaska Office of Children's Services Child Protective Services Manual (revised on March 1, 2016).³² The Manual is not an agreement between two (or more) parties but is the State's unilateral procedures that are followed by the State for all child welfare matters.

The State does have 130 confidentiality agreements with Tribal Villages in which the State agrees to provide confidential information relating to child protection investigations to the Tribes. The confidentiality agreements further require the Tribes to have established written policies to protect such confidential information.³³

2. California

There are 106 federally recognized tribes within the State of California.³⁴ Though there are no California State ICWA Agreements with Tribes, there are a handful of county

³⁰ O'Loughlin, Shannon and Trope, Jack. "A Survey and Analysis of Select Title IV-E Tribal-State Agreements Including Template of Promising Practices," p. 24 (March 2014) at http://www.narf.org/nill/resources/title-iv-e/20140320_title_iv-e_report.pdf (last visited on December 22, 2016).

³¹ BIA Tribal Map, note 10.

³² See <http://dhss.alaska.gov/ocs/Documents/Publications/CPSManual/cps-manual.pdf> (last viewed on September 10, 2016).

³³ See <http://dhss.alaska.gov/ocs/Pages/confidentiality.aspx> (last viewed on September 10, 2016).

³⁴ BIA Tribal Map, note 10.

ICWA agreements with Tribes, and other unilateral county protocols.³⁵ The agreements in place include: Alpine County and the Washoe Tribe; Mendocino County Health and Human Services Agency and the Hopland Band of Pomo Indians; Riverside County Department of Public Social Services and the Soboba Band of Luiseño Indians; and Sonoma County Human Services Department and the Dry Creek Rancheria of Pomo Indians.

There are other county protocols and guidance documents that are not agreements with tribes but are unilateral operational agreements for county staff.³⁶

3. Idaho

The State of Idaho has no formal ICWA Agreements with the four federally recognized tribes in that state,³⁷ although the State asserts an informal working relationship with all tribes in Idaho on ICWA matters. The State has broad consultation agreements with two tribes. Idaho, like several other states, provides guidance documents for its child welfare staff; the Idaho guidance document is called the “Standard for Implementing the Indian Child Welfare Act” and it provides direction for state child welfare staff, tribes and the public about the State’s Child and Family Services Program.

4. Kansas

The Sac and Fox Nation of Missouri in Kansas and Nebraska provided a draft Memorandum of Agreement to the State of Kansas regarding ICWA. However, the Tribe has not been successful negotiating the agreement with the State for several years. There are four federally recognized Tribes in Kansas.³⁸

5. Louisiana

Louisiana has interagency agreements with two tribes, of four federally recognized tribes total, relating to the protection of non-Indian children visiting the Tribes’ casinos.³⁹ The Jena Band of Choctaw’s interagency agreement states that child abuse reports involving Native American children will revert back to the ICWA procedure, but does not cite to any formal policy, guidance or agreement regarding ICWA, and this procedure was not provided on request.

The Coushatta Tribe of Louisiana does not want to enter into a formal ICWA agreement with the State for reasons unknown. However, the Coushatta Tribe and Louisiana have agreed to the following protocols:

³⁵ See <http://www.childsworld.ca.gov/PG3383.htm> (last viewed on December 11, 2016).

³⁶ Id.

³⁷ BIA Tribal Map, note 10. Id.

³⁸ Id.

³⁹ Id.

The Indian Child Welfare Act (ICWA) and the OCS [Louisiana Department of Social Services, Office of Community Services] policy mandates that we develop working agreements with any federally recognized Indian tribe within our region. The Coushatta Tribe of Elton is a federally recognized tribe. While they do not wish to enter into a formal written agreement, we have reached the following agreements regarding the procedures to be followed when working with tribal members:

1. OCS will make every effort to ascertain whether or not clients are tribal members through interviews and will verify tribal membership through contact with the Social Service Director when questionable.
2. OCS will notify the tribe through Social Services and/or the tribal attorney, when involved with tribal members.
3. If it is determined that a tribal child is not safe in his/her home, OCS will take whatever steps necessary to protect the child, up to and including seeking an instant order to remove the child from the home and notify both Social Services and the tribal attorney of the removal at least by the next day. Phone calls are sufficient for emergency situations with written confirmation within 3 days. The tribal attorney should be served a copy of any petition and notified of court hearings so that the tribe can exercise its right to intervene if they choose.
4. The Social Services Director can be contacted at any point in the investigation or life of the case for consultation and collaboration (to identify relatives, etc.).
5. In cases involving tribal members, OCS will make every effort, as usual, to attempt to offer preventive services and to seek relative placement when possible.

6. Nebraska

In response to the request for ICWA agreements, the State of Nebraska provided three Intergovernmental Cooperation Contracts for Services with the Omaha, Santee Sioux and Winnebago Tribes called "Child Welfare, Adult and Child Protection and Safety Services Contract between the Nebraska Dept. of Health and Human Services Division of Children and Family Services and the [Tribe]."⁴⁰ These agreements are duplicative and mention ICWA. However, they only provide funding for child welfare services and do not provide protocol or guidance in line with ICWA to be considered an ICWA Agreement.

7. New York

The Saint Regis Mohawk Tribe and New York state entered into a "Child Welfare Services

⁴⁰ There are four federally recognized tribes in Nebraska. BIA Tribal Map, note 10.

Agreement between the Saint Regis Mohawk Tribe and the New York State Department of Social Services” on April 1, 1994. The purpose of the agreement is to implement the provisions of New York State law that allows the Department to enter into an agreement with the Tribe for the provision of foster care, preventive services and adoption services to Indian children as defined by State law or ICWA. The agreement sets forward compliance with Title IV-B, IV-E and XX of the Social Security Act and its regulations, as well as the Indian Child Welfare Act. However, it does not provide any terms that describe coordination or application of the ICWA other than referring to the Act itself.

8. Wisconsin

The State of Wisconsin provided a template ICWA agreement that is used between the Ho-Chunk Nation and a county entitled “Memorandum of Understanding between the Department of Human Service Child Welfare Unit and Ho-Chunk Nation Department of Social Services Child Protection/Indian Child Welfare Unit Juvenile Justice”.⁴¹ The Agreement provides coordination with county services.

9. Wyoming

Similar to Nebraska, in response to the request for ICWA agreements, Wyoming provided two funding agreements for the two federally recognized tribes in the state: the Northern Arapaho Tribe and the Eastern Shoshone Tribe regarding child protection and juvenile probation services. Neither agreement mentions ICWA though they do provide funding for investigative and other ICWA-type services. These agreements are simple contractor agreements and waive the Tribes’ sovereign immunity so that the State can enforce the terms of the agreement.

⁴¹ There are eleven federally recognized tribes in Wisconsin. BIA Tribal Map, note 10. Wisconsin has codified the Wisconsin Indian Child Welfare Act within the State’s Children’s Code at § 48.028. In addition, the 1983 Wisconsin Act 161, which became effective on March 23, 1984, provides a process for county social service agencies to pay for out-of-home placement costs for Indian children when that placement is ordered by the Tribal Court, which is implemented by a county-tribal agreement regarding those costs. This Act could be relevant to ICWA in cases that have been transferred to a tribe.

III. PREAMBLE AND STATED PURPOSES

This section describes provisions for the Tribal-State ICWA Agreement that can provide the foundation for the relationship between the parties. The preamble or purposes section of an agreement is usually the first part of an agreement and generally sets the tone. A preamble section may describe the general mission and goals for the parties' implementation of the agreement. It can be seen as the starting point or foundation of the agreement from which everything else after is read and should be considered an important part of the Tribal and State relationship.

Legislative acts, like ICWA, usually do the same. ICWA expresses Congress' general policy purpose toward Indian children that states:

The Congress hereby declares 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 and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs. 25 U.S.C. § 1902.

This policy purpose sets the tone and intent of how the statutory provisions of the Act should be read. This section will review how the Agreements have established the parties' starting point for their ICWA relationship.

Of the 39 ICWA Tribal-State Agreements, all but one provides a preamble or purpose section. Overall, the purposes section of the ICWA Agreements provides three main categories of information. First, and most importantly, the parties mutually acknowledge the importance of the Indian child and Indian family, including the importance of maintaining cultural values: "to assure recognition of the cultural and social standards prevailing in the Mohegan Tribe of Indians of Connecticut; to promote stability, security and way of life of Mohegan families; to respect and nurture the heritage and culture of Mohegan children; and to protect and promote the best interests of said children." *Mohegan-CT (I.2)*. In another example of a stated purpose: "Every effort will be made to ensure that the child will be raised within his or her family and the Navajo culture." *Navajo-UT (I.C and D)*.

Second, a recitation of tribal history, or ICWA history, may be provided along with the parties' legal authorities that supports the government-to-government relationship, including a citation to ICWA, 25 U.S.C. § 1919, which provides for the Tribal-State

Agreement. A few Agreements cite to tribal laws to affirm the tribe's authorities, which also provide support for a tribe's prevailing cultural norms.

The Minnesota Agreements acknowledge, although impliedly, that the past history of the tribal-state relationship was not always a mutual one:

The parties acknowledge that, as sovereigns, they may disagree as to the extent of each others' authority, power and jurisdiction in such proceedings. The parties agree, however, that the fundamental purpose of the federal and state laws and the fundamental purpose for making this Agreement is to secure and to preserve an Indian child's sense of belonging to her or his family and Band or Tribe. They agree that cooperating to combine their abilities and resources to provide effective assistance to Indian children and their families is the best means to reach this shared goal. *(I.C.1.)*

The Houlton Band of Maliseet Agreement with the State of Maine similarly expresses a history in which the Tribe ceded authority to the State in child welfare matters resulting in too many placements outside of Tribal homes. *(III)*.

Third, the parties can use the purposes section to express how they will work together, such as: in cooperation, collaboration, in good faith or with mutual respect. Some Agreements discuss how the purpose of the Agreement is to strictly clarify the roles and responsibilities of the parties only; language providing for collaboration and cooperation are not included in the Agreement.

Sometimes a purposes section can be used to provide notice of a party's expectations of the other party, where there may not be a fully expressed mutual agreement. For example, in the introduction of the Alabama-Coushatta Tribe and Texas Agreement, only the "Tribal Council recognizes that there is no resource more vital to the continued existence and integrity of the Tribe than its children pursuant to the Tribe's Children's Code Section 102. The long-term survival of the Tribe involves an interest in child welfare and child protection proceedings concerning the Tribe's children. Moreover, the Tribe has a critical interest in ensuring that the Tribe's children maintain the unique values of the Tribe's traditions and culture." *(P. 1)*. Though this paragraph was not a mutual statement by both the Tribe and the State, the unilateral affirmation from the Tribe regarding the protection of Tribal children does put the State of Texas on notice that the Alabama-Coushatta Tribe will be measuring the parties' partnership based on this Tribal goal.

Preambles or purposes sections in a Tribal-State ICWA Agreement are unique – and should be unique. The preamble or purposes section lays the groundwork for provisions thereafter, providing tone and intent. Each tribe should consider its distinct, separate goals for the Agreement and make sure that those goals, including the recognition of the tribe’s sovereign interest in its children, is recognized in writing.

The state, in determining its tone and intent in the purposes section, may consider its responsibilities in following the federal law, and with that, the best way to build a strong partnership with tribal parties for the best interest of tribal children. The Minnesota Agreements provide as follows:

The purpose of this Agreement is to protect the long term best interests, as defined by the tribes, of Indian children and their families, by maintaining the integrity of the Tribal family, extended family and the child's Tribal relationship. The best interests of Indian children are inherently tied to the concept of belonging. Belonging can only be realized for Indian children by recognition of the values and ways of life of the child's Tribe and support of the strengths inherent in the social and cultural standards of tribal family systems. Family preservation shall be the intended purpose and outcome of these efforts. The foundation of this Agreement is the acknowledgment that Indian people understand that their children are the future of their tribes and vital to their very existence. An Indian child is sacred and close to the creator. *Minnesota (I.B).*

IV. RECOGNITION OF TRIBAL SOVEREIGNTY WITHIN ICWA AGREEMENTS

At the core of ICWA is the connection between the effective exercise of tribal sovereignty and the well-being of tribal children. There are many opportunities in a Tribal-State ICWA Agreement to reiterate and support the inherent authority of tribes to protect the health, safety and welfare of their citizens. ICWA is based on a tribe's inherent sovereignty and arises out of the United States' unique government-to-government relationship with tribes. Provisions in an ICWA Agreement may expressly recognize tribal sovereignty, secure a tribe's sovereign immunity, provide alternative methods of dispute resolution, support higher tribal or state standards than what ICWA provides, and cite to the full faith and credit provisions of ICWA.

ICWA Tribal-State Agreements are entered into between tribal governments and state governments under the authority of ICWA, as well as pursuant to tribes and states' own laws and governance structures. An ICWA Tribal-State Agreement can provide the parties an opportunity to acknowledge inherent tribal sovereignty, as recognized under federal and state laws, thereby expressly protecting the inherent authority of a tribe over its citizens and providing assurance to the tribe that the state understands its own limitations of authority. An express recognition of tribal sovereignty, therefore, is an important prologue for the state's relationship and partnership with the tribe.

This section examines how the Tribal-State ICWA Agreements recognize tribal sovereignty generally, and distinctively.

A. Express Recognition of Tribal Sovereignty

Several Agreements provide an express recognition of tribal sovereignty, and may also recognize the state's sovereignty. Many Agreements give simple statements of such recognition:

This Agreement is based on the fundamental principles of government-to-government relationships and recognizes the sovereignty of the Tribe and the State of Texas and each respective sovereign's interest. *Alabama-Coushatta-TX*.

This MOA recognizes the sovereignty of the Tribe and of the State of Washington and each respective sovereign's interests. *Cowlitz-WA (I)*.

The Washington State Agreements recount other State and Tribal authority that governs their relationship related to tribal sovereignty:

This MOA is based on the fundamental principles of the government-to-government relationship acknowledged in the 1989 Centennial Accord and

recognizes the sovereignty of the Nation and of the State of Washington and each respective sovereign's interests. *Cowlitz, Samish (III), Jamestown S'Klallam (IV), Stillaquamish (III), Suquamish (III)-WA*.

There are a few Agreements that do not make a clear expression of tribal sovereignty, and use language that could be considered a lesser recognition of tribal sovereignty. The Southern Ute and Colorado Agreement states that the Southern Ute Tribe has a "compelling interest in providing and maintaining the integrity of the tribe as a society and as a culture and that in furtherance of the interest, *the tribe has substantial authority in determining the type of care received by children who are Southern Ute tribal members or eligible for tribal membership.*" (P. 2) (emphasis added). The Shoalwater Bay Tribe's Agreement with Washington recognizes that the Tribe is a "federally recognized tribe" without any other express statement of sovereignty.

The Michigan and Saginaw Chippewa Agreement, and the Minnesota Agreements do not provide express and distinctive recognitions of tribal sovereignty.

The Minnesota law and its amendments emphasize the State's interest in supporting the preservation of the tribal identity of an Indian child and *recognize tribes as the appropriate entities to provide direction to the State* as to the best interests of tribal children. *Minnesota Agreements (I.B)* (emphasis added).

However, there are other provisions in the Minnesota and Michigan Agreements that mention tribal sovereignty. These Agreements provides for training to state child welfare staff on tribal sovereignty and the government-to-government relationship, and also that the Tribes do not waive their sovereign immunity by entering into the Agreement. *Saginaw Chippewa-MI (IV.E.1.xv)*.

Whether or not tribal sovereignty is expressly stated in an Agreement, the Tribe is sovereign and has inherent sovereign authority over the safety, health and welfare of its citizens. A strong ICWA Agreement would clearly recognize the state's understanding of a tribe's distinctive sovereignty as an affirmative starting point for the Agreement.

B. Waivers of Sovereign Immunity

The majority of agreements recognizes the sovereign immunity of tribes and simply state that nothing in the ICWA agreement will be construed as a waiver of sovereign immunity. Generally, the statements also include mutual language regarding the state's sovereign immunity.

Below are some provisions recognizing the sovereign immunity of Indian tribes:

Nothing in this provision will be construed as a waiver of the NATION's sovereign immunity. *Navajo-AZ (XIV.E)*.

This Memorandum of Understanding is not intended to, nor shall it be deemed to, waive the sovereign immunity of the Tribe or of the State. *Paiute, Confederated Goshute, Skull Valley Goshute, and Shoshone-UT*.

A simple provision that recognizes that the tribe does not waive its sovereign immunity is important to protect the parties' expectations in case there is a dispute, among other things. This, coupled with a clear dispute resolution mechanism, can provide a constructive method for handling problems that may arise in the course of the state-tribal relationship.

C. Higher Standards than ICWA

ICWA provides minimum federal standards for compliance and supersedes all other state laws and processes that are less protective than ICWA standards.⁴² Under ICWA section 1921, however, where state or other federal law provides a "higher standard of protection to the rights of the parent or Indian custodian of an Indian child" than ICWA, a court shall apply the higher standard.

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a *higher standard of protection to the rights of the parent or Indian custodian of an Indian child* than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard. 25 U.S.C. § 1921 (emphasis added).

The "higher standard" to be measured is the standard that protects the rights of the parent or Indian custodian. There is no question from the language of the Act that the standard to be measured is the one protecting the cohesiveness of the Indian family.

This requirement of ICWA is protective of Indian children and allows flexibility for states and tribes to develop creative solutions to keep families together and, when necessary, for removal and placement matters. It also allows states and tribes to enact supplemental legislation that can enhance the minimum protections provided by ICWA. It further allows tribes and states to enter into ICWA Agreements that provide higher standards, which can further protect Indian families and children, as well as the sovereignty of the tribe.

⁴² Guidelines, section M.1, p. 89.

A few of the Agreements provide general statements in line with ICWA that higher standards control, but do not state specifically within the Agreements that higher standards were created for the terms of the Agreement, or that the Agreements provide higher standards than what ICWA provides.

The Saginaw Chippewa and Michigan Agreement states that ICWA controls, but if the Agreement provides greater protection than ICWA, the Agreement controls, citing to ICWA section 1921. *(I.C)*. The Agreement further provides for the incorporation of Michigan court rules, as well as state policy – unless those rules conflict with the Agreement, then the Agreement controls. *Id.* The Minnesota Agreement similarly provides:

Minnesota child protection statutes must be construed consistently with the Indian Child Welfare Act. Indian children have equal rights granted to other children under federal and state law, and ICWA takes precedence over all state and other federal laws that may conflict, *unless those laws provide higher standard of protection for the rights of the parent or Indian custodian. Minnesota (I.A) (emphasis added).*

D. Application of Federal and State Laws

Other federal and state laws that do not necessarily have a direct connection to ICWA, may be applicable to the parties and the ICWA Agreement may refer to those laws. First there are laws and authorities that allow a tribe or state to enter into the ICWA Agreement. Often, these authorities are included in the preamble or purposes section of the ICWA Agreement. The Jamestown S’Klallam Agreement with the State of Washington provides a listing of state, federal and tribal laws that provide the legal basis for Indian child welfare activities, services and relationships. *(XIII)*. The listing of laws begins with the United States Constitution, includes Treaties between Indian Tribes and the U.S. government as well as Tribes and the State of Washington, and the Jamestown S’Klallam Tribal Code. *Id.*

There may be other laws, such as non-discrimination laws, other federal or state child welfare laws, and state contracting laws that apply to the parties’ ICWA Agreement and may be useful to enumerate in an ICWA Agreement. However, a tribe should always perform research and clarify whether certain federal laws are indeed applicable to the tribe, and should determine for itself whether application of a state law is in the tribe’s best interest.

For example, in the Navajo Nation and Arizona ICWA Agreement, the parties agree to follow state and federal laws relating to equal opportunity and nondiscrimination.

Navajo-AZ (XV). The Saginaw Chippewa Agreement with Michigan and the Minnesota Agreements mention the application of the Adoption and Safe Families Act,⁴³ the Inter-ethnic Adoption Provision, and Titles IV-E, IV-B and XX of the Social Security Act, as well as state child welfare laws. *Saginaw Chippewa-MI (V.C and D) and Minnesota (I.C.6 and 7)*.

E. Full Faith and Credit

The United States Constitution requires states to give sister states “full faith and credit” to court judgments: “Acts, records and judicial proceedings” of any “State, Territory or Possession...shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.” 28 U.S.C. § 1738. Not all state courts apply this full faith and credit doctrine to tribal court orders and judgments and this question has not been resolved by the U.S. Supreme Court.

However, ICWA does require full faith and credit of tribal court orders and other tribal records to achieve its purposes:

Full faith and credit to public acts, records, and judicial proceedings of Indian tribes: 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 applicable to Indian child custody proceedings* to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity. 25 U.S.C. § 1911(d) (emphasis added).

Full faith and credit is a clear acknowledgment of tribal sovereignty through recognition of tribal courts’ judgments. Without the full faith and credit provision of ICWA, if a tribal court issued a decision in a child welfare proceeding that needed to be enforced outside of the tribe’s jurisdiction in a state court, it would be less certain whether the state court would recognize and enforce the tribal court’s decision. Furthermore, the full faith and credit requirement rebukes the perception that tribal courts are in any way inferior or lack capacity to address child welfare matters.

⁴³ The Adoption Assistance and Child Welfare Act of 1980 created Title IV-E and revised Title IV-B of the Social Security Act. The Act does not modify ICWA. See “P.L. 105-89 Adoption and Safe Families Act of 1997: Issues for Tribes and States Serving Indian Children,” by David Simmons and Jack Trope (November 1999), <http://www.nicwa.org/law/asfa/asfa-issues.pdf> (last visited December 31, 2016).

Many Tribal-State Agreements repeat the language of the ICWA prescription in full, or simply state: “The parties agree to provide full faith and credit for the public acts, records, and judicial proceedings of the other in matters governed by the Agreement.” *Houlton Band of Maliseet-ME (V)*; see also *Tesuque Pueblo-NM (I.D)*.

Each party shall give full faith and credit to the judicial proceedings and court orders of the other party as required by each party’s respective laws for any proceedings relevant to this MOU. *Quinault-WA (VIII)*.

The Saginaw Chippewa and Michigan Agreement cites to section 1911(d) and states: “The Department must adhere to this mandate.” *(III.K)*. The Minnesota Agreement also cites to the provision and similarly states: “The Department recognizes its responsibility to adhere to this mandate.” *(I.C.5)*.

The Agreement between the Paiute Indian Tribe and Utah expressly provides only for full faith and credit to the Tribe’s licensing of foster homes: “The Office of Licensing and DCFS shall give full faith and credit to the Tribe’s certification or licensure of tribal foster and kinship homes according to standards developed and approved by the Tribe.” *(P. 4)*. The Paiute Indian Tribe does not maintain its own court system and has given its exclusive jurisdiction over Indian child court proceedings to the state. Therefore, the Tribe does not have any court proceedings that would invoke the full faith and credit provision. However, it is notable that section 1911(d) includes more than judicial proceedings. The full faith and credit requirement is also applicable to “public acts” and “records” of a tribe, such as tribal council resolutions, and other legislative or executive actions. Thus, there is no reason to limit the Paiute provision, and it could be expanded beyond tribal licensing of foster homes to expressly state ICWA’s section 1911(d) requirements.

F. Resolution of Disputes

Generally, agreements and contracts provide mechanisms for dispute resolution other than litigation. Parties to agreements have found that formal types of dispute resolution, such as litigation and arbitration, are often costly and time consuming. An alternative and informal dispute resolution clause can provide certainty that any dispute arising in the course of work under the Agreement is dealt with as efficiently as possible.

Most of the Tribal-State ICWA Agreements provide a mechanism for resolution of disputes. The favored method for handling disputes in the Agreements is through informal mechanisms, such as utilizing good faith communications, raising disputes up the chain of child welfare staff and government officials – sometimes all the way up to the tribal executive and state governor. The Houlton Band of Maliseet Agreement with

Maine sets forward a dispute resolution team to take care of any disputes. *(XVII)*.

Some of these dispute resolution provisions provide a step by step process, while others are quite simple, such as the Paiute, Confederated Goshute and Skull Valley Goshute Agreements with Utah:

All disputes arising under this MOU will be handled through good faith negotiation between the Tribe and DCFS [Utah Division of Child and Family Services]. *Paiute-UT (p. 5)*.

Dispute resolution can be utilized for specified issues in an ICWA Agreement, or for any dispute that may arise from the ICWA tribal-state relationship. For example, some of the Washington-Tribal Agreements provide a resolution mechanism for disagreements that occur between tribal and state child welfare staff when developing a case plan, and a different mechanism for all other disputes:

Dispute Resolution for the Case Plan:

The Tribal and CA social workers will work collaboratively to develop a case plan for the child. When a Tribal social worker makes a recommendation on the care, services and placement for a [Tribal] child and the CA social worker is not in agreement and the CA social worker intends to make a recommendation to the juvenile court, the Tribe may either present its recommendation to the juvenile court, if the Tribe has intervened in the dependency or termination proceeding, or it can invoke the following impasse procedure.

IMPASSE PROCEDURE: The Tribe and state worker will meet with the Tribe's ICW supervisor and the CA supervisor to resolve the differences. If it is not resolved, the impasse will still be in place and the CA Area Manager and Regional Administrator will meet with the Tribe's ICW Supervisor, the Tribal Administrator, and the Health and Human Services Director. If the differences are still not resolved, the CA assistant secretary/DSHS secretary and the Tribal Chairman will work toward resolving the differences. If after that, a satisfactory decision has not been reached, the Tribe may dispute the DSHS decision and appeal it to the Governor. *Cowlitz (XII), Samish (IX), Jamestown S'Klallam (XII)-WA*.

Dispute Resolution for All Other Disputes:

Disputes or disagreements regarding the application or interpretation of this MOA will be resolved by the parties, starting at the lowest level and working up, within the following designated levels:

1. CA Casework supervisor - Tribal ICW Social worker

2. CA Area Administrator - Tribal ICW Supervisor or designee
3. CA Regional Director - Tribal Administrator/Tribal Health and Human Services Director
4. CA Assistant Secretary - Tribal Chairman

If a dispute or disagreement remains unresolved after following the above listed procedures, nothing in this MOA shall be interpreted as preventing the parties from seeking resolution at a higher level within the state or Tribal governments.

Cowlitz (XII), Samish (IX), Jamestown S'Klallam (XII)-WA.

Only a few of the Agreements, including two of the Washington Agreements, point to litigation or more formal methods for handling disputes. The Lummi and Tulalip Agreements provide several methods of dispute resolution: through tribal and state representatives, through a mediator, a "Dispute Board", and finally recognizing that the parties can still raise any disagreement with "Officials of the State of Washington or United States." *Lummi (IX) and Tulalip (XV)-WA.*

In the Southern Ute and Colorado Agreement, both parties shall attempt in good faith to resolve disputes by negotiation. However, if the parties are unable to resolve, "both parties agree that exclusive jurisdiction for the legal resolution of such a dispute shall be in the United States District Court for the District of Colorado, and that the applicable laws and regulations of the United States, the State of Colorado, and the Southern Ute Indian Tribe shall govern." *(IX.)*

The Navajo Nation and Arizona Agreement provides for arbitration: "Nation and DCS agree to comply with mandatory court ordered arbitration under state law as applicable." *Navajo-AZ (XIV.E).* Dispute resolution mechanisms should be unique to the parties and provide an effective and efficient method to resolve disputes that are the least disruptive to the important work required by ICWA and the Tribal-State Agreement. Generally, informal methods of dispute are the most effective and efficient, especially between two sovereign governments. Litigation and arbitration will bring an Indian Nation into the courts of the state, can be expensive and take many years to resolve.

V. DEFINITIONS

This section will review the definitions sections of the ICWA Tribal-State Agreements. Definition sections are important to any agreement to assure that the parties have a mutual understanding of how certain terms are to be used within the agreement.

ICWA contains twelve definitions of the following terms:

Child custody proceeding	Extended family member
Indian	Indian child
Indian child's tribe	Indian custodian
Indian organization	Indian tribe
Parent	Reservation
Secretary	Tribal court

25 U.S.C. § 1903. "Child custody proceeding" also defines four separate terms including "foster care placement," "termination of parental rights," "preadoptive placement," and "adoptive placement."

The new ICWA regulations have provided new definitions that were necessary to provide consistency and clarity to some of ICWA's requirements. The regulations further revised some of the definitions that had been included in the previous guidelines, and repeat some of the definitions from the Act. Significant new definitions from the regulations include:

Agency	Active efforts
Custody	Continued custody
Domicile	Involuntary proceeding
Reservation	Status offenses
Upon demand	Voluntary proceeding

The new terms defined by the regulations may now supersede some of the ICWA Agreements' definitions for these terms.

Many of the Tribal-State ICWA Agreements show concurrence with the ICWA definitions by duplicating those definitions or incorporating them into the Agreement by reference: ICWA definitions "shall be referenced and utilized in the performance of each party's responsibilities under this Agreement." *Ysleta Del Sur-TX (p. 2)*; see also *Southern Ute-CO (I.C.)*.

A few Agreements provide no definitions section. Of the thirteen Washington State

Agreements, five do not provide a definitions section. *See Lummi, Suquamish, Snoqualmie, Kalispel and Samish Agreements*. However, there are a few ICWA Agreements that provide lengthy definitions sections, including the Michigan and Minnesota Agreements.

There are several Agreements that provide definitions beyond ICWA. The following listing provides unique examples of terms (in alphabetical order) that have either been defined differently than ICWA's definitions, or are definitions beyond ICWA's twelve terms.⁴⁴ The Agreements may also provide terms in line with or differing from the new regulations. Terms such as "notice", "jurisdiction", and "intervention" will be discussed in other sections of this report where those concepts are discussed.

A. Acknowledged Father

"Acknowledged father" is not defined by either ICWA or its regulations. The ICWA definition of "parent" states that the parent "does not include the unwed father where paternity has not been *acknowledged* or established." 25 U.S.C. § 1903(9) (emphasis added). The Guidelines state that: "Many State courts have held that, for ICWA purposes, an unwed father must make reasonable efforts to establish paternity, but need not strictly comply with State laws."⁴⁵

There were a couple of Agreements that defined "acknowledged father". Particularly, the Saginaw Chippewa Agreement with Michigan rejects the State's definition:

"Acknowledge" and "acknowledged father": "Acknowledge" means any action on the part of an unwed father to hold himself out as the biological father of an Indian Child (defined below). "Acknowledged father" also means a father as defined by tribal law and custom. *The Act and this definition do not require acknowledgement of paternity as defined under State law*, including under Mich. Comp. Laws §§ 722.1001 *et seq.* *Saginaw Chippewa-MI (II.A) (emphasis added)*.

"Acknowledge" means any action on the part of the unwed father to hold himself out as the biological father of an Indian child. "Acknowledged father" also means a father as defined by tribal law or custom. *Minnesota (I.E.1)*.

The Minnesota and Michigan Agreements' definitions are significant because they

⁴⁴ Some Agreements define certain acronyms, parties to the Agreement including the various divisions or agencies of the state and tribe, or other state specific terms. However, these state or party specific terms and acronyms, though important to the parties' mutual understanding of their Agreement, will not be duplicated here because such terms are specific to the tribal and state parties only.

⁴⁵ Guidelines, section L.16, pp. 84-85. The Guidelines refer to 81 FR 38796 (June 14, 2016) regarding state case law about the rights of unwed fathers.

expressly rely on tribal law and custom, but also recognize independently a broad standard – namely “any action” of the unwed father to hold himself out as the biological father of an Indian child.⁴⁶

B. Active efforts

“Active efforts” is not defined in the definition section of ICWA, but the term is used in ICWA: “Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy 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 proved unsuccessful.” 25 U.S.C. § 1912(d) (emphasis added).

The new regulations now provide the baseline for which the current Tribal-State Agreements must be read. The new regulations define “active efforts” as:

[A]ffirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, 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. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child’s Tribe and should be conducted in partnership with the Indian child and the Indian child’s parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case.

This requirement seeks to “ensure that services are provided that would permit the Indian child to remain or be reunited with her parents, whenever possible, and helps protect against unwarranted removals by ensuring that parents who are, or may readily become, fit parents are provided with services necessary to retain or regain custody of their child. This is viewed by some child-welfare organizations as part of the ‘gold standard’ of what services should be provided in all child-welfare proceedings, not just those involving an Indian child.”⁴⁷

The definition further provides a listing of eleven examples where active efforts may be

⁴⁶ See Minnesota Indian Family Preservation Act at 260.755 § 14, and Michigan Indian Family Preservation Act at § 3(s). The Minnesota definition of “acknowledge” does include “any action.” The Michigan law does not define “acknowledge.”

⁴⁷ Guidelines, section E.1, p. 39.

used. 25 C.F.R. § 23.2. These eleven examples “may” be present in a case and are not an all-inclusive list; other facts and circumstances may also be present to show “active efforts.”⁴⁸

There are a few Agreements that provide an “active efforts” definition, some of which include elements that arguably go beyond the federal regulations and thus would continue to be applicable as they are more protective of parental rights than the regulations. The Jamestown S’Klallam Agreement with Washington provides a very detailed definition that gives a minimum standard for “active efforts.” It describes that the state social services department “shall make timely and diligent efforts to provide or procure such services, including engaging the parent or parents or Indian custodian in reasonably available and culturally appropriate preventive, remedial, or rehabilitative services. This shall include those services offered by tribes and Indian organizations whenever possible.” (II.6.a). The provision then provides the minimum standard of “active efforts” in certain proceedings:

1. In any dependency proceeding under chapter 13.34 RCW seeking out-of-home placement of an Indian child in which the department or supervising agency provided voluntary services to the parent prior to filing the dependency petition, a showing to the court that the department *actively worked with the parents to engage them in remedial services and rehabilitation programs* to prevent the breakup of the family beyond simply providing referrals to such services.
2. In any dependency proceeding under chapter 13.34 RCW, in which the petitioner is seeking the continued out-of-home placement of an Indian child, the department must show to the court that it has *actively worked with the parents in accordance with existing court orders and the individual service plan to engage them in remedial services and rehabilitative programs* to prevent the breakup of the family beyond simply providing referrals to such services.
3. In any termination of parental rights proceeding regarding an Indian child under chapter 13.34 RCW in which the provided services to the parents, a showing to the court that the department or supervising agency social workers *actively worked with the parents to engage them in remedial services and rehabilitation programs* ordered by the court or identified in the department or supervising agency's individual service and safety plan beyond simply providing referrals to such services. (II.6.a) (emphasis added).

⁴⁸ Guidelines, section E.4, p. 41-42.

The Agreement then provides ten examples of what “active efforts casework” may include, such as: “With regard to each child honestly evaluates and balances all elements of the ‘best interests of the Indian child’ as that term is defined by the Washington State Indian Child Welfare Act.” *(II.6.b.8)*.

The Saginaw Chippewa and Michigan Agreement and the Minnesota Agreement also define “active efforts,” applying it to all Indian child custody proceedings and distinguishing “active efforts” from “reasonable efforts”:

[A] rigorous and concerted level of case work that uses the prevailing social and cultural values, conditions, and way of life of the Indian Child’s tribe...to preserve the child’s family and to prevent an out-of-home placement of an Indian Child wherever possible, and if out-of-home placement occurs, to return that child to the child’s family at the earliest time possible.

Active Efforts requires a higher, more intensive, and prolonged standard of effort than the “reasonable efforts” standard found in Mich. Ct. R. 3.965(D). “Reasonable efforts” are those rationally calculated to attempt to prevent removal, and are not required in all cases. All Indian Child-Custody Proceedings require Active Efforts to be made.

Active Efforts require acknowledging traditional helping and healing systems of an Indian Child’s Tribe and using these systems as the core to help and to heal the Indian Child and family. *See* 25 U.S.C. § 1912(d); Bureau of Indian Affairs (“BIA”) Guidelines. 44 Fed. Reg. 67,584, 67,595 at D.2 (Nov. 26, 1979)⁴⁹.

Active efforts are required throughout the county DHS office’s involvement with the family. Where a county DHS office is not involved in a particular Child-Custody Proceeding, and the proceeding is not a voluntary placement as defined in the Act, Active Efforts must be both made and funded by the party seeking to effect an out-of-home placement (such as in a third-party custody action). *(II.B) (emphasis added)*.

The Michigan and Minnesota Agreements further provide eight examples of “active efforts.”

The Houlton Band of Maliseet Indians and the State of Maine Agreement has a much simpler version of “active efforts”: “Active Efforts” means active and thorough efforts by

⁴⁹ The 1979 Guidelines have been superseded by the new Guidelines and regulations.

the State and Tribe social services agencies to fulfill its obligations of ICWA and this Agreement and to keep the child in the home as a first priority.” (VII.B).

While some of the current Tribal-State definitions of “active efforts” may bring unique elements that are not within the “active efforts” definition in the new regulations, there is not one definition of “active efforts” in the Tribal-State Agreements that, standing alone, fulfill all of the requirements of the new regulations.

C. Best Interests

“Best interests of the child” has sometimes been asserted in a subjective manner to thwart the protections ICWA requires for keeping the Indian child with the Indian family, and utilizing ICWA and tribal placement preferences. ICWA was established by Congress to protect the best interests of Indian children through recognizing the need to keep the Indian family together and the prioritizing a child’s cultural development within his or her tribal community.⁵⁰ Though neither ICWA nor the new regulations define “best interests,” a few of the Tribal-State ICWA Agreements recognize the importance of a mutual understanding of this standard.

Here are different examples of “best interests:”

Best Interests of an Indian child means compliance with and recognition of the importance and immediacy of family preservation and using tribal ways and strengths to preserve and maintain an Indian Child’s family. The Best Interests of an Indian Child will support that child’s sense of belonging to family, Extended Family, clan, and tribe. Best Interests of an Indian Child are interwoven with the best interest of the Indian’s Child’s Tribe. Best Interests must be informed by an understanding of the damage that is suffered by Indian Children if a family and Child’s tribal identity is denied or if the child is not allowed contact with her or his family and tribe. *Congress has not imposed a “best interest” test as a requirement for Indian Child-Custody Proceedings, state “best interests” standards that are applied in circumstances involving non-Indian children are different than Best Interest of an Indian Child, and state “best interest” standards do not control either this Agreement or Indian Child-Custody Proceedings. Saginaw Chippewa-MI (II.F) (emphasis added).*⁵¹

“Best interests of the Indian child” means the use of practices in accordance with the federal Indian child welfare act, and other applicable law, that are designed to

⁵⁰ Guidelines, section M.1, p. 89.

⁵¹ The Minnesota Agreement is the same except it does not include the statement that the State’s best interest standard will not be applied to Indian children. *Minnesota (I.E.5).*

accomplish the following: (a) Protect the safety, well-being, development, and stability of the Indian child; (b) prevent the unnecessary out-of-home placement of the Indian child; (c) acknowledge the right of Indian tribes to maintain their existence and integrity which will promote the stability and security of their children and families; (d) recognize the value to the Indian child of establishing, developing, or maintaining a political, cultural, social, and spiritual relationship with the Indian child's tribe and tribal community; and (e) in a proceeding under this chapter where out-of-home placement is necessary, to prioritize placement of the Indian child in accordance with the placement preferences of this chapter. *Jamestown S'Klallam (II.7)*.

"Best Interests of the Indian Child" means the standard of review required under ICWA. Meeting the Best Interests of the Indian Child recognizes the importance of maintaining connections with the family and with the Tribe. *Houlton Band of Maliseet-ME (VII.C)*.

D. Case Plan

The case plan is often associated with "active efforts" in that active efforts must be used to assist in the development of a case plan with the parent or Indian custodian.⁵² Defining "case plan" in the Tribal-State Agreement may assist with a clear understanding of the scope of the case plan as well as the roles and responsibilities of the state and the tribe.

The case plan is a written plan, but the parties should determine which party should develop the plan with the parent or Indian custodian. In addition, the child's tribe should be included in the development of the case plan. The Minnesota Agreement provides for a jointly developed written plan in which "the focus shall be on family preservation and elimination of the issues underlying the child protection proceeding." *(I.E.6)*. It further requires that "the child's tribe,...the guardian ad litem and the child's foster care providers or representative of the residential facility, and where appropriate, the child" are involved in the development of the case plan. *Id.* The Minnesota Agreement involves the mental health provider as well where the "child is in placement solely or in part due to the child's emotional disturbance." *Id.*

The Houlton Band of Maliseet Indians and Maine Agreement simply defines "case plan" as "a written plan prepared by the Tribe's social services department that documents the reasons the child is under the jurisdiction of the Court and the steps that must be taken in order for the child to receive a permanent placement." *(VII.D)*.

⁵² Guidelines, section E.2, p. 40, and section L.1, pp. 77-78.

E. Child Custody Proceeding

This term is defined by ICWA as follows:

“child custody proceeding” shall mean and include—

- (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.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents. 25 U.S.C. § 1903(1).

There are a few Agreements that provide other meanings in addition to the ICWA definition. For example, the Saginaw Chippewa and Michigan Agreement defines “child custody proceeding” to also include “any third-party custody or *de facto* custody where custody of the Indian Child may be transferred to any individual other than the Indian’s Child’s Parent.” (III.I). The Mohegan and Connecticut Agreement add to the ICWA definition by broadly stating the proceeding is any legal action instituted by the State child and family services in court “alleging that a child is neglected, abused, uncared for, dependent, or from a family with service needs (as defined in Conn. Gen. Stat §46b-129) or petitioning the court for a termination of parental rights (as defined in Conn. Gen. Stat. §17a-112).” (I.3.A).

Some ICWA Agreements use the term “child custody proceeding” broadly throughout the Agreement to include not only (voluntary and involuntary) foster care placements and termination of parental rights, but also preadoptive or adoptive placements. ICWA, however, specifically refers only to a tribe’s right to transfer or to intervene in a case to foster care placements and termination of parental rights. 25 U.S.C. § 1911(b). The exact scope of tribal rights for transfer and intervention is significant and has been the subject

of litigation.⁵³ If applicable state law, state court rules, or the interpretation of federal law by the state court recognize a right of tribal intervention in any “child custody proceeding” – or in states where the ICWA right to transfer or intervene has been interpreted to not include preadoptive or adoptive placements, but the Tribal-State Agreement is interpreted as an agreement on jurisdiction permitted by ICWA section 1919(a)⁵⁴ – then a broad recognition of a tribe’s right to transfer or intervene in any “child custody proceeding” would be appropriate. Regardless, if the provision means that a state agency will not object to tribal intervention or transfer in these circumstances, this may, in practice, cause the provision to be implemented more broadly. This is further discussed at Section VI.B.1, below.

F. Citizen

The Jamestown S’Klallam Tribe Agreement with Washington is the only Agreement that defined “citizen.” The distinction between a “citizen” and a “member” is an important distinction for some tribes and is used to support the language of sovereignty and self-determination.

Citizen: CA recognizes that *the Jamestown S’Klallam Tribe considers its people to be citizens of the nation*. To the extent that this agreement references the term “member” as it is used in the state and federal Indian Child Welfare Acts, the terms are intended by the parties to have the same meaning. (II.2) (*emphasis added*).

The new regulations use the term “citizen” in the definition of an “Indian child,” and the Guidelines use the term “citizen” instead of “member” as the preferred term throughout that document. Use of the term “citizen” or “member” does not connote a different legal status on tribes or Indian individuals. However, some tribes and others prefer the term “citizen” over “member” because “citizen” may be seen to signify nationhood in a

⁵³ *Gila River Indian Community v. Department of Child Safety, Sarah H., Jeremy H., A.D.*, No. CV-16-0220-PR (Ariz. S.Ct., June 13, 2017), which can be found at: <https://turtletalk.files.wordpress.com/2017/06/gila-river-v-dcs-opinion.pdf> (last visited June 17, 2017). Among other things, this case held that: (1) ICWA does not provide a right for a tribe to transfer a child custody proceeding to its own tribal court if the request for transfer occurs after a termination of parental rights and only during a preadoptive or adoptive placement; (2) however, a tribe can seek permissive transfer to its tribal court under state law based on the tribe’s inherent sovereign interests over its Indian children; and (3) if a tribe intervenes during a termination of parental rights, that right will continue through the preadoptive or adoptive placement proceeding.

⁵⁴ Section 1919(a) authorizes states and Indian tribes “to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.”

stronger manner.

G. Consultation

The Tulalip Agreement with Washington State defines “consultation.” This term is extremely important to establish a mutual understanding of the parties’ tone for negotiation of its ICWA Agreement, and supports tribal sovereignty and self-determination. Such terms, which could be considered outside the purview of a Tribal-State ICWA Agreement, should be included if the term supports the parties’ clear understanding of their relationship and responsibilities.

“Consultation” between the state and tribal government shall include *real and full dialogues*, not just exercises to meet procedural requirements. Tribal - State consultation should be a *process of decision-making* that works cooperatively toward reaching a true consensus before a decision is made or action taken. *(VI.4) (emphasis added).*

H. Courtesy Supervision

The Navajo Nation Agreements with Utah and New Mexico, as well as the Tesuque Pueblo Agreement with New Mexico, define “courtesy supervision” as “the conduct of routine case activities by one agency at the request of another. Each request for supervision will include provisions regarding purpose, conditions, time lines, goals, and appropriate reporting and follow up.” *(II).*

I. Descendant Child

“Descendant child” is not defined by either ICWA or its regulations. However, the Saginaw Chippewa Agreement with Michigan defines the term as an Indian child not eligible for enrollment.

Descendant Child means a child who has Indian ancestry but who is not eligible for enrollment in a tribe or whose eligibility for enrollment cannot [be] determined. *Saginaw Chippewa-MI (II.L).*

The Agreement treats a “Descendant child” similarly to the way that it treats a child who is eligible for enrollment by requiring the state to take into account the Tribe’s recommendations for placement.

J. Disrupted and Dissolved Adoption

The Navajo Nation Agreements with Arizona, Utah and New Mexico, and the Tesuque Pueblo Agreement with New Mexico, provide definitions for disrupted and dissolved adoptions:

“Disrupted adoption” means an adoption that ends prior to finalization.

“Dissolved adoption” means a finalized adoption that has been terminated. (II).

These Agreements require the state child welfare staff to provide notice in writing to the Navajo Nation where there has been a disrupted or dissolved adoption of a child that the state knows or has reason to believe is a Navajo child. *Navajo-AZ (IV.A.4)*.

K. Domicile

Domicile is not defined in ICWA, however the new regulations provide the following definition for “domicile”:

(1) 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. (2) For an Indian child, the domicile of the Indian child’s parents or Indian custodian or guardian. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child’s custodial parent. 25 C.F.R. § 23.2.

To the extent that the Tribal-State Agreements define “domicile,” the new regulatory definition will likely supersede those definitions, unless the intent of the definition is to define jurisdictional issues, something which is permitted by § 1919(a).

The Jamestown S’Klallam and Washington State Agreement might be viewed as one such example as it expands the regulatory definition of key jurisdictional terms to include when the parents have died, or when the child is a ward of the tribal court:

A child born in wedlock takes the parents domicile. A child born out of wedlock takes the domicile of his or her mother. [*Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. [30] at 43-48 [(1989)]. If a child has no parents, such as when the parents have died, then the child takes the domicile of the person who stands in *loco parentis*, such as a guardian or custodian. *In re S.S.*, 657 N.E.2d 935 (Ill. 1995). The domicile of a child who is a ward of the tribal court is the reservation. *In re D.L.L.*, 291 N.W.2d 278 (S.D. 1980); H.R. REP. NO. 95-1386, at 21 (2d Sess. 1978). (II.9).

L. Extended Family

This term is defined in the Act and its regulations as:

“Extended family member” shall be as defined by the law or custom of the Indian child’s tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child’s grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent. 25 U.S.C. 1903(2), and 25 C.F.R. § 23.2.

Some of the Agreements expand the definition of “extended family” according to the Tribe’s cultural understanding of the term:

Extended family means the child’s grandparent, aunt or uncle, first and second cousins, stepparent, *godparent, or other individual approved by consensus through a Navajo family clan.* *Navajo-AZ (II.F) (emphasis added).*

The Navajo Agreement with Utah also includes “or other individual approved by consensus through Navajo clan or kinship.” *(II.E)*. The Houlton Band of Maliseet Indians’ Agreement with Maine states that the Tribe shall define “extended family” and if the Tribe does not, the term reverts back to the ICWA definition. *(VII.J)*.

These tribal definitions of “extended family” in these examples go beyond ICWA’s term to provide an improved or higher standard to be utilized by state child welfare staff.

M. Good Cause

Both the Minnesota and Michigan Agreements define “good cause” in the definition sections as it relates to “good cause not to follow the placement preferences” and “good cause not to transfer jurisdiction to tribal court.” *Minnesota (I.E.15) and Michigan (I.Q and R)*. Both of these definitions do not entirely track the new regulatory framework on these issues. See 25 C.F.R. §§ 23.118 (how good cause not to transfer jurisdiction to tribal court is made) and 23.132 (how a good cause not to follow placement preferences is made).⁵⁵

The Minnesota and Michigan definitions seem to direct the state court as to what constitutes “good cause.” To the extent that these definitions provide greater protection to parents, they might be enforceable through ICWA sections 1919(a) and 1921. Generally, however, a Tribal-State Agreement does not have the authority to redefine “good cause” for the court. Another way to utilize definitions of “good cause” in a Tribal-State Agreement would be to restrict the parties to the Agreement from objecting to tribal placement preferences or tribal court jurisdiction absent certain circumstances,

⁵⁵ These issues are dealt with in this report at Sections VI.B.1.a (good cause not to transfer) and VIII.D (good cause not to follow placement preferences), below. The Michigan and Minnesota State Indian Child Welfare Laws also address these issues in substantively the same manner as the Agreements.

such as if the tribe agreed to the objection. The parties can decide to limit the state child welfare staff's discretion of how it will treat "good cause" and require collaboration with the tribe on such findings.

N. Indian Child

ICWA is only applicable where the child is an "Indian child." ICWA defines "Indian child" as:

[A]ny unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. 25 U.S.C. § 1903(4); see also 25 C.F.R. § 23.2.⁵⁶

The definition acknowledges that an Indian child may not have an opportunity to establish his or her political relationship with a tribe. This definition protects that political tie through the parent's citizenship or the child's eligibility.⁵⁷

Most of the Agreements utilize this definition, or merely refer to the ICWA definition of "Indian child." *See, for example, Navajo-AZ (II.G); Houlton Band of Maliseet-MN (VII.O).* The Houlton Band of Maliseet Agreement also adds "Alaskan native group" to the definition.

The Saginaw Chippewa and Michigan Agreement provides additional detail about the term "Indian Child" in its definitions section that includes termination of parental rights and the existing Indian family exception, which is generally consistent with the regulations:

"Indian Child" "means an unmarried person who is under age eighteen and is either (a) a member of an Indian Tribe or (b)...eligible for membership in a Indian tribe and is the biological child of a members of an Indian tribe..." 25 U.S.C. § 1903 (4). *A termination of parental rights does not sever the child's membership or eligibility for membership in a tribe or the Child's other rights as an Indian. This statutory definition of an Indian Child applies without exception in any Child-Custody Proceeding. A tribes' determination that a child is a member or eligible for membership in the tribe is conclusive.*

The applicability of the Act to a Child-Custody Proceeding in no way depends

⁵⁶ See Section V.F, above. The regulations define "Indian child" using the term "citizen" as well as "member".

⁵⁷ Guidelines, section B.1, p. 10.

upon whether an Indian child is part of an *“existing” Indian family* or upon the level of contact a child has with the child’s Indian Tribe, reservation, society, or off- reservation community. *The Parties expressly reject any application of the minority judicial rule recognized as the “Existing Indian Family Exception.” (II.V) (emphasis added).*

In addition, many of the Agreements also define “Indian child” with the name of the specific tribe; in other words, the term would be the name of the tribe instead of “Indian” child, such as “Alabama Coushatta Tribe of Texas Child.”

A Snoqualmie Tribal child is an unmarried person under the age of 18 who is (a) a member of the Snoqualmie Indian tribe; or (b) is eligible for membership in the Snoqualmie Indian tribe (as either an adopted or regular member) and is the biological child of a member of the Snoqualmie Indian tribe. 25 U.S.C. § 1903(4); Snoqualmie Tribal ICW Act, STC 13.2.4.0; RCW 13.38.040(7). The Snoqualmie Tribe shall confirm whether or not a child is a Snoqualmie Tribal child for purposes of this Agreement. *Snoqualmie-WA (II).*

O. Reservation

“Reservation” is an important term for a Tribal-State Agreement: whether a child is domiciled or residing on or off the reservation will determine whether the tribal court has exclusive or concurrent jurisdiction over a child custody proceeding involving an Indian child. 25 U.S.C. § 1911(a) and (b).

ICWA defines “reservation” as the term “Indian country” is defined by 18 U.S.C. § 1151, which includes generally, lands within the boundaries of an Indian reservation, dependent Indian communities, and Indian allotments. In addition to “Indian country” lands, the Act further provides that a reservation includes “any lands...title to which is held by the United States in trust for the benefit of any Indian Tribe or individual or held by any Indian Tribe or individual subject to a restriction by the United States against alienation.” 25 U.S.C. § 1903(10).

The Southern Ute-Colorado Agreement defines “the Southern Ute Indian Reservation, as established in treaties and agreements between the United States Government and the Ute people, is located in southwestern Colorado.” (*P. 2*). The Agreement between Navajo and Utah provides language similar to the “Indian country” definition:

The “Navajo Nation” is defined in the ICWA as all land within the limits of the Navajo Reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation; all dependent Navajo

communities within the borders of Utah; all Navajo allotments, the Indian titles to which have not been extinguished, including rights-of-way running through same; and any other lands, title to which is either held by the United States for the benefit of the Navajo Nation or Navajo individuals, or held by the Navajo Nation subject to a restriction by the United States against alienation. (VI.2).

None of the Tribal-State Agreements provide any more detailed reference or explanation of the meaning of “reservation” as it applies to that particular tribe. However, an Agreement could provide specific information about what constitutes the tribe’s reservation for purposes of the ICWA Agreement. This may assist the state child welfare staff to determine how to handle a referral and investigation and how to allocate between the state and tribal resources.

P. Termination of Parental Rights

“Termination of parental rights” or “TPR” is defined by ICWA within the “child custody proceeding” definition. TPR is defined simply as, “any action resulting in the termination of the parent-child relationship.” 25 U.S.C. § 1903(1)(ii); *and see, for example, Maliseet-ME (VII.U)*. The Minnesota Agreement, however, provides a more lengthy definition that requires following ICWA as well as state law:

“Termination of Parental Rights” (“TPR”) means any action resulting in the termination of the parent-child relationship. 25 U.S.C. § 1903(1)(ii). No order for *involuntary termination of parental rights* shall be made in the absence of a determination, supported by *evidence beyond a reasonable doubt*, including testimony of a qualified expert witness or 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). In addition, the petitioner must prove *beyond a reasonable doubt* one or more grounds for termination of parental rights pursuant to state statute. Minn. Stat. § 260C.301 (2006). Termination of parental rights *includes any voluntary or involuntary action* as part of a step-parent adoption and an adoption consent pursuant to Minn. Stat. § 259 (2006); see also 25 U.S.C. § 1913. *Minnesota (I.E.38)*.

This provision seems to provide a standard for the state court to use regarding TPR. A Tribal-State ICWA Agreement will likely not have authority to bind the state court in regard to the requisite standard of proof under state law. This provision could be better written to require state child welfare staff to prepare reports, in collaboration with the Tribe, and to limit the State’s discretion to file a TPR when the Tribe believes it to be inappropriate. Note that the regulations provide detailed requirements for parental consent for a voluntary TPR at 25 C.F.R. §§ 23.125-128, and also clarifies the standard of

evidence for TPR at 25 C.F.R. § 23.121.

Q. Tribal Home

Tribal home is not defined by ICWA or the regulations. The Confederated Goshute Tribe and Northwestern Band of the Shoshone Nation Agreements with the State of Utah provide a definition of the term, which refers to a tribally licensed home for placement purposes. The State of Utah must give “full faith and credit to the Tribe’s certification or licensure...according to Tribal foster home standards.”

For purposes of this MOU, a Tribal home is defined as a home in which the head of household, spouse of the head of household, or the child's primary caregiver is residing in the home and is either an enrolled member of the Tribe or is eligible for membership in the Tribe. A Tribal home is also defined as a home in which (1) the head of household, spouse of the head of household, or the child’s primary caregiver is residing in the home and is either a member of, or eligible for membership in, any Federally-recognized Tribe; and (2) the home is located on the [Tribe’s] Reservation. *(P.4.)*

VI. JURISDICTION

ICWA recognizes a tribe's exclusive jurisdiction over an Indian child custody proceeding involving an Indian child domiciled or residing within the reservation, and where an Indian child is a ward of the tribal court; and when the child is domiciled or residing outside of the reservation, the tribe and the state have concurrent jurisdiction over the Indian child custody proceeding. 25 U.S.C. § 1911(a) and (b). The residence or domicile⁵⁸ of the Indian child, and whether that is within the boundaries of the reservation,⁵⁹ must first be established to determine jurisdiction. 25 C.F.R. § 23.110.

Several of the ICWA Tribal-State Agreements provide a general statement regarding tribal jurisdiction, usually in the introductory sections of the Agreement and prior to any discussion on exclusive or concurrent jurisdiction. Some of the Washington State Agreements define the term "jurisdiction" generally as follows: "the legal authority of a state or tribal court to hear a juvenile dependency action or other related juvenile matter. The Tribe and [the state social service agency] acknowledge that either or both may be involved in providing services to Tribal children regardless of which court has jurisdiction over a child's case." *Suquamish (IV); Snoqualmie (III); Samish (IV); Stillaguamish (IV); and Makah (IV)*.

The Paiute Indian Tribe Agreement with Utah provides specific information on the Tribe's governance structure and *limits* to its jurisdiction. The Agreement states that the Tribe "is a Public Law 280 (67 Stat. 588) tribe subject to the criminal jurisdiction of the State of Utah. The Tribe does not maintain an independent civil or criminal tribal court system and does not exercise exclusive jurisdiction over Indian child custody proceedings under ICWA (25 U.S.C. 1911)."⁶⁰ (P. 1).

This section will discuss how the state and tribal parties utilize ICWA's requirements concerning exclusive and concurrent jurisdiction, including a tribe's power to transfer and intervene in cases, within their ICWA Agreements.

A. Exclusive jurisdiction

ICWA provides that:

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceedings involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such

⁵⁸ The terms "domicile" and "residence" are discussed in Section V.K, above.

⁵⁹ See Section V.O, above regarding the term "reservation."

⁶⁰ But see note 21, above.

jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child. 25 U.S.C. § 1911(a).

The majority of Agreements reiterate this section of the Act. *Confederated Goshute-UT (p.6)*, *Northwestern Shoshone-UT (p. 6)*, and *Skull Valley Goshute-UT (p. 6)*; *Suquamish-WA (III)*; *Minnesota (I.C.1)*; and *Navajo-NM and Tesuque Pueblo-NM (VI.C)*. There are several tribes however that do not have their own tribal court system or other adjudicatory body and have chosen not to exercise exclusive jurisdiction.

The Cowlitz Tribe does not have its own court system.⁶¹ In its Agreement with Washington State, the parties have agreed to work together and involve the Tribe's social service agency in all steps of the ICWA process, and amend the Agreement once the Tribe has an established court system. *Cowlitz-WA (V)*.

The Houlton Band of Maliseet in Maine does not have its own court system either. The Houlton Band of Maliseet however has agreed to develop agreements with the Penobscot and Passamaquoddy Tribal Courts so that it does not have to rely on the state court system. The Agreement acknowledges that the Tribe's jurisdiction extends to all Tribal children, "regardless of whether domiciled on the Reservation or not.... The Parties agree that it is in the best interest of the Indian Children and families and the Tribe for the Tribe to take jurisdiction of existing cases and all future cases as contemplated by ICWA." *(IV)*.

In addition, there are a few Agreements that recognize instances in which "jurisdiction is otherwise vested in the State by existing Federal law." 25 U.S.C. § 1911(a). This phrase has been interpreted by some courts to allow Public Law 280⁶² states to take concurrent

⁶¹ The Cowlitz Agreement was entered into in 2010 and it is not clear whether a Tribal Court has yet been developed. See <https://www.cowlitz.org/> (last viewed on December 23, 2016).

⁶² Public Law 280, codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360, gave certain states criminal and limited civil jurisdiction over Indian country lands and reservations. There have been other federal laws and land settlement acts that have also given some states certain jurisdiction over Indian country lands and reservations. Whether Public Law 280 or those other federal acts have provided states with concurrent jurisdiction on the reservation in Indian child welfare matters is disputed. See *Doe v. Mann*, 415 F.3d 1038 (9 Cir. 2005) (holding that Public Law 280 gave California civil adjudicatory jurisdiction over ICWA cases pursuant to ICWA section 1911(a)); *but see State ex rel. Dep't Human Servs. V. Whitebreast*, 409 N.W.2d 460 (Iowa 1987) (holding that state Public Law 280 jurisdiction did not apply to involuntary child welfare proceedings because they concern tribal civil regulatory jurisdiction); *see also California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (explaining states' limitations over tribal regulatory jurisdiction, among other things). Where Public Law 280 or other federal acts exist, however, tribes are permitted under ICWA to reassume exclusive jurisdiction from the state. 25 U.S.C. § 1918(a). A tribe in a Public Law

jurisdiction over Indian children residing or domiciled within the reservation.⁶³

In the case of the Paiute and Utah Agreement, the parties affirmatively state that the Tribe does not have a Tribal Court, Public Law 280 applies to the Tribe,⁶⁴ and the Tribe “does not exercise exclusive jurisdiction over Indian child custody proceedings under ICWA. Accordingly, the parties to this MOU recognize and agree that the Tribe’s children and families are entitled to the same protection and services from DCFS and the juvenile courts of the State of Utah as are afforded other children and families in Utah, whether they reside or are domiciled on or off the reservation.” There are certain protections and rights recognized under ICWA that may not be recognized under state laws for child services, such as providing culturally appropriate services. A tribe agreeing to such a provision should understand how ICWA requires higher levels of protection for and involvement with tribes.

Several of the Washington State Agreements handle the Public Law 280 issue differently. Washington is a Public Law 280 state and the state has assumed jurisdiction over Indians on reservation lands including jurisdiction over adoption proceedings. RCW 37.12.010. However, in the State’s ICWA legislation, the State has also subscribed to ICWA’s exclusive and concurrent jurisdiction mandates. RCW 13.38.060. Interestingly, some of the Washington Agreements provide differing statements on whether the tribes have exclusive jurisdiction in this Public Law 280 state.

The Suquamish, Snoqualmie, Stillaguamish, Makah and Tulalip Agreements all make clear and explicit the statement that the “tribal court has exclusive jurisdiction over any child custody proceeding involving an Indian child who resides on or is domiciled on the Tribe’s reservation.” *Suquamish (IV), Snoqualmie (II), Stillaguamish (VI.1), Makah (VI.1), Tulalip (IV); see also Shoalwater Bay, p. 1 (the Tribe has jurisdiction “as defined in the ICWA”).*

There are other Tribal Agreements in Washington State that do not make any jurisdictional statement, such as the Port Gamble S’Klallam, Kalispel and Samish Agreements. The Kalispel Agreement however does state that the Tribe shall investigate where the child is a member and domiciled on the reservation. (3).

The Lummi, Quinault and Jamestown S’Klallam Agreements are unusual as they each seem to point out a conflict between the State’s position on exclusive jurisdiction versus

280 state, or where another federal law has endowed a state with jurisdiction over tribal lands, should determine whether it has reassumed, or would like to reassume, its exclusive jurisdiction from the state.

⁶³ Guidelines, section F.1, p. 45, note 41.

⁶⁴ However, see note 21.

the Tribes' positions. The Quinault Agreement provides:

Notwithstanding the decision in *Comenout v. Burdman*, it is the position of the QIN [Quinault Indian Nation] that it has retroceded jurisdiction of child welfare proceedings from the state of Washington by way of tribal resolution in the mid 1960's. In addition, the tribe reiterates that it currently does not consent to the state's concurrent jurisdiction under RCW 13.38.060. Accordingly, CA [Washington Department of Social and Health Services Children's Administration] acknowledges that it is the position of QIN that jurisdiction over child welfare proceedings involving Quinault Indian children on the Quinault reservation is exclusive and CA does not take a position with regard to that issue for purposes of the MOU. (VI.1).

The Lummi and Jamestown S'Klallam Agreements state:

The Nation and CA enter into this MOA based on the premise that pursuant to RCW 37.12.010(5), CA and the Nation have concurrent civil jurisdiction with respect to child welfare matters covered by this MOA. It is further premised on the Nation's right under the state and federal Indian Child Welfare Acts to intervene at any point in a State Juvenile Court proceeding involving a child who is a member of the [] Nation or is eligible for membership and is the biological child of a member.

The parties understand that the Nation believes it has exclusive jurisdiction over child welfare matters involving [Nation] children, in circumstances involving termination of parental rights, involuntary foster care placement and adoption proceedings, application of dependency neglect, children in need of supervision and child abuse laws. *Lummi (III) and Jamestown S'Klallam (II.1)*.

The Lummi Agreement goes further and pronounces Tribal law stating that the Nation's court has jurisdiction over their children "wherever they may reside, consistent with Title 8 of the Lummi Code of Laws." (III).

The Maine Agreement with the Penobscot does not provide a clear statement of exclusive jurisdiction to the Tribe.⁶⁵ It states that: "Through this agreement the responsibility of the Penobscot Indian nation for the receipt and investigation of such

⁶⁵ The Maine Indian Claims Settlement Act of 1980, section 1727, mandates that the Penobscot must petition the Secretary for approval to assert exclusive jurisdiction over Indian child custody proceedings. Otherwise, the State shall have such exclusive jurisdiction. The Settlement Act allows the Houlton Band of Maliseet to mutually agree to assertion of jurisdiction over Indian child welfare matters.

referrals regarding Indian children as defined by the Indian Child Welfare Act who reside on the reservation is recognized.” (III.A). The Houlton Band of Maliseet Agreement with Maine, however, provides stronger language that the Tribe has jurisdiction, without delineating exclusive or concurrent jurisdiction under ICWA:

The parties acknowledge and agree that the Tribe has jurisdiction over child custody proceedings as described by ICWA. This jurisdiction extends to all of the Tribe’s children who are members or eligible for membership under the Tribe’s definition, regardless of whether domiciled on the Reservation or not. (IV).

B. Concurrent Jurisdiction

Where an Indian child is neither residing nor domiciled within the reservation, then the tribe and the state may exercise concurrent jurisdiction. 25 U.S.C. § 1911(a) and (b). Even though a state may exercise jurisdiction initially, even concurrent jurisdiction is presumptively tribal jurisdiction.⁶⁶

Where a state court exercises its concurrent jurisdiction, the court “shall transfer such proceeding to the jurisdiction of the tribe.” Id. § 1911(b). However, the transfer may be subject to a court determination that there is good cause not to transfer the proceeding, a parent may object to the transfer, or a tribal court may decline to take the matter. Id. If a matter proceeds in a state court and is not transferred to the tribal court, the Indian custodian and the tribe have the right to intervene at any point in the proceeding. Id. § 1911(c).

As noted previously, the specific language in ICWA’s provisions on transfer and intervention rights refer to (voluntary and involuntary) foster care placements or the termination of parental rights to the Indian child. Id. § 1911(b). The Guidelines state that tribes possess inherent jurisdiction over domestic relations, which includes child welfare issues beyond the scope of ICWA.⁶⁷ Therefore it would be considered a best practice to allow the Indian custodian and the tribe to intervene in other preadoptive and adoptive proceedings involving Indian children.⁶⁸ However, the issue can be complicated considering this is a decision that a state court would make and is dependent upon the facts of the case.⁶⁹

The following sections provide analysis regarding transfer and the exceptions for transfer, and intervention rights as found in the Agreements.

⁶⁶ *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989).

⁶⁷ Guidelines, section F.2, p. 47.

⁶⁸ Id.

⁶⁹ This issue is currently being litigated, see notes 53 and 54.

1. Transfer

Generally, the Agreements reiterated the language of ICWA regarding transfer. The Navajo Agreements with Arizona and Utah, and the Navajo and Tesuque Pueblo Agreements with New Mexico, reiterated that language, but also provided more:

- A. The TRIBE agrees to make reasonable efforts to file a motion to transfer jurisdiction in children's court proceedings involving a Pueblo of Tesuque child. A delay in moving to transfer may occur if insufficient information has been provided to the TRIBE to verify membership, eligibility for membership or status of a child or parent. Notwithstanding any other provision of this Agreement, the TRIBE may seek to transfer at any point in the proceeding.
- B. If the TRIBE declines or fails to transfer in a particular case, CYFD [New Mexico Children, Youth and Families Department] shall continue to inform the TRIBE about the State court proceeding involving the child by providing the TRIBE with notice of all hearings in that case. With the consent of the court, CYFD shall also provide copies of all motions, orders, petitions and other pleadings filed with the court. *(VI)*.

The Navajo Agreements with Arizona and Utah, and the Navajo and Tesuque Pueblo Agreements with New Mexico also provide that: "It shall be the policy of CYFD that a petition to transfer by the TRIBE will be favored whenever permitted by ICWA. It shall be the policy of the TRIBE to request transfer only upon a determination that such transfer is in the best interests of the Pueblo of Tesuque child and family. *(VI)*; *see also Navajo-AZ (VI) and Navajo-UT (VI.B)*. This provision could be read as adding a burden to the Tribe by requiring the Tribe to make a determination that the transfer is in the best interests of the child, which ICWA does not require. Generally, such an issue would only be raised if there is an objection to the transfer. However, this provision could be read as deferring to the Tribe pursuant to its processes and authorities.

There were several Agreements that include language expanding the right to transfer beyond foster care placement and termination of parental rights proceedings and provided transfer to "any child custody proceeding" or "all child custody proceedings". *See Southern Ute-CO (III.A)*; *Saginaw Chippewa-MI (III.G.I)*; and *Minnesota (I.C.3.b)*. The Washington Agreements⁷⁰ provided the right to transfer to any "dependency action" or proceeding. However, the Agreements did not define the scope of a dependency proceeding, but it is assumed that the parties interpret this term broadly to include all

⁷⁰ The Tulalip Agreement, however, does specify "child custody proceeding" generally. *(IV)*.

child custody proceedings as defined by ICWA.⁷¹

Expanding the right to transfer to any child custody proceeding is supportive of tribal authority over Indian children more broadly. However, it is unknown whether ICWA section 1919(a) would be interpreted as broad enough to encompass an expansion of the proceedings covered by these provisions, assuming that the state court would otherwise not interpret ICWA so broadly.⁷² The state child welfare staff however can support a transfer to tribal court of any child custody proceeding beyond ICWA's limitations. The language in the ICWA Agreement should be clear that the state child welfare staff will support a transfer, instead of merely stating that transfer shall apply to any child custody proceeding.

Finally, a few of the Washington Agreements provide cooperative language in which the State child welfare staff will assist the Tribe to transfer the matter to tribal court:

The [Tulalip] Tribes has the right to request transfer of jurisdiction at any time of any state juvenile court proceeding involving an Indian child as defined by tribal, state and federal ICWAs. CA shall timely notify the Tribes of the filing of any such proceeding, and assist and support the Tribes in seeking transfer to the Tulalip Tribal Court. Within two weeks of the transfer the CA shall provide the case file to the Tribes. *Tulalip (V)*.

None of the Agreements provide a clear mechanism that will allow the Tribe to assert jurisdiction over an Indian child domiciled off the reservation before an action is filed in a state court.⁷³

a) **Good Cause Not to Transfer**

The Act and the regulations allow a state court to determine, on a case by case basis,

⁷¹ The Revised Code of Washington under Chapter 13.34, Juvenile Court Act—Dependency and Termination of Parent-Child Relationship, does not define a “dependency proceeding” but does define that a dependent child is one that is abandoned, abused or neglected, does not have a parent or custodian or is under foster care. RCW 13.34.030. This would seem to encompass the definition of “child custody proceeding” under ICWA. However, Washington’s ICWA, RCW 13.38.080, defines the right to transfer as to only involuntary and voluntary foster care placements and termination of parental rights proceedings. Thus, there is a lack of clarity when comparing Washington State Law and the Washington-Tribal ICWA Agreements regarding the right to transfer.

⁷² See notes 53 and 54, above.

⁷³ Case law on whether a state court will provide full faith and credit to a tribal court judge when the tribe has reached out and made an off-reservation child a ward of the tribal court, thereby asserting exclusive jurisdiction for an off-reservation child, is mixed. South Dakota says no, *see In re J.M.D.C.*, 739 N.W.2d 796 (S.D. 2007); *but see Alaska v. Native Village of Tanana*, 249 P.3d 734 (Alaska 2011) (answering yes in some circumstances).

whether good cause exists not to transfer a child custody proceeding to a tribal court. The new regulations further provide certain procedural protections for the court's good cause determination.⁷⁴ The regulations require that the reasons not to transfer for good cause must be on the record, either in writing or orally, and provided to the parties with an opportunity to be heard by the court on whether or not good cause exists. 25 C.F.R. § 23.118.

In addition, the regulations require that a state court *cannot* consider the following elements in making a decision not to transfer based on good cause:

- (1) Whether the foster-care or termination-of-parental-rights proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage;
- (2) Whether there have been prior proceedings involving the child for which no petition to transfer was filed;
- (3) Whether transfer could affect the placement of the child;
- (4) The Indian child's cultural connections with the Tribe or its reservation; or
- (5) Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems. 25 C.F.R. § 23.118.

The Act and the regulations do not provide a standard of evidence for a court's good cause consideration; the Guidelines recommend a clear and convincing standard of evidence.⁷⁵

Several of the Agreements give parameters similar to the new regulations – but none to the same extent. The Southern Ute and Colorado Agreement requires a request for transfer to be on the record and places the burden of establishing good cause on the party that opposes the transfer. *(III.A, B, and D)*. In this Agreement, the court cannot consider socio-economic conditions or any perceived adequacy of tribal social services or judicial systems. *(III.E)*. The Minnesota Agreement also requires that socio-economic conditions and the perceived adequacy of tribal service cannot be considered in the good cause consideration. *(I.C.3.b)*.

The Minnesota Agreement further states that the determination is a "fact-specific inquiry to be determined on a case-by-case basis," and that the court *may deny* a petition to transfer, upon a finding of any one of the following:

- (a) The Indian child's tribe does not have a tribal court as defined by the Indian

⁷⁴ See Guidelines, sections F.4, 5, and 6, pp. 48-51, and 25 C.F.R. § 23.118.

⁷⁵ Guidelines, section F.5, pp. 49-50.

- Child Welfare Act to which the case can be transferred and no other Tribal Court has been designated by the Indian child's tribe... The Indian Child Welfare Act defines "tribal court" broadly to include courts and "any other administrative body of a tribe which is vested with authority over child custody proceedings." 25 U.S.C. § 1903(12);
- (b) The petition is inexcusably filed when the proceeding is already at an advanced stage. The parties understand that fundamental tribal values may guide the timing by a tribe to petition for a transfer; or
 - (c) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses and the tribal court is unable to mitigate the hardship by any means permitted in the tribal court's rules. Without evidence of undue hardship, distance alone should not defeat transfer. *Minnesota (I.C.3)*.

The ICWA Tribal-State Agreement gives the parties an opportunity to memorialize the state agency's willingness to support a transfer to the tribal court. The language of such a provision in an Agreement should also be directed to the actions of the parties in the Agreement, and not just to the court, as it is uncertain whether a state court would conclude that it is bound by a Tribal-State ICWA Agreement on an issue such as good cause. On the other hand, ICWA section 1919(a) provides that a Tribal-State ICWA Agreement can address the division of jurisdiction between a tribe and a state.⁷⁶

b) Parental Objection

The state court shall transfer the proceeding "absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe." 25 U.S.C. § 1911(b). The few cases that discuss the limitations to the right to transfer a case to the tribal court merely mention the language of ICWA, which states that transfer shall occur "absent objection by either parent." *See Minnesota Agreements (I.C.3.b.2)*.

c) Tribal Court Declines Jurisdiction

Transfer will not occur if the tribal court declines jurisdiction. 25 U.S.C. § 1911(b). The Southern Ute and Colorado Agreement assumes that tribal court is willing to accept transfer: "When a request for transfer has been made, it shall be assumed that the tribal court is willing to accept transfer of the case unless the tribal court files a written statement with the state court or agency declining jurisdiction within a reasonable amount of time." *(III.C)*.

If the Confederated Goshute Tribal Court declines the transfer from the State of Utah, the Tribe's:

⁷⁶ See note 54, above.

declination must be provided to the State within 45 days of the filing of the petition to transfer. The Tribe's declination must be a court order signed by the Tribal judge and either the Tribal Chairman or authorized representative in order to be valid. If the Tribe accepts jurisdiction, such acceptance must be provided to the State within 45 days of the filing of the petition to transfer. The Tribe's acceptance must be a court order signed only the Tribal judge in order to be valid. *(P. 5)*.

ICWA does not provide any timelines that would limit a Tribe's timeline for accepting a transfer of jurisdiction, contrary to the Confederated Goshute-Utah provision. However, the regulations allow the state court to request a timely response from the tribe. 25 C.F.R. § 23.116.

2. Intervention

"In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding." 25 U.S.C. § 1911(c). The Agreements generally reiterate this right to intervene at any point in the proceeding. As mentioned regarding the right to transfer, some of the Agreements broaden the right to intervene to all child custody proceedings.

Some of the Agreements provide additional procedures regarding the right to intervene, and how the Tribe will be kept informed if the Tribe chooses not to intervene.

[W]hether or not Nation intervenes, DCS [Arizona Department of Child Safety] will request the court to endorse the NATION on all minute entries concerning the case and will provide copies of all pleadings filed by DCS. Until the NATION legally intervenes, DCS's counsel will send all pleadings to the address listed in Section III.F. If and when the NATION intervenes, DCS's counsel will send pleadings to the NATION's counsel. *Navajo-AZ (V.A)*.

Tribal rights:

1. ICWA grants the Tribe the right to intervene in any child custody proceedings under ICWA (i.e., foster care placements, termination of parental rights, pre-adoptive placements, and adoptive placements) at any point in the case.
2. When the Tribe intervenes they become a party to the proceeding and have the same rights as any other party. For example, the Tribe has the right to counsel, the right to notice, the right to access all documents filed with the court, the right to present its own witnesses or cross examine witnesses, the right to retain counsel if it chooses, and the right to appeal.

3. The Tribe has the right to attend the same meetings as any other party in the proceeding, including any Child and Family Team Meetings, mediations, and discussions.
4. If the Tribe declines jurisdiction, the Tribe still will have the right to participate as an interested party or to intervene at any point in the proceeding. The right to intervene extends to voluntary as well as to involuntary proceedings. *Skull Valley-UT (p. 3-4).*

The Penobscot and Maine Agreement relies on the state court to “assess intervenor status” but does not explain what that assessment entails. *(P. 5).* This statement would seem to contradict ICWA’s clear mandate that a tribe can intervene at any time during a foster care placement or termination of parental rights proceedings.

Of particular note, the Lummi Tribe and Washington Agreement recognizes the possibility of permissive tribal intervention for children who do not meet the Indian child definition. *(III).* The Snoqualmie and Washington Agreement states that Snoqualmie Tribal Law *requires* the Tribe to intervene. *(II).*

VII. CHILD WELFARE PROCEEDINGS

This section provides analysis about how tribal and state child welfare staff address provisions in ICWA that apply to state court activities in the ICWA Tribal-State Agreements. The enforceability of ICWA Agreements when they address court procedures is not entirely settled; an Agreement's provisions could be incompatible with a court's legal obligations under the Act and its regulations. However, regardless, a tribe and a state can agree to work together to provide supporting documents for a court's determinations, and agree not to challenge tribal determinations of jurisdiction and citizenship, among other things, which is what makes an ICWA Agreement vital to the relationship between a tribe and a state.

A. Determination of Who is an "Indian Child"

ICWA applies to an "Indian child" that is the subject of a child custody proceeding. ICWA defines "Indian child" as an unmarried person under 18 who is a member of an Indian tribe, or is eligible to be a member of an Indian tribe and is the biological child of a member of an Indian tribe. 25 U.S.C. § 1903(4); 25 C.F.R. § 23.2. The majority of ICWA Tribal-State Agreements restate this definition.⁷⁷

The new regulations establish procedures that a state court will utilize in its determination of whether there is a reason to know that a child is an "Indian child." 25 C.F.R. § 23.107. These procedures apply to any voluntary, involuntary or emergency proceeding. *Id.*⁷⁸ This section will review Agreements that have provided procedures for child welfare staff to support the court's determination of whether a child is an "Indian child."

In general, the Agreements that include this issue state that the tribe is the only party that can determine member or citizenship status. The Southern Ute and Colorado Agreement requires the "Indian child" determination to be made "in accordance with the Constitution of the Southern Ute Indian Tribe.... All questions of membership...shall be decided by the tribe and such decisions shall be conclusive and irrebuttable." *(II.C); see also Navajo-UT (III.A); Tesuque Pueblo-NM (III.B); Navajo-NM (III.B); Navajo-AZ (III.B).*

The Navajo Agreement with Arizona, but not the Navajo Agreements in New Mexico and Utah, requires verification of enrollment of the child by the Tribe for ICWA to apply and not simply that that child is a member or eligible for membership and the child of a member, before ICWA will apply. The Agreement states that "[v]erification of enrollment is necessary to determine whether the ICWA applies, and ultimate responsibility for

⁷⁷ "Indian child" is dealt with in the definitions section at V.N, above.

⁷⁸ See also Guidelines, sections B.1 and 2, pp. 9-15.

verification rests with the NATION.” (III.B). However, it is contrary to ICWA to exclude a child who is eligible to be a member of an Indian tribe and is the biological child of a member of an Indian tribe as that is part of the definition of “Indian child” in ICWA. 25 U.S.C. § 1903(4); 25 C.F.R. § 23.2. It is also the case that enrollment and membership are not always synonymous. In some tribes, a person can be a member without being enrolled. Thus, it is better to use the term “member,” rather than referring to “enrollment,” to avoid any confusion about when the Act applies.

The Agreements often include the tribal point of contact for the membership or citizenship determination. Some include a time limitation for the tribe’s determination; the assumption being that such time limits may be helpful to provide necessary information in a court proceeding. However, the regulations require the child to be treated as an Indian child until there is evidence that the child is not an Indian child. 25 C.F.R. § 23.107(b)(2). Thus, time limits may be helpful for the parties, but such limits should not be used to foreclose an inquiry into the child’s status at any time.

The New Mexico Agreements with the Tesuque Pueblo and Navajo Nation mandate a very restrictive 10 working-day turnaround for the Tribe’s “Indian child” determination if there is sufficient information. (III.B). The Skull Valley Goshute and Utah Agreement requires the Tribe to provide a written verification of enrollment or eligibility for enrollment within only five days. (D.3.a). The Navajo-Utah Agreement provides a more reasonable:

30 working days from the time sufficient background information is provided to the Nation. If insufficient information to verify membership is provided, the NATION will request additional information from DCFS in writing within ten working days of receiving the inquiry concerning the minor's membership. If DCFS is not able to provide additional information, the NATION will be notified, and the NATION will make a determination on the status of the child within 30 days. *If the NATION does not respond, DCFS can proceed as if the child is not a Navajo child. (III.A) (emphasis added).*

The last sentence of this Navajo-Utah provision contradicts the requirement of the regulations that states if there is reason to know that a child is an Indian child, the state court must treat the child as an Indian child until a determination is made that the child is not an Indian child. 25 C.F.R. § 23.107(b)(2). State child welfare staff must also do the same.

In contrast to the Navajo-Utah Agreement, the Skull Valley Goshute and Utah Agreement states that Utah will continue to work actively with the Tribe even if the Tribe

has not responded within the time limit, “realizing that the Tribe has not waived any rights and may assert their rights under ICWA later.” (D.3.d).

It is notable that several of the Agreements require an inquiry of “Indian child” status throughout any child custody proceedings. For example, the Paiute and Utah Agreement requires “diligent efforts to identify every child who is subject to the ICWA...at the earliest stages of the case...throughout the duration of the case.” (P. 2).

The Saginaw Chippewa Agreement with Michigan states that the statutory definition of “Indian child” applies without exception in any child custody proceeding, and the Tribe’s determination of citizenship is conclusive. (II.V). It also specifically condemns the “Existing Indian Family Exception:”

The applicability of the Act to a Child-Custody Proceeding in no way depends upon whether an Indian child is part of an “existing” Indian family or upon the level of contact a child has with the child’s Indian Tribe, reservation, society, or off-reservation community. The Parties expressly reject any application of the minority judicial rule recognized as the “Existing Indian Family Exception” (II.V).

While this type of language is positive, it does not provide any protocol or procedures as to what the state and Tribe will do in a court proceeding where the “existing Indian family exception” and citizenship of a child may be in question. Better language would provide that the state child welfare staff will support the Tribe’s determination that the child is an “Indian child.”

In an ICWA Tribal-State Agreement, the parties can agree to provide reports or declarations to the court supporting a Tribe’s determination of citizenship and use specific procedures for the state child welfare staff to document its work with the tribe to determine citizenship, and continue to inquire “unless and until” the child’s status is known for sure. 25 C.F.R. § 23.107(b)(2).

B. Types of Proceedings and Procedures Involved

This section discusses the types of state court actions that involve an “Indian child” in the ICWA context: involuntary proceedings, voluntary proceedings and emergency proceedings. ICWA mandates certain procedures, including notice and standards of evidence that can be different depending on the type of proceeding. The new regulations provide additional requirements for state courts, tribes and tribal parties.

A collaborative relationship with state child welfare staff, can support tribal interests in protecting the Indian child and family in each type of proceeding covered by the law –

involuntary, voluntary, and emergency proceedings. As stated in the New Mexico Agreements:

- Both voluntary and involuntary proceedings are of critical interest to the TRIBE:
- (a) To prevent any inappropriate cultural separation of Pueblo of Tesuque children from their families and their Pueblo of Tesuque community;
 - (b) To ensure that Pueblo of Tesuque children who are removed from their homes maintain contact with their Pueblo of Tesuque culture; and
 - (c) To ensure that the values of Pueblo of Tesuque culture are preserved.
- Tesuque-NM (I.B.5).*

1. Involuntary Proceedings

a) Notice

ICWA requires notice to the parent or Indian custodian and the Indian child's tribe by registered mail with return receipt requested of pending involuntary foster care placement or termination of parental rights proceedings, and of the right to intervene in the proceedings. 25 U.S.C. § 1912(a). The new regulations allow for notice by certified mail, and mandate that the state court ensure that this notice is sent promptly and that record of notice is kept on file with the court. 25 C.F.R. §§ 23.11, 23.111. The regulations provide that notice "must be in clear and understandable language" and include specific items such as the child's name, birthdate and birthplace, all known names of the parents and lineal relationships the child has with a Tribe, as well as the right to intervene, the right of the parent to a court appointed attorney, and that the notice is confidential. *Id.* State laws may provide higher standards for notice.⁷⁹

The Act sets forward time limits in which involuntary proceedings for foster care placement and termination of parental rights can be held after notice is given. The proceeding cannot be held until at least 10 days after the notice is received by the parent and the tribe, and they can be granted 20 additional days to prepare. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.112. The Guidelines recommend that if notice is not responded to, that notification should continue to be sent at every phase of the proceeding.⁸⁰

Some Agreements provide very little procedure for these notice requirements, although they may expand upon the formal notice requirement to provide for additional types of informal notice. For example, the Skull Valley and Utah Agreement requires the state's child welfare service staff to notify the Tribe "by certified mail, return receipt, and by phone or fax, as soon as there is any reason to believe that the child may be enrolled or

⁷⁹ See Guidelines, section D.2, p. 32.

⁸⁰ *Id.*, section D.10, p. 38.

eligible to enroll...to [a]ssist in compliance with the notification requirement of the ICWA." (Pp. 2-4). Other Agreements state the ICWA requirement and add language that supports notice by the most efficient and earliest notice possible. *Stillaguamish-WA (V)*, *Quinault-WA (IV)*, and *Lummi-WA (VI.1)*.

Some Agreements provide quite complex notice requirements. The Navajo Agreements with Arizona and Utah, and the Navajo and Tesuque Pueblo Agreements with New Mexico go beyond ICWA's notice requirements and apply to pre-adoptive placements and voluntary foster care placement proceedings. They further require the state child welfare staff to notify the Tribe of all judicial hearings in all of these proceedings, as well as proceedings regarding any disrupted or dissolved adoption. *Navajo-AZ (IV)*. The Agreements also mandate that the state child welfare staff include specific content in the notice, with a copy of all pleadings and other information about the child, including special needs, with documentation of all attempts to contact the Nation. *Id.* The Navajo-Arizona Agreement provides a specific 24 hour notice by telephone when taking physical custody or commencing an action. *(IV.C)*; see also *Southern Ute-CO (II)* (*applying notice to all involuntary and voluntary proceedings, and requiring notice by telephone as soon as reasonably possible, followed by a letter with return receipt*).

The notification requirements from the Agreements are varied, and some do not provide ICWA's section 1912(a) mandate for notice. Instead, the Agreements set notification requirements for the tribe-state relationship outside of court proceedings. Almost all of this pre-court notice includes notice to be given to the tribe when state child welfare staff believes the child to be an Indian child.

The Agreements require this pre-court notice from state child welfare staff to be verbal, in writing, or both depending on the circumstances.

The Department will... Give written notice to the Tribe that a report of abuse or neglect has been received...as soon as the Department knows or has reason to believe the case involves an Alabama-Coushatta Tribe of Texas child. Give verbal notice to the Tribe before making an initial contact with a family or individual on the Tribe's reservation.... Give verbal notice to the Tribe before performing a removal...of a...child on the Tribe's reservation.... If a removal occurs without prior notice under emergency circumstances, the Department will give the Tribe notice the first working day after removal. *Alabama-Coushatta-TX (III.C)*.

Notice prior to an involuntary proceeding is required by ICWA. Notice during referral and investigation of a matter, provided as soon as the state child welfare staff has any reason to believe the child is an Indian child, will protect the interests of a tribe early on

and is preferable to waiting for a court proceeding to be initiated.

b) Appointment of Counsel

ICWA provides:

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title. 25 U.S.C. § 1912(b).

Though ICWA allows the court appointment of an attorney for any parent or Indian custodian in any involuntary removal, placement or termination proceeding when it is in the best interest of the child, there were no Agreements that mentioned this right of the parent or Indian custodian.

c) Examination of Documents

ICWA requires that "Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based." 25 U.S.C. § 1912(c). The ICWA Agreements that mentioned document sharing did not limit the sharing of information to reports and documents filed with the court in foster care placement or termination of parental rights proceedings. The Agreements generally provide much broader statements about sharing information between the parties. This may be because the Agreements put forward provisions for the relationship between state and tribal child welfare staff, and are not merely recitations of ICWA requirements for examination of documents in a state court proceeding.

The majority of Agreements make general statements about the mutual sharing of information between tribal and state child welfare staff, as long as the sharing and confidentiality requirements are in line with federal and state laws. The information obtained through this sharing may go beyond the state court file and include all investigative information. *See Saginaw Chippewa-MI (III.E); Penobscot-ME (p. 2); Minnesota (II.F).* The Tesuque Pueblo and Navajo Agreements with New Mexico, and the

Navajo-Utah Agreements state that such free flow of information is proper and necessary and in best interests of the Indian child as authorized by State and Tribal laws. (III.C). Many of these provisions allow the sharing of information by either verbal or written request. The Washington State Agreements also provide access to the FamLink Information System, the State's case management system for foster care clients.

d) Active Efforts

In order for a party to successfully obtain foster care placement or termination of parental rights in an involuntary proceeding, a state court must find that active efforts were made to provide remedial services and rehabilitative programs to prevent the breakup of an Indian family and that those efforts were unsuccessful. 25 U.S.C. § 1912(d). ICWA does not provide a definition of "active efforts" and states have inconsistently defined it, sometimes equating it to "reasonable efforts."⁸¹ The regulations define "active efforts" to be affirmative, active, thorough and timely, require that they be documented on the record, and provide examples of what some active efforts could be depending on the facts of the case.⁸² 25 C.F.R. § 23.2. The Guidelines provide a comprehensive discussion on the regulatory requirements as well as best practices for "active efforts."⁸³

Less than half of the Agreements provide information regarding "active efforts." Thirteen of the Agreements provide some detail on what type of remedial services must be provided through active efforts. The Navajo and Arizona Agreement requires "reasonable and active efforts" to allow visitation with the parent and child, and to provide accommodations, transportation and other services so that the parent can exercise visitation rights. (VIII.C). It further requires active efforts to ensure contact among siblings. (IX.E).

Several of the Utah State Agreements require active efforts to provide remedial services after the investigation but before a decision is made to place the child outside of the home. The effort "should take into account the prevailing social and cultural conditions and the way of life." *Northwestern Shoshone-WA* (pp. 5-6). The Tribe's child welfare staff should be involved in the evaluation of the home to reduce the potential for cultural bias, and services in the community designed for Indian families should be used, if available. *Id.*

The majority of the thirteen Agreements that mention "active efforts" discuss cultural appropriateness of the active efforts, in line with the new regulations:

⁸¹ Guidelines, section E.1, p. 39.

⁸² The definition of "active efforts" was discussed in Section V.B, above.

⁸³ Guidelines, sections E.1 through E.6, pp. 39-44.

To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe. 25 C.F.R. § 23.2.

The Utah Agreements, Navajo Agreement with Arizona, the New Mexico Agreements, as well as the Saginaw Chippewa Agreement with Michigan, the Minnesota Agreement, and the Jamestown S'Klallam and Makah Agreements with Washington all contain language regarding the cultural appropriateness of the active efforts.

The Jamestown S'Klallam Agreement with Washington is one Agreement that provides the most comprehensive description of "active efforts," and requires the state child welfare staff to show to the court that it has actively worked with the parents beyond simply providing referrals to services, and provides a non-exhaustive list of active efforts "casework." (III.6). Interestingly, only the Jamestown S'Klallam and Makah Agreements with Washington mention "active efforts;" eleven of the thirteen Washington State Agreements did not mention "active efforts."

The Navajo-Arizona Agreement provides for active efforts in emergency cases where the State expects removal to result in a dependency petition. In those cases the state shall make active efforts including to:

1. Engage the child's family and the NATION to the greatest extent possible in planning for voluntary intervention that minimizes DCS [Arizona Department of Child Safety] intrusion while ensuring the child's safety.
2. Assist the child's family or the NATION in identifying a relative or friend who can care for the child temporarily during the intervention.
3. When appropriate, place the child in voluntary foster care upon written consent by the parent and DCS before a judge of competent jurisdiction.
4. Request assistance from the NATION's ICWA Social Workers to incorporate values and practices of Navajo culture that can contribute to providing services to the family.
5. Consider involving peers, family members, tribal social service resources, and community representatives in case planning and service delivery process when the NATION and DCS agree that it is in the child's best interests.
6. Whenever possible, DCS will develop a service plan that is designed to make it possible for the child to be reunited with the parent(s). (VIII.A).

e) Evidence Required for Foster Care Placement

Involuntary foster care placement proceedings require “a determination, supported by *clear and convincing evidence*, including 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) (emphasis added). The new regulations require that the evidence show a “causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding.” 25 C.F.R. § 23.121. Various socio-economic information, substance abuse or nonconforming social behavior does not constitute clear and convincing evidence alone. *Id.* § 23.121(d). The evidence must include testimony from a qualified expert witness.

The ICWA Tribal-State Agreements from Michigan and Minnesota are the only Agreements that recite to a standard of evidence from section 1912(e) and (f) in their definitions of “qualified expert witness” and “termination of parental rights.” Again, the tribal and state child welfare staff cannot dictate standards of evidence to the state court. However, the parties can include the standard of evidence in the Tribal-State Agreement and use the standard to dictate the scope of information gathered during an investigation.

f) Expert Witnesses

ICWA at § 1912(e) requires a qualified expert witness opinion in an involuntary proceeding; the regulations require specific expertise about whether the child’s custody with his or her parent or custodian is “likely to result in serious emotional or physical damage to the child,” and should be familiar with the “prevailing social and cultural standards of the Indian child’s tribe.” 25 C.F.R. § 23.122.

Many Agreements include a simple provision regarding witnesses. “The Tribe will make good faith efforts to secure any necessary testimony from Tribal members.” *Mohegan-CT (4.C)*. “The Tribe will appear as witnesses as requested.” *Penobscot-ME (pp. 5-6)*. “Subpoenas shall be serviced on individuals of the Tribe if necessary to provide testimony in court.” *Ysleta Del Sur-TX (IV.13)*. “In state court where tribe has not transferred to tribal court the Nation will timely provide an expert witness to appear.” *See also Lummi-WA (VI.2.b); Navajo-AZ (III.H); Minnesota (II.G)*.

The Tribes who are parties to the Minnesota Agreement provide a list of qualified expert witnesses to the state whose qualifications “shall not be subject to challenges in Indian child custody proceedings.” *Minnesota (I.E.33 and II.G)*. On the other hand, the Navajo and Arizona Agreement states that the state department of child services will only

“consider” the Navajo Nation’s experts and the state will prepare any witness for court. *Navajo-AZ (III.H)*. The Minnesota Agreement affirmatively supports tribal selection of witnesses.

Regarding what type of expertise the qualified expert witness should have, the New Mexico Agreements and the Navajo-Utah and Arizona Agreements define the witness’ expertise to include “issues of tribal customs regarding child rearing, parenting and the role of extended family members raising” the child. The qualified expert witnesses in the Washington State Agreements will have knowledge and experience regarding the culture, community, history and traditions of the Tribe, as well as knowledge of ICWA. *Cowlitz (VI)*. Some of the Agreements also allow for a state expert to be used in the Tribal court. *Navajo-AZ (III.H)*.

None of the Agreements address the regulatory requirement that the qualified expert witness’ expertise include background about whether the child will have “serious emotional or physical damage” if the child remains with the parent or custodian. The Agreements that include provisions regarding a qualified expert witness discuss the qualified expert witness’ knowledge of tribal customs and culture, and some require knowledge of ICWA. It may be wise for the tribal-state parties to consider the new regulatory requirements for what constitutes a “qualified expert witness.”

g) Termination of Parental Rights

For involuntary proceedings involving the termination of parental rights, the court must find that there is evidence beyond a reasonable doubt that the continued custody of the child by the parent or custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(f). The evidence must include testimony of a qualified expert witness.

Other than citation to section 1912(f), there were very few Agreements that touched on termination of parental rights. Two of the Washington State Agreements attached Tribal laws concerning Tribal court procedures for termination of parental rights. *See Makah, Attachment E, Chapter 10; and Snoqualmie, Attachment A, Section 14.*

The Makah Agreement also provided a list of significant laws, attached as Attachment B, including RCW 13.38.040(16), which defines “tribal customary adoption” as “adoption or other process through the tribal custom, traditions, or laws of an Indian child’s tribe by which the Indian child is permanently placed with a nonparent and through which the nonparent is vested with the rights, privileges, and obligations of a legal parent. Termination of the parent-child relationship between the Indian child and the biological parent is not required to effect or recognize a tribal customary adoption.” In addition to

citing state law, recognition of any tribal laws relevant to tribal customary adoption may also be useful in an Agreement.

The Snoqualmie-Washington Agreement states:

The Tribe has not traditionally recognized the termination of a parent's rights to their birth children. It is currently the custom of the Tribe to pursue involuntary termination of a parent's rights to its child only as a last resort, and only when it is clear that long-term guardianship with parental visitation is insufficient to meet the needs of the child, and an adoption is feasible and in the best interests of the child. STC 13.2.14.1. [Washington Children's Administration] acknowledges the tribe's position and will work with the Tribe to timely determine other permanency options, as appropriate and available. The Tribe agrees to engage early in the case to assist in locating and recommending permanent placements for the child. (*VIII.F*).

Except for these few Agreements, no Agreement addresses how the state and tribe will attend to issues of involuntary termination of parental rights in state court. It would be reasonable to presume that tribes would want to limit the use of termination of parental rights without appropriate safeguards and tribal involvement, though it is not clear why the Agreements fail to deal with this issue.⁸⁴

2. Voluntary Proceedings

Voluntary proceedings are not defined expressly by ICWA. The new regulations define voluntary proceedings to include:

a child-custody proceeding that is not an involuntary proceeding, such as a proceeding for foster-care, preadoptive, or adoptive placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, consented to for the Indian child, or a proceeding for voluntary termination of parental rights. 25 C.F.R. § 23.2.

⁸⁴ Though there are no Tribal-State ICWA Agreements in California, certain County protocols exist that mention "tribal customary adoption." On July 1, 2010 a California law was adopted that recognized "tribal customary adoption," which is adoption through tribal custom, traditions, or law that does not require a termination of parental rights. The placement preferences of the Tribe are utilized to determine whether long-term foster care or other living arrangement is an appropriate permanent plan for the child instead of termination of parental rights. See Sonoma County Indian Child Welfare Act Protocol, pp. 26-30, which can be found at http://www.childsworld.ca.gov/res/pdf/Sonoma_ICWA_Protocol.pdf (last visited December 31, 2016).

In a voluntary proceeding, a state court must verify whether the child is an Indian child in order to determine its jurisdiction. 25 C.F.R. § 23.124. In order to verify the status of a child, a state child welfare staff should necessarily contact the tribe.

(a) The State court must require the participants in a voluntary proceeding to state on the record whether the child is an Indian child, or whether there is reason to believe the child is an Indian child, as provided in §23.107.

(b) If there is reason to believe the child is an Indian child, the State court must ensure that the party seeking placement has taken all reasonable steps to verify the child's status. *This may include contacting the Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) to verify the child's status.* 25 C.F.R. § 23.124 (emphasis added).

So, although notice is not required in voluntary proceedings, the Tribe should be contacted to verify the child's status as an "Indian child."

Voluntary proceedings require that placement preferences be followed. 25 U.S.C. § 1915; 25 C.F.R. § 23.124(c). ICWA further requires verification of consent and withdrawal of consent for voluntary foster care placement or termination of parental rights. 25 U.S.C. § 1913.

a) Notice

Neither ICWA nor the regulations require notice in voluntary child custody proceedings, although such notice is a recommended practice.⁸⁵ Some states have passed laws that do require notice in voluntary proceedings and this higher standard of protection would apply.

The Tesuque Pueblo and Navajo Agreements with New Mexico, and the Navajo and Utah Agreement provide for notice to the Tribe of any voluntary proceedings involving foster care placement, pre-adoptive placement, relinquishments, permanent guardianship and consent to termination of parental rights. *See Tesuque-New Mexico (IV.A.2)*. Notice shall be provided by telephone from the state child welfare staff to the Tribe within 24 hours of taking custody, commencing an action, or if there are changes to hearings involving a child the state knows or has reason to believe is an Indian child. *(IV.C)*.

The Navajo and Arizona Agreement requires notice for any voluntary foster care

⁸⁵ Guidelines, section I.3, p. 65.

placement under state law when the child is not returned to the parent upon expiration of a 90 day placement agreement or upon demand by the parent. *(IV.A.2)*.

b) Consent to Foster Care Placement and Termination of Parental Rights

The Act's section 1913 describes the verification of consent and withdrawal of consent in voluntary proceedings for foster care placement and termination of parental rights. The regulations provide detailed directives on how a parent's consent can be obtained, and the contents of a consent document. 25 C.F.R. §§ 23.125, 23.126. A parent may withdraw consent for a voluntary placement, termination of parental rights, or for an adoption at any time prior to the entry of a decree for adoption. 25 C.F.R. §§ 23.127, 23.128.

A few of the ICWA Tribal-State Agreements either recite to or incorporate section 1913 into their Agreement. *See Saginaw Chippewa-MN (II.TT and UU); Minnesota (I.E.43-44); Tesuque Pueblo-NM (XI); Navajo-NM (XI); and Navajo-UT (XI)*. The Agreements provide no discussion or further decision points between the parties regarding a parent's consent or right to withdraw consent.

3. Emergency Proceedings

Emergency proceedings involve any state court action for emergency removal or emergency placement of an Indian child. 25 C.F.R. § 23.2. Emergency proceedings apply to Indian children either on or off the reservation and allow the state to proceed regardless of a tribe's jurisdiction if the action is necessary to prevent imminent physical damage or harm to the child. *Id.* § 23.113(b)(1).

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate. 25 U.S.C. § 1922.

Emergency circumstances have been defined as circumstances in which the child is immediately threatened with harm, including when there is an immediate threat to the

child's safety, when a young child is left without care or supervision, or where there is evidence of serious ongoing abuse and the officials have reason to fear imminent recurrence.⁸⁶

When there is no longer an emergency – when it is no longer necessary to prevent imminent physical damage or harm to the child – the state court shall terminate the emergency removal or placement and proceed with ICWA for non-emergency proceedings, which may require the state court to transfer the child to the tribal court or return the child to the parent or Indian custodian. 25 U.S.C. § 1922. The regulations require that the court make a finding on the record, promptly hold a hearing when new information shows the emergency has ended, and terminate the emergency proceeding once the emergency removal or placement is no longer necessary. 25 C.F.R. § 23.113. The regulations provide detailed information for what is recommended in a petition for a court order authorizing the emergency removal or placement. *Id.*

Emergency proceedings in the Agreements reiterate the authority of the state to protect an Indian child, whether on or off the reservation, in emergency circumstances. A few Agreements discuss a state's ability to enter the reservation if it receives an emergency referral. For example, the Ysleta Del Sur Agreement with Texas requires the state child welfare staff to contact the Tribal Police when entering the reservation for an emergency referral.⁸⁷ (III.4).

There are no statutory or regulatory requirements for notice when an emergency proceeding is occurring. However, the majority of Agreements that discuss emergency proceedings provide terms for notice from the state agency to the Tribe when an emergency referral, removal or placement is taking place, and the state agency has reason to believe the child is an Indian child:

Navajo-AZ (IV.A.5)	Notify within 48 hours by telephone, followed up with written notice to the Nation by certified mail, return receipt
Saginaw Chippewa-MI (III.D)	Notice by telephone as soon as possible
New Mexico (X.H)	24 hour notice by telephone

⁸⁶ Guidelines, section C.2, p. 24.

⁸⁷ Considering that the State of Texas asserts concurrent jurisdiction over the Ysleta Del Sur Pueblo, see note 20 above, the Agreement's requirement that the State contact Tribal Police is appropriate. If such concurrent jurisdiction did not exist, the state would normally not be able to enter the reservation to perform these functions without the permission of the tribe.

Ysleta Del Sur-TX (III.4)	Notice to Tribal child welfare staff prior to the removal if possible; then notify Tribal Policy of removal taking place on reservation; or if either not available, provide notice the next business day
Alabama Coushatta-TX (III.4)	Notify Tribe the first working day after the removal
Navajo-UT (IX.F and G)	Provide notice within 2 working days
Quinault (V.1), Makah (V.1), Samish (V.1) and Port Gamble (VIII.A)	Notice in writing, or by phone, fax or email within 24 hours
Shoalwater Bay (P. 3)	Notify immediately by telephone
Tulalip (VIII.1)	Immediately by telephone or email

The Suquamish Tribe and the Washington State Children’s Administration have agreed to “take what measures are necessary to protect children while continuing to respect one another’s sovereignty. Case responsibility questions will be resolved on the next working day.” (V.9).

The Navajo and Arizona Agreement is the only Agreement that provides some detail requiring the extended family to be notified, and that the Nation is consulted on placement options for emergency proceedings. (IV.A.5). It further requires coordination between the tribal and state child welfare staff so that the Nation can reassume custody of the child. (VI.B.2).

4. Other Proceedings

The ICWA gives the parent or Indian custodian the right to petition the court to invalidate any action for foster care placement or termination of parental rights that has violated any provision of sections 1911, 1912 or 1913 of the Act. 25 U.S.C. § 1914. The regulations expand this and allow the Indian child and the Tribe to petition as well. 25 C.F.R. § 23.137. The Act further allows the parent or Indian custodian to have custody of the child returned to them. 25 U.S.C. § 1916.

Where there has been an improper removal of the child, the state court can return the child expeditiously to his or her parent or Indian custodian. 25 C.F.R. § 23.114. Even if

there has been a final decree of adoption, the regulations allow a state court to invalidate a voluntary adoption within two years of a final decree upon a "finding that the parent's consent was obtained by fraud or duress." 25 C.F.R. § 136(a).

The Agreements did not deal with the invalidation of an order of placement or adoption.

VIII. PLACEMENT PREFERENCES

ICWA provides an order of placement preferences for adoptive placement, and foster care or pre-adoptive placement. 25 U.S.C. § 1915(a) and (b); 25 C.F.R. §§ 23.130(a) and 23.131(b). ICWA also recognizes a tribe's inherent right to establish its own order of placement preferences, which may be different than what ICWA provides. 25 U.S.C. § 1915(c); 25 C.F.R. §§ 23.130(b), 23.131(c). Any placement must meet the prevailing social and cultural standards of the Indian community, and the state must maintain a record of the placement that shows what placement preference was used. *Id.* § 1915(d)-(e).

Interestingly, there are five Agreements that do not provide any information about placement preferences, and it is assumed those five Agreements follow ICWA's placement preferences. *See Mohegan-CT; Penobscot-ME; Ysleta Del Sur-TX, Alabama-Coushatta-TX; and Kalispel-WA.* The majority of the Washington Agreements follow ICWA's placement preferences, though there are some tribes that have provided their own unique placement preferences.

This section will focus on tribal placement preferences, good cause to depart from placement preferences, and how the tribes and states provide opportunities to collaborate in placement matters. Other important issues concerning placement include licensing and recruitment of foster care and adoptive placement, maintenance of records, and how placements are handled across state lines. There are many opportunities for tribes and states to work collaboratively in an ICWA Agreement to find creative ways to provide appropriate placements that support the Indian child and Indian family.

A. Adoptive Placement Preferences

The ICWA preferences for adoptive placement are: (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families. 25 U.S.C. § 1915(a). The majority of Agreements that set forward adoptive placement preferences incorporate ICWA preferences as is. A couple of Agreements, however, add additional priorities.

The Navajo-Arizona and the New Mexico Agreements follow the ICWA adoption placement preferences, but add a fourth priority: "or other adoptive family approved by the Nation." *Navajo-AZ (IX.A.4).* The Skull Valley Goshute and Utah Agreement adds a fourth priority as well: "In the event none of the above placement options are available, the caseworker will proceed with locating a placement within the same procedures and criteria of any non-ICWA case." (*P. 5*).

The Navajo-Arizona and New Mexico Agreement's fourth preference follows the spirit of

ICWA by requiring that the Tribe maintain control and decision-making authority in a case where the three placement preferences are not viable. The Skull Valley Goshute provision, instead, falls back on state law for a non-ICWA case, and does not seem to include any decision-making by the Tribe.

B. Foster Care or Pre-Adoptive Placement Preferences

The ICWA preferences for foster care for pre-adoptive placements are:

- (1) A member of the Indian child's extended family;
- (2) A foster home licensed, approved, or specified by the Indian child's tribe;
- (3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- (4) An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs. 25 U.S.C. § 1915(b).

These placements should be in the "least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child." Id.

Again, the majority of Agreements that set forward placement preferences for foster care and pre-adoptive placement follow ICWA preferences. A few add to this ICWA language. The New Mexico and Navajo-UT Agreements expressly require, as priority number one, that the child remain with the parent(s) or custodian. *See Tesuque-NM (IV.G) and Navajo-UT (VIII.B.1).*

The Saginaw Chippewa and Michigan Agreement provides an interesting provision concerning the placement of siblings in a non-Indian home:

An out-of-home placement of an Indian Child with her or his siblings or half siblings in a non-relative, non-Indian home does not meet the Act's placement preference requirements. This type of placement does not constitute a placement with "family" or with "relatives." The child's family, relatives, or kinship relationships must be determined with reference to the Parent(s) and/or Indian Custodian(s), and not with reference to other children in the placement home. *(II.EE).*

The intent of this provision is to make sure that the placement occurs in an Indian home;

the fact that an Indian child's siblings are in a non-Indian home does not recharacterize the home as an Indian home.

C. Tribal Order of Preference

Section 1915(c) of ICWA acknowledges the inherent sovereignty of a Tribe to secure different placement preferences for its children:

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section.

Each tribe should determine whether it will establish a different order of placement, considering the realistic availability of foster care and adoptive placements with the tribe, and how to best meet the cultural and programmatic needs for the circumstances.

For review and example, some tribal orders of placement in the ICWA Agreements are provided here:

If CA [Washington Department of Social and Health Services Children's Administration] has placement authority for a Tribal member (i.e. the dependency action is in state court) placement shall always take into account the child's extended family and cultural affiliation shall be consistent with the best interests of the child, and the following Tribal preferences, in order of following priorities of TTC 4.05.520:

- a. Relatives or family members or with a person who would qualify as having a significant familial relation with the child as defined within this chapter;
- b. Private Tribal home, licensed or approved by beda?chelh⁸⁸;
- c. Private other Native home, licensed or approved by beda?chelh on the Reservation;
- d. Private non-Native home, licensed or approved by beda?chelh on the Reservation;
- e. Private other Native home, licensed or approved by beda?chelh off the Reservation;
- f. Private non-Native home, licensed or approved by beda?chelh off the

⁸⁸ The "beda?chelh" is the "social services division charged by the Tulalip Tribes with the responsibility to foster and protect the health and welfare of the Indian families and their children and to carry out the purpose of ICWA and this Agreement." *Tulalip-WA (VI.1)*.

Reservation; or

- g. In an emergency placement, however, beda?chelh shall continue to attempt to locate a family member or Tribal home for the child consistent with subsections (4)(a) and (b) of this section.
- h. A Tribal member shall be placed in as close proximity to the parent or guardian as possible to facilitate and encourage visitation and reunification unless such placement is not in the best interest of the child.
- i. A Tribal member child shall be placed in the least restrictive placement available to meet the child's treatment needs; preference for placement shall be on or near the Tulalip Reservation so that the child can participate in all cultural events available and have access to family members. *Tulalip-WA (XI.v).*

If CA has placement authority for a Lummi child (i.e. the dependency action is in state court) placement shall always take into account the child's extended family and cultural affiliation and shall be made in accordance with the priorities set out in Title 8 of the Lummi Code of Laws (Children's Code) as amended from time to time. At present those priorities are:

With grandparents;

With other adult relatives;

With tribal members of the child's tribe;

With members of other tribes;

With community members; and

With non-tribal members who are sensitive to and committed to encourage and maintain the child's access to the child's inherent tribal heritage, culture, traditions and history; and contact with the child's tribe. *Lummi-WA (VI.3).*

Unless otherwise specified, the following order of preference for placement shall be used:

First priority - A member of the Indian Child's extended family with which he or she has had significant contact with and an understanding of Indian cultural customs and norms in the event that the family is non-Indian.

Second priority - A Cowlitz foster home, licensed and approved by an authorized licensing authority.

Third priority - An Indian foster home, licensed and approved by an authorized licensing authority.

Fourth priority - A non-Indian foster home with an understanding of Indian customs and cultural norms, licensed, approved, or specified by the Cowlitz Indian Tribe. *Cowlitz-WA (IX).*

Other Washington Agreements add that the foster care or pre-adoptive placement must also be prioritized based on the proximity of the home to the child's parent(s) or custodian. *See Makah (VII); Stillaguamish (VII.3); Samish (VU.3); Suquamish (VIII.3); Snoqualmie (VIII.E).*

Section 1915(c) of ICWA also allows for the preference of the Indian child or parent to be considered.⁸⁹ The Navajo-Utah and the New Mexico Agreements recognize this preference. These Agreements, along with the Navajo-Arizona Agreement, also require that the state child welfare agency consider the Tribe's customs and law regarding custody and placement of children and refer any questions of Tribal custom and law to the Tribe. *See Tesuque-NM (IX.D).*

D. Good Cause to Depart from Placement Preferences

Placement preferences must be applied unless good cause to depart from the placement preferences exists. The regulations provide procedural safeguards to assist a court determination of good cause to depart from the placement preferences. 25 C.F.R. § 23.132. A court's determination must be made on the record, either in writing or orally. The party seeking a good cause finding "should bear the burden of proving by clear and convincing evidence that there is 'good cause' to depart from the placement preferences." *Id.*, § 23.132(b).

The regulations provide five considerations on which a good cause determination should be based:

- (1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;
- (2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;
- (3) The presence of a sibling attachment that can be maintained only through a particular placement;
- (4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;
- (5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements

⁸⁹ ICWA section 1915(c) also provides that: "Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences." See also 25 C.F.R. §§ 23.130(c) and 23.131(d).

meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties. 25 C.F.R. § 23.132(c).

The preferred placement preferences of ICWA were mandated by Congress to support the welfare of Indian children, parents, families, and tribes. Therefore, a consideration of good cause to depart from ICWA's placement preferences must be interpreted restrictively to provide meaningful limits on the discretion of courts to act outside of those preferences. These factors provide a limited, but still flexible basis for court decision-making. The Guidelines describe the structure of 25 C.F.R. § 23.132 as maintaining flexibility for a court to find, even where one of these five factors are present, that good cause may still not exist.⁹⁰ The court is the ultimate authority to determine good cause.

Similar to the limitations for finding good cause not to transfer, a determination of good cause to depart from placement preferences cannot be made based on socioeconomic status. 25 C.F.R. § 23.132(d). In addition, a placement cannot depart from the preferences solely based on ordinary bonding from a non-preferred placement made in violation of ICWA. Id. § 23.132(e).

Please note that a Tribal-State ICWA Agreement will likely not bind a state court in its determination of good cause. An ICWA Agreement would better state how the tribal and state parties will provide the record and documentation for the court's determination, that the state will not present a good cause argument unless limited circumstances in line with the regulations are present, and provide guidance to the agency as to what efforts the agency must make (in conjunction with the tribe) to find a preferred placement. The Saginaw Chippewa and Michigan and the Minnesota Agreements describe how a court will determine what constitutes good cause not to follow a placement preference, with some language pertaining to the application of the diligent search requirements. The Michigan and Minnesota Agreements provide:

"Good Cause Not to Follow the Placement Preferences" means, for the purposes of Foster Care, Pre-adoptive, or Adoptive Placement, or other permanency placements, a court's determination that there is good cause not to follow the order of preference set out in the Act. Such determination should be limited to

⁹⁰ Guidelines, section H.4, pp. 60-61.

those cases where a court finds that one or more of the following considerations is present:

1. A competent biological parent(s) or child (when the child is 13 or older) requests that the court decline to follow the Placement Preferences, but is the sole basis for the preference of the parent or child is to avoid application of the Act, there is not Good Causes Not to Follow the Placement Preference, and the court should reject the request;
2. Expert testimony establishes that the child's extraordinary physical or emotional needs require highly specialized treatment services; or
3. A diligent search, consistent with Active Efforts, for families meeting the preference criteria discloses no suitable families for placement that meet the Placement Preference. If this circumstance occurs, SCIT will assist DHS [Michigan Department of Human Services] to locate a suitable family for placement. Bonding or attachment with a foster family alone, without the existence of any of the above conditions, is generally not "good cause" to keep an Indian Child in a lower preference or non-preference home. *Saginaw Chippewa-MI (II.Q)*.

As stated earlier, although an ICWA Tribal-State Agreement should be enforceable by a court in some respects, a court is likely to find that the determination of good cause to deviate from the placement preferences is governed by the Act and its regulations.

Several of the Agreements provide corrective measures if the ICWA placement preferences are not followed. In that instance, the state child welfare agency "shall prepare a detailed summary of the reasons for its decision to recommend deviation from preferences..., and shall be sent to tribe." *Southern Ute-Colorado (IV)*. Similarly, all the Utah and New Mexico Agreements provide that:

In any proceeding in which DCFS [Utah Division of Child and Family Services] is unable to comply with placement preferences established by this Agreement, the DCFS social worker assigned to the case shall send a report explaining the active efforts made to comply with the ICWA placement preference requirements, pursuant to the ICWA, Section 1912(d). DCFS shall contact the NATION within five days (excluding weekends and holidays) of the placement. The Nation may request that DCFS re-evaluate its placement decision. *Navajo-UT (VIII.C)*.

The Saginaw Chippewa and Michigan Agreement does not require a report from the State. Instead, if the Tribe "learns of a placement of a SCIT Child that does not meet the placement preferences set forth in the Act or this Agreement, upon notice from SCIT, the Department must cooperate with SCIT to remedy the placement so that it conforms with the Act, or the Department must show Good Cause Not to Follow the Placement."

(V.B).

ICWA Tribal-State Agreements can be used to conform the activities of the state agency with the new regulations requiring documentation and reporting in line with placement preferences, place additional responsibilities or requirements upon agency placements or procedures, or can describe how placement preferences could not be met, but that the health and welfare of the Indian child, as well as his or her cultural identity, were protected.

E. Tribal and State Cooperation to Seek Placement

What type of search or due diligence should be done by the tribal and state child welfare agencies to obtain the proper placement? Some Tribal-State Agreements discuss recruitment of foster homes, among other things, to support the availability of proper placement options. The Guidelines also provide recommendations about how to conduct a diligent search for placements that are thorough, ongoing and in line with child welfare best practices.⁹¹

Several Agreements simply say that the parties will work together to locate an appropriate placement. *Makah-WA (VII)*; *Samish-WA (VU.2)*; *Quinault-WA (VI.6)*; *Paiute-UT (p. 4, no. 23)*; *Penobscot-ME (p. 3 and 5)*. The Navajo and Arizona Agreement states that they will “actively assist one another” and that the Nation will “provide DCS [Arizona Department of Child Safety] with the names and home studies of prospective adoptive homes in order to assist DCS in complying with the placement preferences established in this Agreement, Section 1915 of the ICWA, and those of Navajo custom. DCS may conduct home studies of tribal members who wish to be adoptive placements. The NATION shall assist in the assessment process, which may include conducting a home study.” *(XII)*; *see also the New Mexico Agreements*. Some Agreements rely heavily on the state’s efforts alone to find appropriate placements. *Snoqualmie-WA (VIII.B)*.

F. Licensing and Recruitment of Foster Home Providers

ICWA’s order of preferences for foster care and pre-adoptive placements include foster homes that are licensed or approved by the Indian child’s tribe, an authorized non-Indian licensing authority, or an institution operated by an Indian organization suitable to meet the Indian child’s needs. 25 U.S.C. § 1915(b)(ii)-(iv). The foster care placement should also be in the least restrictive setting that most approximates a family and meets any special needs of the child. *Id.* § 1915(b). Proximity to the child’s home is also an important factor. *Id.*

⁹¹ Guidelines, section H.3, pp. 58-59.

The state and tribal parties to an ICWA Agreement can provide provisions that concern the licensing and recruitment for foster home providers and how the parties will work together on licensing and recruitment in order to achieve a proper placement pursuant to ICWA's order of placement. Some of the current ICWA Agreements provide provisions concerning licensing requirements and how the parties work together to recruit foster care placements.

In order to assure that foster care and adoptive homes are approved under state and tribal law that serve the best interests of the Indian child, the New Mexico Agreements require all adults who reside in a foster care or adoptive placement to complete a criminal background check pursuant to the State and Tribal procedures before the State can use the home for an Indian child. *Tesuque-NM (IX.H)*. The placement shall not be certified if a person cannot pass a background check, and the parties agree that pursuant to confidentiality requirements, specific information in a criminal records check cannot be shared. *Id.* The parties therefore agree that if one party finds good cause not to certify, the placement will not be certified. *Id.* Finally, the Tribe "may offer to be a resource in providing specific cultural information through videos, heritage, celebrations and tribal related matters to the Pueblo of Tesuque child, their foster/adoptive parents and relative caretakers." *Id.* The Navajo and Utah Agreement requires that all foster homes meet Social Security Act Title IV-E licensing standards.⁹² *(VIII.E)*.

Tribally licensed homes are the second preferred placement after placement with the extended family. Several Agreements expressly acknowledge tribal authority to license both on and off reservation placements. Though there may be practical limitations for a tribe to license a placement off the reservation, including funding issues,⁹³ there should be no legal implications. The tribe should be able to utilize tribal licensing standards off the reservation.⁹⁴

The Southern Ute and Colorado Agreement acknowledges that the Tribe has authority to license foster care facilities within the Tribe's reservation, as well as off-reservation. The parties therefore agree to adopt special standards on licensing of Indian foster homes and the placement of Indian children, so the parties can make reciprocal use of all state and tribal licensed facilities. *(V)*.

⁹² All tribes that receive Social Security Act Title IV-E funding are required to follow Title IV-E licensing standards. 42 U.S.C. § 671(a)(10).

⁹³ Title IV-E will pay for tribally licensed homes on or near the reservation. A tribe defines what "near" the reservation means. If the home is not "near," then IV-E funding will not cover the costs and other funds, such as tribal, state or BIA funding, must be found. Lack of funding does not constitute good cause to deviate from the placement preference for licensed tribal facility, but the funding does constitute an issue that can be addressed in a Tribal-State ICWA Agreement.

⁹⁴ See notes 92 and 93.

The Utah, New Mexico, Navajo-Arizona, Saginaw Chippewa-Michigan, Snoqualmie and Port Gamble-Washington Agreements provide similar acknowledgement. For example, the Paiute and Utah Agreement provides:

19. The Tribe agrees to use its own foster care and kinship licensing or approval standards in determining the suitability of a home to provide foster care and its own procedure for approval of Indian foster homes and further agrees to provide DCFS within thirty (30) days after passage by the Tribe a copy of any changes made to those standards.
20. Due to limited number of Indian families available to serve as foster homes, both the Tribe and DCFS agree that a given Indian family may be approved and used by both parties.
21. The Tribe, utilizing its foster home standards, may approve or license the home to care for children affected by this MOU.
22. DCFS, utilizing its standards, may approve the home to care for children affected or unaffected by this MOU.
23. Both the Tribe and DCFS agree to coordinate the placement of children in such dually approved homes to assure the individual needs of each child can be met. *(P. 4)*.

The Saginaw Chippewa and Michigan Agreement provides a master list of Tribal approved foster homes to the State and all counties that can be used for state court wards who are a Saginaw Chippewa child or a sibling of a Saginaw Chippewa child, or the minor parent of such child. *(IV.A.2)*. Where placement with a tribally licensed foster home is not available, the State must identify which State-licensed foster homes meet ICWA's third preference for an Indian foster home approved by an authorized non-Indian authority." *Id.* The Tribe and State use "Borrowed Bed Agreements" to allow a Tribally licensed home that does not necessarily meet state licensing requirements to be used for placement of non-Indian children with their Indian siblings or a minor parent of an Indian child to be placed with the child. *(III.F)*. The Saginaw Chippewa Agreement also states that its provisions cover work of state subcontractors or other private child placement agencies. *(IV.D)*.

Several of the ICWA Tribal-State Agreements' provisions specify how the parties will recruit foster and adoptive care homes. Some Agreements provide a simple statement that the parties will work cooperatively to recruit and develop programs to recruit foster care and adoptive homes. *Paiute-UT (p.4), Skull Valley Goshute-UT (p. 4) and Ysleta Del Sur-TX (IV.2)*. In addition to recruitment the Tribes may agree to provide a registry of tribally approved foster and adoptive care homes.

The Shoalwater Bay Tribe in Washington State utilizes the South Puget Intertribal Planning Agency⁹⁵ (SPIPA) as a child placing agency, “which has the authority to recruit, license, and maintain foster homes for Shoalwater Bay children. At all times the Shoalwater Bay tribe has the ability to place children into SPIPA licensed homes. Placement by the Tribe in a [State] licensed foster home...or institution will be through established [State] procedures in accordance with applicable laws and regulations and [State] policy.” (P. 5).

G. Record of Placement

The state shall maintain a record of placement evidencing the efforts to comply with the order of preference, which shall be available by the request of the Secretary or the Indian child’s tribe. 25 U.S.C. § 1915(e). There are very few Agreements that mention this section of ICWA. Because ICWA expressly mandates that the state maintain records of placements, parties may feel that inclusion of the requirement in the Tribal-State Agreement is not necessary.

The Houlton Band of Maliseet and Maine Agreement does repeat the requirement for record keeping. (VIII.A.8). Most commonly, the Agreements make a generalized statement that all record keeping shall be in compliance with ICWA. See *Southern Ute-CO* (VII).

H. Interstate Placements

ICWA and its regulations do not provide any different process for adoptive, foster care or pre-adoptive placement that occurs between and among different states. The Interstate Compact on the Placement of Children⁹⁶ (ICPC) is a compact signed by all 50 states and the District of Columbia that is recognized under federal law as the mechanism for transferring custody of a child across state lines. The purpose of the Compact is to place the child in a suitable environment and parse out the roles and responsibilities between the states involved, including which party is responsible for funding the placement.

One concern about the Interstate Compact is that the sending state agency retains jurisdiction over the child.⁹⁷ If the child is an Indian child, this requirement may conflict with ICWA’s mandate to transfer the child to the tribe’s jurisdiction unless good cause

⁹⁵ SPIPA is an intertribal, nonprofit consortium that serves the Chehalis, Nisqually, Shoalwater Bay, Skokomish and Squaxin Island Tribes to promote and enhance the prosperity of their Tribal Communities. <https://www.spipa.org/index.php> (last visited January 2, 2017). SPIPA includes a child placing agency that is contracted through the state and provides a full range of foster care services including foster home recruitment, child placement and foster parent training and support.

⁹⁶ <http://www.aphsa.org/content/AAICPC/en/ICPCArticle.html> (last visited on January 2, 2017).

⁹⁷ Id., Article 5.

exists, the parent or custodian objects, or the tribe declines jurisdiction.

There are a few Tribal-State Agreements that acknowledge the Interstate Compact on the Placement of Children. *Houlton Band of Maliseet-ME (XIV)*, *Penobscot-ME (p. 1)*; *Saginaw Chippewa-Michigan Agreement (V.B)*; *Minnesota (IV.C)*; and *Southern Ute-CO (VI)*.

The Houlton Band of Maliseet Agreement with Maine requires the State to notify the Tribe when an Indian child may be placed in Maine from another state. The State also agrees to send a request to the child's Tribe when it seeks to make a placement outside of the State. The sending state retains jurisdiction until the receiving state or the Tribe accepts jurisdiction. However, nothing in the Agreement obligates another state to take any particular action. *(XIV)*. The other state is not bound by the terms of the Agreement between the Houlton Band of Malisset and Maine.

Whenever the tribe plans to place a child for out-of-state foster care or adoption, the tribe may seek the assistance of the department in securing adequate and appropriate transfer, placement and care of such child. Every effort shall be made to facilitate such placements, and if assistance is denied the department shall notify the tribe of the reasons that assistance was not possible under the circumstances. *Southern Ute-CO (VI)*.

If the Department receives [a] child-transfer request, the Department is governed by the Best Interests of an Indian Child as set forth in this Agreement. *If the child is an Indian Child, and the proposed placements [are] not within the order of preference identified in the Act, the Department must not accept the child for placement in Michigan unless the placement meets the good-cause exception to the placement preferences as set forth in the Act, and under this Agreement.* In determining whether the good-cause exception to the placement preferences applies in a particular case, the Department must contact the sending state and request a letter from the Indian Child's Tribe providing the tribe's views of the placement. Where the Indian Child is a SCIT Child or SCIT Descendant Child, the Department must consider SCIT's position before making any final decision. *Saginaw Chippewa-MI (V.B.1) (emphasis added)*.

The Minnesota Agreement is similar:

Whenever the Department is considering whether to place an Indian child pursuant to the Inter-State Compact on the placement of children, *the Department will follow the provisions of the Indian Child Welfare Act*, the

Minnesota Indian Family Preservation Act *and this Agreement*, including placement preferences requirements for Indian children. *(IV.C) (emphasis added)*.

The Saginaw Chippewa and Michigan, and the Minnesota Agreements provide a very unique provision that specifically requires an interstate placement to follow the order of placement set out by the Agreement, in line with ICWA.

*The Interstate Compact on the Placement of Children: A Manual and Instructional Guide for Juvenile and Family Court Judges*⁹⁸ provides a useful summary of how the ICPC and ICWA interact:

It is well established that federal law enacted for the benefit of Indian people preempts any state law that conflicts with that federal law.

Consequently, the [Interstate Compact on the Placement of Children or ICPC] does not apply to interstate placements of an Indian child if the placement is being made within an Indian reservation unless:

- the tribal government requests ICPC services;
- the tribe has adopted the ICPC or incorporated its provisions into its own laws; or
- the tribe has an existing Title IV-E agreement with the state requiring ICPC compliance.

If an Indian child (as that term is defined in the ICWA) is being placed interstate but not within a reservation, the ICPC applies to that placement. However, the placement requirements of the ICWA preempt any ICPC requirements that interfere with, or impede, the implementation of the placement required by the ICWA. Thus, if a state agency seeks to place an Indian child in a relative or other priority foster, preadoptive or adoptive placement pursuant to the preference requirements of the ICWA, any procedural or substantive requirements of the ICPC that conflict or interfere with effectuation of that placement are preempted by the requirements of the ICWA.

⁹⁸ A Collaboration of the National Council of Juvenile and Family Court Judges and the American Public Human Services Association (Fall 2001), pp. 42-44, and can be found at https://www.ncjfcj.org/sites/default/files/ICPCManualandGuideFullDoc_0.pdf (last visited December 31, 2016).

IX. DIVISION OF RIGHTS AND RESPONSIBILITIES BETWEEN THE TRIBE AND STATE

Beyond the provisions of ICWA and what the parties do to initiate and support a voluntary, involuntary or emergency court proceeding, the state and the tribe must coordinate other activities that are necessary to achieve the purpose of ICWA, and that ultimately support the court proceedings. These activities include referrals, investigations and providing services to the Indian child and Indian family.

These types of provisions can accomplish what the Act and its regulations cannot, and provide a practical roadmap of how the parties can collaborate and ensure that the tribe's voice is fully integrated into these activities. Most of the ICWA Tribal-State Agreements set forward provisions that deal with these activities. A few Agreements provide very little direction for this working relationship and stick close to ICWA's requirements within the context of court proceedings. *See for example Saginaw Chippewa-MI and Minnesota Agreements.*

A. Referral and Investigation

Generally, the Agreements separate referral and investigation responsibilities between the tribe and the state depending on the domicile or residence of the child. If the child is living off the reservation, the state generally has primary responsibility for receiving reports and initiating the ICWA processes, and will be responsible for the health and safety of the child unless the case is transferred to the Tribe. When the child lives on the reservation, the Tribe has the primary responsibility and of course, the exclusive jurisdiction to handle the referral and investigation according to Tribal processes.⁹⁹ *See Navajo-AZ (VII); Penobscot-ME (III); Houlton Band of Maliseet-ME (IX.D); New Mexico (VII); and Navajo-UT (VII).*

All of the Agreements lay out provisions providing contact information for both state and tribal child welfare staff. Some of the Agreements stipulate joint investigations by the tribe and state child welfare staff. *Ysleta Del Sur-TX (III.1 and 5); Alabama Coushatta-TX (II).* Certain Agreements allow the tribe to request the state's assistance with or assume responsibility for an investigation on the reservation. *Alabama Coushatta-TX (II); Quinault-WA (V), Makah-WA (V), Stillaguamish-WA (V), Kalispel-WA (3.a), Shoalwater-WA (p. 4), Port Gamble-WA (VIII.B) and Suquamish-WA (V.B.1).*

Where the tribe has chosen not to perform the investigation on the reservation, the

⁹⁹ There are some instances in which "jurisdiction is otherwise vested in the State by existing Federal law." 25 U.S.C. § 1911(a). This phrase has been interpreted by some courts to allow Public Law 280 states to take concurrent jurisdiction over Indian children residing or domiciled within the reservation. See note 60, above.

tribe and state child welfare staff work in partnership, cooperating on most if not all phases of the investigation and provisions for services. *Paiute-UT (p. 2); Confederated Goshute-UT (p. 2); Northwestern Shoshone-UT (p. 4); Tulalip-WA (VIII), Jamestown S’Klallam-WA (VII.1), Samish-WA (V.A), Lummi-WA (IV.1), Snoqualmie-WA (IV.A.1), and Cowlitz-WA (VII).*

The Washington Agreements have a unique structure for referral and investigations, called the “FAR Pathway.” The majority of the Washington Agreements provide two and sometimes three pathways to follow for referral, investigations and providing services: (1) Child Protective Services Investigative Pathway where the state shall take the lead in the investigation; (2) Tribal Investigative Pathway where the tribe shall take the lead in the investigation; and (3) the Family Assessment Response or FAR Pathway. The FAR Pathway is a result of a Washington law enacted in March 2012 that requires the State’s child protective services to implement an alternative pathway for accepted reports of low to moderate risk of child maltreatment. This pathway provides a comprehensive assessment of child safety, risk of subsequent child abuse or neglect, family strengths and needs in order to provide services – without the need for any formal findings to be made. A family’s involvement in the FAR program is voluntary.¹⁰⁰

The Makah, Shoalwater, Stillaguamish, Snoqualmie, Quinault, Tulalip, Jamestown S’Klallam and Stillaguamish Agreements with Washington all provide pathways that include FAR as an alternative investigative pathway. The Agreements differ where the Tribe has asked the Washington Children’s Administration to take on the investigation of referrals that occur on the reservation, from those in which the Tribe will take the lead in investigation of referrals on the reservation. Whether the State or the Tribe takes primary responsibility for the investigation of a referral of child abuse or neglect on the reservation, the parties agree to coordinate and cooperate.

Where the allegation of child abuse or neglect occurs off the reservation, the Agreements similarly provide that the State will be primarily responsible for the investigation and will notify the Tribal child welfare staff of the referral. Where the State takes the lead on an investigation, the State will follow its laws, but will consult with the Tribe to determine whether an allegation is founded or unfounded.

The FAR services are provided by the State; the Tribe can be present during the assessment to plan for appropriate community or tribal support and services. The FAR services are only available for a maximum of 90 days. The Tribe can continue these services at its own expense after the 90 days have passed. The Samish, Lummi, Cowlitz,

¹⁰⁰ See <https://www.dshs.wa.gov/ca/advancing-child-welfare/family-assessment-response-far> (last visited January 15, 2017).

Kalispel and Port Gamble Agreements with Washington do not provide for the alternative FAR pathway.

B. Referral of a Non-Indian Child

Some of the Agreements deal with how the parties will work together when a non-Indian child is the subject of a referral or investigation when that child is on the reservation or is part of the Indian family group. *See Navajo-AZ (VII.B); Penobscot-ME (p.4); New Mexico Agreements (VII.B); Navajo-UT (VII.B).* These provisions stipulate that the Indian tribe will turn the non-Indian child over to the custody of the state and the state will have the primary responsibility for treatment, services and placement. When the child is part of an Indian family, the tribe will participate in the case, including working together with the state to place the child with Indian siblings and near the Indian family.

While the non-Indian child is in the custody of the tribe, the tribe assures that it will take whatever action necessary to ensure the safety of the child. The state is in charge of the entirety of costs, such as in the Navajo and Arizona Agreement: "DCS [Arizona Department of Child Safety] will be responsible for the cost of sheltering for cases that are in the process of transfer involving non-Indian children within the Navajo Nation." *(VII.B.2).*

An example of one of these provisions regarding non-Indian children residing with an Indian family comes from the Mohegan-Connecticut Agreement:

Non-Indian children residing with a Mohegan family.

A. In any case involving non-Indian children who are residing with a Mohegan family, the Tribe will immediately notify DCF [Connecticut Department of Children and Families] of any child protective referral it receives.

B. DCF will conduct an investigation of the allegations of the referral pursuant to state law.

C. Although DCF has primary jurisdiction over a non-Indian child residing with a Mohegan family, DCF will work cooperatively with the Tribe to provide services to the Indian family.

D. The Tribe will be entitled to any information on the case which is in any way relevant to the welfare of the Mohegan family, to the extent permitted by federal, state, and Tribal law. *(II.6).*

C. Case Management

The Agreements are diverse in their expression of case management activities. Case management can be implemented in the current Tribal-State ICWA Agreements through

development of the case plan,¹⁰¹ provisions of services and funding for services, staffing, and coordination meetings. Generally, these activities are performed jointly or in coordination between the tribe and state. Coordination meetings and case plan development can also include other parties involved in an Indian child's case, such as the parent or guardian and other family members. *See for example Navajo-AZ (VIII.D); Mohegan-CT (II.3); Tesuque Pueblo-NM (VIII.C); Navajo-NM (VIII.C); and Navajo-UT (XII.C).*

One method to improve implementation of case management is for the parties to provide detailed procedures for various activities. The Washington Agreements provide:

If a dependency action is initiated in state court and is not transferred to the Tribal Court, then the Tribes will:

1. Designate a case manager to assist CA [Washington Department of Social and Health Services Children's Administration] in locating an appropriate placement. The Tribes' case manager and CA social workers shall collaborate in developing an appropriate case plan.
2. Unless otherwise specified, the Lead Case manager or the [Tribal] manager shall identify an "expert witness" to appear on behalf of Tribes' children.
3. The Tribes and CA will work together to develop a plan for any Tribal members who are placed out-of-home care to assist the child in developing or maintaining an understanding of the Tribes' customs, traditions and history.
4. The Tulalip Tribes and CA will work together to develop a plan for any Tribal member placed in out-of-home care to ensure the child's connection with family and culture is preserved. *Tulalip-WA (XI).*

As soon as CYFD [New Mexico Children, Youth and Families Department] becomes aware that a Pueblo of Tesuque child, parent and/or custodian who are domiciled off the Pueblo of Tesuque, are in need of services to make it possible for the child to safely remain in or return to the home, CYFD shall:

1. Assess the strengths and needs of the child and family and, unless efforts to reunify the Pueblo of Tesuque child with his/her Indian custodian are deemed futile by CYFD and by the state court having jurisdiction over the child, develop a service plan that is designed to make it possible for the child to safely remain in or return to the home.
2. Identify and incorporate values and practices of the Pueblo of Tesuque and Indian cultures that can contribute to providing services to the family.
3. Seek to design culturally appropriate services that are responsive to the Pueblo

¹⁰¹ "Case plan" is discussed in the definitions section at V.D, above.

of Tesuque and Indian values.

4. Consider involving peers, family members, tribal social service resources and community representatives in the case planning and service delivery process when the TRIBE and CYFD agree that it is in the best interests of the Pueblo of Tesuque child. *Tesuque Pueblo-NM (VIII.A); see also Navajo-UT (XII.A)*

1. Which Party Provides Services to the Indian Child and Indian Family

The Agreements vary but the majority requires that the state provide, or assist in providing, services regardless of whether the Tribe is exerting its exclusive jurisdiction over an Indian child or family on the reservation. *For example see Saginaw Chippewa-MI (IV.A); Minnesota (II.C)*. The states and tribes provide a collaborative approach to finding appropriate services to the Indian child and family and many Agreements express the importance of the tribe delivering tribal specific services that are aligned with cultural norms and values.

Services in the community specifically designed for Indian families are to be used where available, including resources of the extended family, the tribe, urban Indian organizations, tribal family service programs and individual Indian caregivers, e.g. medicine men or women, and other individual tribal members who may have developed special skills that can be used to help the child's family succeed. *Paiute-UT (p. 5); Confederated Goshute-UT (p. 5); Northwestern Shoshone-UT (pp. 5-6)*.

The provisions for services may also deal with permission by either the state or the tribe to enter the other's jurisdiction to provide those services:

When CYFD has jurisdiction of a case involving a Pueblo of Tesuque child residing within the Pueblo of Tesuque, CYFD social workers shall be permitted to enter the Pueblo of Tesuque to provide appropriate social services to the child and his/her family. When the TRIBE has jurisdiction of a case involving a Pueblo of Tesuque child residing off the Pueblo of Tesuque, TRIBE social workers shall be permitted into New Mexico to provide appropriate social services to that child and his/her family. Arrangements may also be made in other individual cases to provide social services on or off the Pueblo of Tesuque by CYFD and the TRIBE where such arrangements will be in the best interests of the child and/or family being served. CYFD social workers may request the assistance of Pueblo of Tesuque police in appropriate circumstances. *Tesuque-NM (VI.D.4)*.

Where service plans are discussed in the Agreements, they are developed with the tribal child welfare staff and a copy of the service plan is provided to the tribe. *Ysleta Del Sur-*

TX (IV.7-8).

In the Washington Agreements that provide for the alternative FAR Pathway, as discussed in Section IX.A above, the State FAR worker has the lead and directs the provision of services, but will collaborate with the Tribe. *See Tulalip-WA (VIII).* For children who are within the exclusive jurisdiction of the Tribe and the Tribe requests services from the State of Washington, the State will:

- a. Assign the case to Tribal payment only social worker, who recognizes that the Tribes has custody of and decision making authority over the child, and who is willing to accept the customs and traditions of the Tribes. The CA social worker will not be responsible for case management, but instead will assist the Tribal case manager in accessing services.
- b. Maintain a child file consisting of the referral information, the Tribal case plan, Tribal Court documents, and payment information.
- c. Work with the Tribal case manager to determine what services would best meet the needs of the child and, at the request of the Tribes, pursue intensive services for the child, using established CA procedures. The CA social worker will help make the Tribes aware of appropriate services available through CA, as well as how to access those services. *Tulalip (X.4)*

2. Which Party Provides Funding for Services

Tribal-State ICWA Agreements are one way to set forward funding sources and procedures for child welfare work. Social Security Act Title IV-B and Title IV-E are other sources of funding to support ICWA work.¹⁰² Some states assume total responsibility for payment of services through Title IV-E, for example, but costs are generally borne by the party who is providing the service. *Navajo-UT (VII.C); Navajo-AZ (VII.C).*

Though in several Agreements the state is primarily responsible for funding and assisting in funding, regardless of which party is taking jurisdiction of the case, some Agreements transfer the obligation of costs for services when the tribe takes exclusive jurisdiction of a child: "Whenever the tribe assumes jurisdiction of a child, the county department having custody of the child will pay the cost of returning the child to the Southern Ute Indian Reservation and the cost of foster care until such return is accomplished." *Southern Ute-CO (III.H); see also Tesuque Pueblo-NM (VII.C) and Navajo-NM (VII.C).*

The state will provide funding, regardless of jurisdiction, for specific services in several

¹⁰² For examples of how tribes and states have worked together to develop Title IV-E funding agreements, see note 30, above.

Agreements in which the tribe does not take exclusive jurisdiction, or where the tribe has limited infrastructure to provide services. *Paiute-UT (p. 4); Confederated Goshute-UT (p. 4); Northwestern Shoshone-UT (p. 4); generally, Washington Agreements.* Minnesota pays for foster care maintenance payments, adoptive placement costs, and adoption assistance payments (which likely come from Title IV-E). *(III.)* Maine will make available social services which are funded with a social service block grant. *Penobscot-ME (p. 3).*

A few Agreements do a good job at describing the process by which the state will assist the tribe in finding funding for services:

The State and or OHS [Maine Department of Human Services] will do the following to assist with funding: To the extent possible, assist the Tribe in obtaining state and federal funding to facilitate the Tribe's ability to provide services that address the conditions in a child's home to (1) support the goal of family preservation. This means that the State will do the following: (a) Promote access by the Tribe to services available with providers who have contracted with the State by providing information and any necessary authorizations; (b) Advocate for direct funding to the Tribe by the federal government through Title IV-E of the Social Security Act, and/or work to develop an agreement to pass through IV-E funds to the tribe; and (c) Assist the Tribe to maximize funding available through Medicaid, including the provision of technical assistance. *Houlton Band of Maliseet-ME (VIII.B).*

The Minnesota Agreement makes available contracts with the Tribes for which the state pays the Tribes to provide social services:

As provided by the Minnesota Indian Family Preservation Act, if permitted by law and existing funding allocations, the Department agrees to purchase, at the request of a tribe, "child welfare services" (as defined in 42 U.S.C. § 625(a)(l)) and "social services" (as defined in 42 U.S.C. § 1397), by contract from the tribe, Indian organization or any other organization recognized and approved by a tribe as providing culturally appropriate child welfare services to Indian families. In addition, if requested by the tribe, and required by law and permitted by existing funding allocations, the Department also agrees to purchase by contract, from these entities, all "other services" provided by the Department to or on behalf of Indian children and families. This agreement also recognizes the possibility that the State may provide a block grant to a tribe for the provision of culturally appropriate services to Indian children. In compliance with all federal and state laws and regulations governing the utilization of funds provided through purchase of services contracts, the tribe from whom services are purchased will

provide such services to or on behalf of Indian children and families. All of the agreements set forth in the foregoing paragraph are subject to state and federal law and available funding resources. *Minnesota II.B.*

3. Staffing

Some Agreements allow the tribe to have a say in the staffing of case management activities and provide directives for the hiring of state Indian child welfare staff.

To the extent that funding is available, the Department agrees to establish or to maintain one or more positions that shall be filled by a qualified person with knowledge of and experience with tribal identities in Minnesota and Indian child welfare. The Department will include representation from the Indian Child Welfare Advisory Council in the hiring process. The job duties will include strengthening and monitoring services to American Indian children and families provided by the local social service agencies and private child placement agencies and ensuring compliance with the requirements of the Indian Child Welfare Act, Minnesota Indian Family Preservation Act and this Agreement. Such compliance shall be monitored in a manner that is mutually acceptable to the individuals referred to in Part II, Section D of this Agreement, as the agreement compliance contact. *Minnesota (II.I.1).*

The Tribe shall be given the opportunity to participate in the selection of any CA staff who will have responsibility for carrying and/or supervising cases involving Snoqualmie Tribal children as indicated in regional 7.01 plans. *Snoqualmie-WA (XI).*

Besides the Snoqualmie Agreement with Washington, all the other Washington State Agreements require the state to unilaterally determine staffing of investigations. *For example see Tulalip (VIII).* The Washington State Agreements require however, that when the Tribe requests services from the State for children within the jurisdiction of the Tribe, the social worker chosen by the State shall recognize "that the Tribe has custody of, and decision-making authority, over the child, and...is willing to accept the customs and traditions of the Tribe. The CA social worker will not be responsible for case management, but instead will assist the Tribal social worker in accessing services, unless a contract for case management services for the child has been separately entered into." *Jamestown S'Klallam-WA (VIII).*

4. Group Coordination Meetings

Agreements can provide for group coordination meetings that occur either as a regular part of case management and may include meetings with the family and other

participants in the child's case, or meetings that occur as part of the overall goals of the Tribal-State ICWA relationship. Several Agreements establish certain points in time where coordination meetings are held as a part of an individual case.

The Navajo Agreement with Utah mandates that the state invite the Tribe to all team case management meetings. *(III.G); see also Paiute-UT (p. 3)*. Other Agreements provide provisions for group coordination meetings to discuss broad topics and not necessarily individual cases. The Navajo Agreements with Arizona and Utah, as well as both the Navajo and Tesuque Agreements with New Mexico provide for quarterly meetings that address specific issues:

1. Coordination and communication between parties;
2. Interpretation of this Agreement;
3. Reviews of policies and procedures;
4. Caseload trends and their implications;
5. Matters of mutual concern;
6. Navajo customs and laws;
7. Federal, State, or Tribal laws and regulations; and
8. Other issues that may arise as deemed appropriate. *Navajo-AZ (III.D); Navajo-UT (III.H); Navajo-NM (III.E); Tesuque Pueblo-NM (III.E); see also Ysleta Del Sur-TX (VII.3) and Alabama Coushatta-TX (VII.C)*.

Several of the Washington Agreements compel the Tribe to designate a candidate to represent the Tribe on the Local Indian Child Welfare Advisory Committee. *See Tulalip-WA (XIII) and Quinault-WA (X.3)*.

D. Training

A tribe and state can work together to provide training through an ICWA Agreement, or through other means such as a Title IV-E Agreement.¹⁰³ Most of the Agreements provide provisions for training of either or both state and tribal ICWA staff. Some are simple: "Parties will make training available to the other party." *Penobscot-ME (pp. 6-7)*. Others include specific topics for directed training:

1. The Department will provide reasonable technical assistance to aid the Tribe in complying with Federal and State Child Welfare laws, policies and regulations. This will include the Department providing an overview of program operations, reporting procedures and compliance with the terms and conditions of this Agreement on an annual basis.

¹⁰³ See note 30, above.

2. The Department agrees to offer overview training for the [Tribe], including:
 - a. Roles and responsibilities;
 - b. Stages of service;
 - c. Available child protective services; and,
 - d. Available legal services and resources.
3. The Department also agrees to notify the Tribe Social Service Director, Department of Human Services, of trainings on sexual abuse dynamics, Department trainings, resource availability trainings and other relevant trainings available in the community of which the Department is aware. Attendance or participation by the tribe at the above trainings shall be at the expense of the tribe.
4. The Tribe agrees to notify the Department's Regional Director of all Indian Child Welfare specific training. The Regional Director will designate which staff will attend the training.
5. The Tribe and the Department agree to provide joint trainings each year. These joint presentations will include two (2) sessions on abuse/neglect overview and two (2) sessions on foster home recruitment, to be scheduled with the [Tribe] and limited to one (1) hour in length. *Ysleta Del Sur-TX (VI)*.

The Minnesota Agreement and Saginaw Chippewa Tribe Agreement with Michigan also provide listings of subject matter for training. *Minnesota (IV); Saginaw Chippewa-MI (II.K.1)*.

Most of the Washington Agreements provide interactive opportunities for the State and the Tribes to work together on training activities, and the State will include information about scholarships available for trainings provided by the State. The Agreements further provide opportunities for the Tribe to provide training or technical assistance to the State's staff:

CA shall ensure that all staff assigned to work with the Tulalip Tribes have received Indian Child Welfare Act training, and have met with [Tribal] staff and received training from [Tribe] about the Tulalip Community. CA and [Tribe] shall work together to create training opportunities/webinars. *Tulalip-WA (VII)*.

The Tribes will provide technical assistance and consultation on Native American cases, as requested by CA. The Tribes will provide an annual training to CA staff during Native American Heritage month regarding ethics, cultural awareness and Tulalip Tribal law. *Tulalip-WA (XIII)*.

The Navajo Agreements with Arizona and Utah, and the New Mexico Agreements with

the Tesuque Pueblo and the Navajo Nation require that the new employees of the state child welfare service have cultural competency-type training: “DCS agrees to continue providing cultural competency training at initial hire or shortly thereafter for DCS employees assigned to these proceedings. DCS will coordinate periodically with the NATION to provide specific cultural awareness training regarding working with Navajo children and families.” *Navajo-AZ (XIII); Navajo-UT (XIII); Navajo-NM (XIII); Tesuque Pueblo-NM (XIII).*

The Utah, Texas and Maine Agreements also provide general statements about training requirements for state and tribal child welfare workers. *See Houlton Band of Maliseet-ME (VIII.A.2 and IX.C); Alabama Coushatta-TX (VI); Northwestern Shoshone-UT (p. 6).*

E. Incorporation of Culture and Values

Throughout the majority of the Agreements are statements that confirm the importance of a tribe’s culture and values to support the best interests of the Indian child. Some of these provisions have been stated in other sections of this report. Processes for referral, investigation and case management also provide opportunities for the parties to express the importance of culture and cultural values.

For example, the Ysleta Del Sur Agreement with Texas provides for a native-speaking translator who will be available for the investigation and as other services are provided, including when the service plan is being developed with the family “to ensure the family understands the content of the written Service Plan.” *(IV.9.)* The Ysleta Del Sur provision expands ICWA and the regulation’s requirements to include the development of the service plan. 25 U.S.C. § 1913(a) (translator required in voluntary proceedings for parental consent to foster care placement or termination of parental rights); and 25 C.F.R. § 23.111 (translator required if a parent is unable to understand notice provided in an involuntary proceeding).

The Utah Agreements include partnership and Tribal involvement in all decision making during investigation and case management in order “to reduce the potential for cultural bias in evaluating home and family conditions.” *See Paiute-UT (pp. 2 and 5); Confederated Goshute-UT (pp. 2, 4-5); Northwestern Shoshone-UT (pp. 2 and 5).*

Finally, the Navajo and Utah Agreement simply states that “Every effort will be made to ensure that the child will be raised within his or her family and the Navajo culture.” *(I.D.3.)*

F. Application to Private Agencies Licensed by the State

When a state delegates its responsibility to deliver services to a private agency, or the

state licenses an agency to perform certain functions relating to child welfare proceedings that do not necessarily involve state agencies directly, the private agency is bound by ICWA and the Tribal-State Agreement. Thus, ideally, the state and private agency agreement should provide express requirements that the private agency must follow ICWA and the Tribal-State Agreement. In turn, the tribe should also be notified that a private agency has been licensed by the state to deliver appropriate services to Indian children.

Only the Saginaw Chippewa-Michigan and Minnesota Agreements require private state licensed child placement agencies to abide by ICWA and the Tribal-State Agreement. *Saginaw Chippewa-MI (IV.D); Minnesota (I.1)*. Although the 1987 Washington agreements are not reviewed as part of this report except in the Promising Practices section, the 1987 Washington agreements do provide an explicit process to achieve private agency compliance with the agreement, including the tribe assisting the State to monitor private entities.¹⁰⁴ This is an exceptional practice that provides notice to both the tribe and the private agency, and implements a process for the tribe to monitor the private agency's performance of the state's obligations to provide appropriate services and its compliance with ICWA.

¹⁰⁴ The full citation to this provision in the 1987 Washington Original Exclusive Jurisdiction Tribal State Agreement is included below in the Promising Practices section at XI.H.11.

X. OTHER GENERAL OR STANDARDIZED TERMS OF THE AGREEMENT

Agreements in general will establish basic fundamental terms for interpreting or constructing the agreement, and provide direction if the parties seek to amend or terminate their existing relationship. This Section provides some examples of these general or standardized terms that are found in the ICWA Tribal-State Agreements.

A. Construction of the Agreement

The majority of the Agreements have a statement that construes or interprets the Agreement similar to this statement from the New Mexico Agreements: “in the spirit of cooperation to serve best interests or to carry out policy of ICWA. *(I.G); see also Navajo-UT (I.H); Shoalwater-WA (Introduction) (“...liberally construed in the full spirit of cooperation with the goal of carrying out...the Indian Child Welfare Act.”)*. The best of these provisions also construe the Agreement to reflect the “values of Indian culture, custom and tradition.” *Navajo-UT (I.I)*.

The Houlton Band of Maliseet and Maine Agreement provides guidelines for the construction of their Agreement, which are tied to ICWA:

Interpretation of Agreement. This Agreement shall be construed liberally so as to achieve results consistent with ICWA and this Agreement. The following guidelines shall be followed:

- A. Indian Families should be preserved;
- B. Cases involving the Tribe’s children should be heard in a Tribal Court whenever possible. Indian children who must be removed from their homes should have placements within their own families or Tribe.
- C. The State and the Tribe will collaborate on child welfare and custody decisions for children who remain in the custody of the State. The State will defer to Tribal determinations on child welfare and custody, unless the State believes that such Tribal determinations pose a risk to the child. Where the State disagrees with the Tribal determination and makes a different determination, the Tribe retains the right to raise the issue in the appropriate forum. *(VI.)*

Interestingly, there is little diversity in these provisions – they almost always express in simple language the parties’ mutual understanding that the Agreements should be read to carry out the intent of ICWA and the protection of the Indian child and cohesiveness of the Indian family and tribal culture.

B. Provisions to Amend or Terminate the Agreement

ICWA section 1919 provides little detail about what type of provisions can be included in a Tribal-State Agreement. However, it is quite detailed on the termination provision of

a Tribal-State Agreement:

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise. 25 U.S.C. §1919(b).

Many of the Agreements reiterate the 180 day written notice to termination language. *Southern Ute-Colorado (VIII)*; *Penobscot-ME (p. 7)*; *Saginaw Chippewa-MI (VI.A)*; *Minnesota (II.N)*; *Tesuque Pueblo-NM (XIV.A)*; *Navajo-NM (XIV.A)*; *Navajo-UT (XIV.A)*; *Snoqualmie-WA (XIII)*. However, there are some Tribal-State Agreements that differ, requiring written notice with only 30, 60 or 90 days to terminate the Agreement.

- 30 days: Ysleta Del Sur-TX (VIII); Alabama Coushatta-TX (VIII); Tulalip-WA (XVII); Shoalwater-WA (p. 6);
- 60 days: Mohegan-CT (p. 4); Maliseet-ME (XV); Navajo-AZ (XIV.A); and
- 90 days: Port Gamble (XIV).

The majority of the 13 Washington State Agreements does not provide a termination time period and instead requires the parties to have a continuing relationship in which the Agreement is modified when needed and reviewed at specific time periods. This approach is arguably a higher standard than ICWA's 180-day notice of termination by maintaining the important ICWA Tribal-State relationship through continual review and improvement instead of termination.

This is a working document to guide the Tribe and CA in supporting Indian children in need of services. Its description of services, policies, procedures and processes may be changed as programs are added, changed or deleted, eligibility requirements are added, changed or deleted, or as circumstances otherwise warrant. This MOA may be modified at any time by mutual written agreement of the Tribe and CA. *Jamestown S'Klallam-WA (XIV)*; *see also Cowlitz-WA (XIV)*; *Samish-WA (X)*; *Lummi-WA (X)*; *Makah-WA (XI)*; *Quinault-WA (XII)*; *Snoqualmie-WA (XII)*; *Kalispel-WA (7)*; *and Suquamish-WA (X)*.

Many of the other Tribal-State Agreements provide modification or amendment clauses together with the termination provision or in close proximity to similarly express the desire to mutually amend an Agreement rather than terminate it. *See Southern Ute-CO (VIII)*; *Penobscot-ME (p. 7)*. Some Agreements use the termination time period to allow

the parties to work towards modifying or amending the Agreement, or correct issues that are the cause of a potential termination.

Either party may cancel with 180 written notice, provided parties agree to make good faith efforts to discuss, renegotiate and modify agreement. Cancellation shall not affect any action or proceeding over which a court has already assumed jurisdiction. *Tesuque Pueblo-NM (XIV.A); Navajo-NM (XIV.A); Navajo-UT (XIV.A); Navajo-AZ (XIV.A, but with 60 days notice); see also Saginaw Chippewa-MI (VI.A) and Minnesota (II.N).*

XI. PROMISING PRACTICES

This survey and analysis of Tribal-State ICWA Agreements has examined a variety of Agreements. Research found only 39 Tribal-State ICWA Agreements involving 37 tribes and 10 states (of 567 federally recognized tribes) that were in effect in 2015 and 2016. The majority of these Agreements tend to follow ICWA's requirements for state court proceedings. More significantly, there were Agreements that went beyond the framework of ICWA to address the roles and responsibilities of the parties' day-to-day ICWA work, such as provisions supporting ICWA's mandates as well as provisions holding the parties accountable to processes and procedures for referral, case management, notice and training, among other things.

This final section of the report highlights particular provisions extracted from the Agreements that offer "promising practices." A "promising practice" provision offers a well-drafted example that offers protections or considerations in line with the spirit of ICWA, or provides for standards higher than ICWA. These promising practice provisions are provided in an outline structure similar to the organization of this report; this promising practice section is not set up as a template agreement. More than one promising practice provision may be given in the different subject matter areas so that a tribe and a state have access to a range of different approaches. Of course, a tribe should always develop its own language to fit its needs and support its working relationship with the state.

In addition, two ICWA Tribal-State Agreements developed in 1987 are also included in this Promising Practices section.¹⁰⁵ These agreements – called the Original Concurrent Jurisdiction Tribal State Agreement and the Original Exclusive Jurisdiction Tribal State Agreement – were approved by Washington tribes and provide strong detailed examples of promising practices. Though these Agreements were developed in 1987, they offer a comprehensive approach, more so than any of the current 39 ICWA Agreements. In addition, these 1987 agreements supply robust language that obligates the state beyond the terms of ICWA.

Finally, due to the recent promulgation of the ICWA regulations and guidelines, many of the current Agreements may now require updating and revision; therefore, what may have been a promising practice before the regulations went into effect may no longer be a promising practice. The best language, therefore, may be found in the new regulations. Where that is the case, the text of the regulations is provided.

Of the 39 ICWA Tribal-State Agreements representing 37 tribes and 10 states, not one

¹⁰⁵ <https://www.dshs.wa.gov/sesa/office-indian-policy/indian-policy-advisory-committee-ipac> (last visited December 31, 2016); see also notes 25 through 28, above

of them alone can operate as a template to fulfill the needs of all tribal and state relationships. However, many of the Agreements provide essential parts that are useful to review and consider in the development of a robust Agreement. The best Tribal-State ICWA Agreement is, of course, negotiated on a government-to-government basis with the full participation of an individual Indian nation's tribal leaders, social services directors and legal counsel enumerating the tribe's interests, culture and vision for the protection of their children. The following are the promising practice provisions offered to assist both tribes and states in developing or renewing the basis for a vital government-to-government ICWA relationship.

A. Introduction and Purposes or Preamble Section

Promising Practices Note: This section provides background and tone for the Agreement. The key concepts contained in an introduction may include an outline of the intent and history of ICWA and a general understanding of the parties' relationship. This section may also recognize the tribe's sovereignty and its government-to-government relationship with the state.

Purpose. This Agreement is intended to coordinate the abilities and to maximize the guidance, resources and participation of tribes in order to remove barriers from the process that impede the proper care of Indian children. The Agreement is directed at child welfare activities of the State through its local social services systems and attempts to impact the State's judicial systems. It represents the development of a comprehensive working relationship between each of the eleven tribes located within the geographical bounds of the State of Minnesota and the Minnesota Department of Human Services for the delivery of child welfare services.

The purpose of this Agreement is to protect the long term best interests, as defined by the tribes, of Indian children and their families, by maintaining the integrity of the Tribal family, extended family and the child's Tribal relationship. The best interests of Indian children are inherently tied to the concept of belonging. Belonging can only be realized for Indian children by recognition of the values and ways of life of the child's Tribe and support of the strengths inherent in the social and cultural standards of tribal family systems. Family preservation shall be the intended purpose and outcome of these efforts.

The foundation of this Agreement is the acknowledgment that Indian people understand that their children are the future of their tribes and vital to their very existence. An Indian child is sacred and close to the creator. *Minnesota (I.B).*

By entering into this Letter, the Tribe and DCF [Connecticut Department of Children and

Families] intend to achieve the following objectives:

- A. Provide a framework for advancing a cooperative partnership between the Tribe and DCF in the delivery of child protective services to Mohegan families. The responsibilities established by this Letter will be fulfilled in a conscientious manner in order to realize the objectives stated herein.
 - B. Deliver child protective services in a manner which seeks to foster and support the Tribe's culture, tradition and history, while at the same time fulfilling the mandates of applicable Tribal, state and federal laws.
 - C. Establish the necessary lines of communication and implement that communication between the Tribe and DCF on all child protection matters involving Mohegan children and families. *Mohegan-CT (I.2).*
-

CYFD [New Mexico Children, Youth and Families Department] and the TRIBE recognize that:

1. There is no resource that is more vital to the continued existence and integrity of the TRIBE than its children;
 2. The United States has a direct interest, as trustee, in protecting Indian children who are members of or eligible for membership in an Indian tribe;
 3. CYFD has a direct interest in protecting Native American culture and encouraging the cultural diversity of the citizens of the State of New Mexico;
 4. This Agreement is entered into under 25 USC Section 1919 and the New Mexico Children's Code and is predicated on a government to government relationship between the STATE OF NEW MEXICO and the TRIBE in a spirit of cooperation, coordination, communication, collaboration and good will. *Tesuque Pueblo-NM, (I.B).*
-

The Tribal Council¹⁰⁶ recognizes that there is no resource more vital to the continued existence and integrity of the Tribe than its children pursuant to the Tribe's Children's Code Section 102. The long-term survival of the Tribe involves an interest in child welfare and child protection proceedings concerning the Tribe's children. Moreover, the Tribe has a critical interest in ensuring that the Tribe's children maintain the unique values of the Tribe's traditions and culture. *Alabama-Coushatta Tribe-TX.*

This Agreement is the result of a partnership formed by Indian tribes in the State of

¹⁰⁶ Though promising practices would ideally include a mutual statement by a tribe and state that these purposes or values are important to both parties in their ICWA working relationship, where the state will not agree to a mutual statement it remains important for the tribe to express its intent and interests expressly in the Tribal-State Agreement. The parties' expressed and written intent sets the tone of the relationship and even how an agreement may be interpreted as such language gives notice of expectations to the other party.

Washington, the Washington State Department of Social and Health Services, and the Bureau of Indian Affairs. The intent of this Agreement is to protect Indian children and families by maintaining the integrity of the family unit and resolving family problems in a way that is beneficial to Indian children.

The children are the single most important resource that Indian people have. This principle is also held by most people. The child is viewed as a sacred being, close to the creator with strong spiritual ties. Most tribal and urban Indian communities share this belief and the responsibilities associated with protecting the children, family and extended families.

This Agreement was developed in the spirit of providing the mechanism for maximum participation by tribes in child welfare services for the protection of Indian children and families. This Agreement goes beyond the scope of the Indian Child Welfare Act and demonstrates the concerns shared by tribal leaders and representatives, the Bureau of Indian Affairs and the Washington State Department of Social and Health Services.

This Agreement represents the spirit of cooperation through tribal, state, and federal participation in the development of a comprehensive working relationship between the Department of Social and Health Services and the tribes for delivery of social and child welfare services. Consistent with the Indian Child Welfare Act and the Indian child welfare provisions of the Washington State Administrative Code, the Agreement was developed to address barriers to implementing services. The Agreement sets forth principles and concepts agreed to by the tribes and the Department. It specifies the roles and duties of the parties. It is intended to be a blueprint for the development of policy, local agreements, training, and other necessary activities to be undertaken jointly by the tribes and the Department, for the purpose of carrying into effect on a daily basis the provisions contained herein. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (I.1).*

B. Recognition of Tribal Sovereignty within ICWA Agreements

Promising Practices Note: Any tribal-state agreement should recognize tribal sovereignty, manage the scope of any waiver of sovereign immunity and provide a mechanism for the resolution of disputes. In addition, this section includes references about how state child welfare staff will comply with ICWA's requirement that a higher standard of protection to the rights of the parent or Indian custodian of an Indian child should apply above any other federal or state law, 25 U.S.C. § 1921, and full faith and credit shall be observed for all public acts, records and judicial proceedings of Indian tribes, 25 U.S.C. § 1911(d).

1. Express Recognition of Tribal Sovereignty

This Agreement is based on the fundamental principles of government-to-government relationships and recognizes the sovereignty of the Tribe and the State of Texas and each respective sovereign's interest. *Alabama-Coushatta-TX*.

This MOA is based on the fundamental principles of the government-to-government relationship acknowledged in the 1989 Centennial Accord and recognizes the sovereignty of the Nation and of the State of Washington and each respective sovereign's interests. *Cowlitz, Samish (III), Jamestown S'Klallam (IV), Stillaquamish (III), Suquamish (III)-WA*.

2. Waivers of Sovereign Immunity

Nothing in this provision will be construed as a waiver of the NATION's sovereign immunity. *Navajo-AZ (XIV.E)*.

This Memorandum of Understanding is not intended to, nor shall it be deemed to, waive the sovereign immunity of the Tribe or of the State. *Paiute, Confederated Goshute, Skull Valley Goshute, and Shoshone-UT*.

3. Higher Standards

Minnesota child protection statutes must be construed consistently with the Indian Child Welfare Act. Indian children have equal rights granted to other children under federal and state law, and ICWA takes precedence over all state and other federal laws that may conflict, unless those laws provide higher standard of protection for the rights of the parent or Indian custodian. *Minnesota (I.A)*.

This Agreement does not alter the Act. To the extent that any aspect of this Agreement is ever construed to limit the protections of the Act, the Act controls. To the extent that this Agreement affords greater protection than the Act, this Agreement controls.¹⁰⁷

Saginaw Chippewa-MI (I.C).

4. Full Faith and Credit

In carrying out this Agreement and the Act, DSHS [Washington Department of Social and Health Services] shall give full faith and credit to the public acts, records and judicial proceedings of the Tribe applicable to Indian child custody proceedings to the same extent that it gives full faith and credit to the public acts, records, and judicial proceedings of other states.

¹⁰⁷ As referenced elsewhere, the extent to which an Agreement's provisions can be enforced beyond ICWA will likely be determined on a case-by-case, subject-by-subject basis.

Whenever it may be necessary for the Tribe to obtain enforcement in the courts of the State of Washington of orders entered in tribal child custody proceedings, DSHS, upon the request of the Tribe, agrees to assist the Tribe to obtain such enforcement to the same extent that DSHS assists other states in obtaining enforcement of the child custody orders issued by such other states.

Whenever DSHS has custody of an Indian child pursuant to an order of the tribal court, the Tribe agrees to assist DSHS in enforcement of such order, including, if necessary, utilization of tribal police and the resources of other appropriate tribal governmental agencies.

Whenever DSHS has custody of an Indian child pursuant to an order of the superior court and the child has been placed by DSHS in a home located within the boundaries of the Tribe's reservation or whenever an Indian child's parent, legal custodian, or any other person is a party to a superior court child custody proceeding and is located within the boundaries of the Tribe's reservation, the Tribe shall give full faith and credit to the orders of the superior court in such proceeding and shall assist DSHS in the enforcement of such order, to the same extent that the Tribe assists any other tribes or states in obtaining enforcement of the child custody orders issued by such other tribes or states. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (I.2.A).*

5. Resolution of Disputes

The parties agree that, upon the request of any party, disputes arising between any signatory Tribe and the Department concerning the application and interpretation of this Agreement shall be referred to a duly designated representative (or representatives) of the Department and the Tribe for a good faith effort to resolve the dispute. If a resolution is reached, the decision shall be binding upon the Department and upon the participating Tribe. Notice of the dispute and ultimate resolution shall be shared with all of the other signatory Tribes, but none of the Tribes who did not participate in the dispute resolution process shall be bound by the decision. *Minnesota (II.M).*

When a Tribal social worker makes a recommendation on the care, services and placement for a [Tribal] child and the CA [Washington State Department of Social and Health Services Children's Administration] social worker is not in agreement and the CA social worker intends to make a recommendation to the juvenile court, the Tribe may either present its recommendation to the juvenile court, if the Tribe has intervened in the dependency or termination proceeding, or it can invoke the following impasse procedure.

The Tribe and state worker will meet with the Tribe's ICW supervisor and the CA

supervisor to resolve the differences. If it is not resolved, the impasse will still be in place and the CA Area Manager and Regional Administrator will meet with the Tribe's ICW Supervisor, the Tribal Administrator, and the Health and Human Services Director. If the differences are still not resolved, the CA assistant secretary/DSHS secretary and the Tribal Chairman will work toward resolving the differences. If after that, a satisfactory decision has not been reached, the Tribe may dispute the DSHS decision and appeal it to the Governor. *Cowlitz-WA (XII), Samish-WA (IX), Jamestown S'Klallam-WA (XII)*.

1. The Parties agree to work cooperatively to accomplish all of the terms of this Agreement, however, acknowledge that there may be instances in which either the Tribe or the Department has not complied with the conditions of this Agreement or that clarification is necessary to interpret provisions of this Agreement. In such an instance, the Tribe and the Department agree to refer the matter to non-binding mediation.
 2. Either Party may request that a mediator be selected to assist in resolving any conflict or dispute. The mediator shall be jointly selected and shall be approved by both the Tribe and the Department. The cost of a mediator shall be born equally by the Tribe and the Department with neither Party using funds dedicated for the programs or services contained in this Agreement.
 3. If the mediator cannot resolve the conflict or dispute then the issue shall be brought before a Disputes Board. The Disputes Board shall consist of three (3) individuals; one (1) selected by the Tribe, one (1) selected by the Department and a third party to be chosen by the first two. The Disputes Board shall review all issues, concerns and conflicts with a goal to determine acceptable solutions for both parties. The decisions of the Disputes Board shall be final and binding on both parties. *Port Gamble-WA (XI and Appendix D)*.
-

C. Definitions

Promising Practices Note: This section will not repeat the statute or regulatory definitions, but instead will bring forward words or phrases that are not defined by ICWA or its regulations, or where the Agreements have provided a higher standard or more thorough definition. Thus, if a definition is not included here, the Act or the regulations should be referred to.

▪ Acknowledged Father:

"Acknowledge" and "acknowledged father": "Acknowledge" means any action on the part of an unwed father to hold himself out as the biological father of an Indian Child. "Acknowledged father" also means a father as defined by tribal law and custom. The Act and this definition do not require acknowledgement of paternity as defined under State law, including under Mich. Comp. Laws §§ 722.1001 *et seq.*

“Acknowledge” means any action on the part of the unwed father to hold himself out as the biological father of an Indian child. “Acknowledged father” also means a father as defined by tribal law or custom. *Minnesota (I.E. 1)*.

▪ **Best Interests:**

Best Interests of an Indian child means compliance with and recognition of the importance and immediacy of family preservation and using tribal ways and strengths to preserve and maintain an Indian Child’s family. The Best Interests of an Indian Child will support that child’s sense of belonging to family, Extended Family, clan, and tribe. Best Interests of an Indian Child are interwoven with the best interest of the Indian’s Child’s Tribe. Best Interests must be informed by an understanding of the damage that is suffered by Indian Children if a family and Child’s tribal identity is denied or if the child is not allowed contact with her or his family and tribe. Congress has not imposed a “best interest” test as a requirement for Indian Child-Custody Proceedings, state “best interests” standards that are applied in circumstances involving non-Indian children are different than Best Interest of an Indian Child, and state “best interest” standards do not control either this Agreement or Indian Child-Custody Proceedings. *Saginaw Chippewa-MI (II.F)*.

“Best interests of the Indian child” means the use of practices in accordance with the federal Indian Child Welfare Act, and other applicable law, that are designed to accomplish the following: (a) Protect the safety, well-being, development, and stability of the Indian child; (b) prevent the unnecessary out-of-home placement of the Indian child; (c) acknowledge the right of Indian tribes to maintain their existence and integrity which will promote the stability and security of their children and families; (d) recognize the value to the Indian child of establishing, developing, or maintaining a political, cultural, social, and spiritual relationship with the Indian child’s tribe and tribal community; and (e) in a proceeding under this chapter where out-of-home placement is necessary, to prioritize placement of the Indian child in accordance with the placement preferences of this chapter. *Jamestown S’Klallam (II.7)*.

▪ **Case Plan:**

“Case Plan” means a written plan prepared by the local social service agency jointly with the parent(s), Indian custodian or guardian of the child; the child’s tribe and in consultation with the guardian ad litem and the child’s foster care providers or representative of the residential facility, and where appropriate, the child. If the child is in placement solely or in part due to the child’s emotional disturbance, the mental health provider shall be included. In addition, the parties agree that the focus shall be on family preservation and elimination of the issues underlying the child protection

proceeding. *Minnesota (I.E.6)*.

▪ Citizen:

Citizen: CA recognizes that the Jamestown S’Klallam Tribe considers its people to be citizens of the nation. To the extent that this agreement references the term “member” as it is used in the state and federal Indian Child Welfare Acts, the terms are intended by the parties to have the same meaning. *Jamestown S’Klallam-WA (II.2)*.

▪ Consultation:

“Consultation” between the state and tribal government shall include real and full dialogues, not just exercises to meet procedural requirements. Tribal-State consultation should be a process of decision-making that works cooperatively toward reaching a true consensus before a decision is made or action taken. *Tulalip-WA (VI.4)*.

▪ Extended Family:

Extended family means the child’s grandparent, aunt or uncle, first and second cousins, stepparent, godparent, or other individual approved by consensus through a Navajo family clan. *Navajo-AZ (II.F)*.

“Extended Family” shall be defined by the Tribe. *Houlton Band of Maliseet-ME (VII.J)*.

▪ Indian Child:

“Indian Child” “means an unmarried person who is under age eighteen and is either (a) a member of an Indian Tribe or (b)...eligible for membership in a Indian tribe and is the biological child of a members of an Indian tribe...” 25 U.S.C. § 1903(4). A termination of parental rights does not sever the child’s membership or eligibility for membership in a tribe or the Child’s other rights as an Indian. *Saginaw Chippewa (II.V)*.

▪ Qualified Expert Witness:

Qualified expert or qualified expert witness:

- a. A professional person recognized and approved by the Tribe and DSHS as having substantial education and experience in the area of his or her specialty, and extensive knowledge of the prevailing social and cultural standards, family organization and child rearing practices within the Indian community relevant to the Indian child who is the subject of the child custody proceeding or other action.
- b. A person recognized and approved by the Tribe and DSHS as having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of the prevailing social and cultural standards and child-rearing practices within the Indian community relevant to the child who is the subject of

the child custody proceeding or other action.

- c. A member of the child's Indian community who is recognized within the community as an expert in tribal customs and practices pertaining to family organization and child-rearing. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (II. 1).*
-

D. Jurisdiction

Promising Practices Note: The majority of Tribal-State ICWA Agreements reiterate the language of ICWA regarding exclusive and concurrent jurisdiction, as well as ICWA's language regarding transfer to the tribal court and intervention in a state court case. This section will provide any promising practice provisions that go beyond or provide exceptions to ICWA or the regulation's language, including obligations of the state child welfare staff, when a Tribe does not have a tribal court, or how the parties have handled Public Law 280 jurisdiction. The regulations also provide new language that should be considered on this topic.

25 C.F.R. § 23.110 When must a State court dismiss an action? Subject to 25 U.S.C. 1919 (Agreements between States and Indian Tribes) and §23.113 (emergency proceedings), the following limitations on a State court's jurisdiction apply:

(a) The court in any voluntary or involuntary child-custody proceeding involving an Indian child must determine the residence and domicile of the Indian child. If either the residence or domicile is on a reservation where the Tribe exercises exclusive jurisdiction over child-custody proceedings, the State court must expeditiously notify the Tribal court of the pending dismissal based on the Tribe's exclusive jurisdiction, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.

(b) If the child is a ward of a Tribal court, the State court must expeditiously notify the Tribal court of the pending dismissal, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.

Prior to filing any petition or complaint to initiate an involuntary child custody proceeding in superior court or prior to assisting a parent or Indian custodian to obtain superior court validation of a voluntary consent to the foster care placement or adoption of or termination of parental rights to an Indian child, DSHS will seek to determine whether the Indian child is a ward of a tribal court or whether the child is domiciled or resident on an Indian reservation.

DSHS will keep a record on a case-by-case basis of the inquiries made to determine whether a child is a ward of the tribal court and of the facts considered in reaching a decision that the child is or is not domiciled or resident on an Indian reservation. This record, upon request, will be provided to the Indian child's tribe, parent or Indian

custodian and any guardian ad litem appointed to represent the child. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (II.17)*.

The parties have agreed to enter into this Agreement based on the premise that DSHS and the Tribe, pursuant to P.L. 83-280, have concurrent civil jurisdiction with respect to the matters covered by this Agreement that arise within the Tribe's reservation or that involve Indian children resident or domiciled on such reservation. However in furtherance of this Agreement, DSHS agrees to provide the Tribe with an opportunity to exercise tribal jurisdiction before DSHS takes any action to invoke state court jurisdiction, except as otherwise specified in this Agreement.

The parties understand that the Tribe's position is that, under P.L. 83-280, the Tribe has exclusive civil jurisdiction over matters concerning Indian children in circumstances involving termination of parental rights, involuntary foster care placement and adoption proceedings, and application of decency neglect, children in need of supervision, and child abuse laws. The parties understand that nothing in this Agreement may be deemed as a waiver or abandonment of the Tribe's exclusive jurisdiction position with respect to these matters.

Except as otherwise agreed herein, this Agreement likewise shall not be deemed as a waiver or abandonment of any jurisdictional power or prerogatives of the State or any of its subdivisions. *1987 Washington Original Concurrent Jurisdiction Tribal State Agreement (2.B)*.

At the time of signing this agreement, the Cowlitz Indian Tribe does not have a court system. This agreement anticipates that a tribal court system will be established in the future. The establishment of a tribal court system may require amendment of this agreement. *Cowlitz-WA (V)*.

Because the Tribe has not had a Tribal Court, the Tribe has not been able to have its child protection cases heard by a Tribal Judge. All Maliseet child protection cases have been heard solely in the State court, which is not satisfactory to the Tribe. The Tribe has not had a tribal child welfare system until this time, and therefore has relied on the State for casework and foster care licensing. While the State and the Tribe have made efforts to recruit foster parents, there are a limited number of Indian foster homes available for placement.

...

the Tribe shall enter into a separate agreement with the Penobscot Nation to use the Penobscot Tribal Court or the Passamaquoddy Tribe to use the Passamaquoddy Tribal

Court as the Tribe's Tribal Court, until such time as the Tribe shall establish its own Tribal Court, and the Tribe will adopt a Child Welfare Code and Policy, as well as foster home licensing rules. *Houlton Band of Maliseet-ME (I)*.

Within 120 days of the signing of this Agreement, the State and the Tribe shall work together to create procedures for identifying the Tribe's children currently in the custody of OHS, effecting Tribal Court jurisdiction over new cases, and transferring continuing cases to Tribal Court. *Houlton Band of Maliseet-ME (IX.F)*.

The Lummi Nation Tribal Court has jurisdiction over Lummi Children, wherever they may reside, consistent with Title 8 of the Lummi Code of Laws. *Lummi-WA (III)*.

1. Good Cause Not to Transfer

25 C.F.R. § 23.118 How is a determination of "good cause" to deny transfer made?

(a) If the State court believes, or any party asserts, that good cause to deny transfer exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing on the record and to the parties to the child-custody proceeding.

(b) Any party to the child-custody proceeding must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists.

(c) In determining whether good cause exists, the court must not consider: (1) Whether the foster-care or termination-of-parental-rights proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage; (2) Whether there have been prior proceedings involving the child for which no petition to transfer was filed; (3) Whether transfer could affect the placement of the child; (4) The Indian child's cultural connections with the Tribe or its reservation; or (5) Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems.

(d) The basis for any State-court decision to deny transfer should be stated orally on the record or in a written order.

2. Tribal Court Declines Jurisdiction

When a request for transfer has been made, it shall be assumed that the tribal court is willing to accept transfer of the case unless the tribal court files a written statement with the state court or agency declining jurisdiction within a reasonable amount of time. *Southern Ute-CO (III.C)*.

3. Intervention

Whether the NATION intervenes or not, DCS [Arizona Department of Child Safety], through counsel, will request the court to endorse the NATION on all minute entries concerning the case and will provide copies of all pleadings filed by DCS. Until the NATION legally intervenes, DCS's counsel will send all pleadings to the address listed in

Section III.F. If and when the NATION intervenes, DCS's counsel will send pleadings to the NATION's counsel. *Navajo-AZ (V.B)*.

A. Tribal rights:

1. ICWA grants the Tribe the right to intervene in any child custody proceedings under ICWA (i.e., foster care placements, termination of parental rights, pre-adoptive placements, and adoptive placements) at any point in the case.
 2. When the Tribe intervenes they become a party to the proceeding and have the same rights as any other party. For example, the Tribe has the right to counsel, the right to notice, the right to access all documents filed with the court, the right to present its own witnesses or cross examine witnesses, the right to retain counsel if it chooses, and the right to appeal.
 3. The Tribe has the right to attend the same meetings as any other party in the proceeding, including any Child and Family Team Meetings, mediations, and discussions.
 4. If the Tribe declines jurisdiction, the Tribe still will have the right to participate as an interested party or to intervene at any point in the proceeding. The right to intervene extends to voluntary as well as to involuntary proceedings. *Skull Valley-UT (pp. 3-4)*.
-

It is further premised on the Nation's right under the state and federal Indian Child Welfare Acts to intervene at any point in a State Juvenile Court proceeding involving a child who is a member of the Lummi Nation or is eligible for membership and is the biological child of a member. For children who do not meet the Indian child definition, permissive intervention under state law may be sought. CA shall support the Lummi Nation in achieving intervention in either case. *Lummi-WA (III)*.

E. Child Welfare Proceedings

1. General Provisions Applicable to Emergency, Voluntary and Involuntary Proceedings

a) Determination of Who is an "Indian Child"

25 C.F.R. § 23.107 How should a State court determine if there is reason to know the child is an Indian child?

(a) State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record. State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.

(b) If there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an "Indian child," the court must: (1)

Confirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership); and (2) Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an "Indian child" in this part.

(c) A court, upon conducting the inquiry required in paragraph (a) of this section, has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if: (1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child; (2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child; (3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child; (4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village; (5) The court is informed that the child is or has been a ward of a Tribal court; or (6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.

(d) In seeking verification of the child's status in a voluntary proceeding where a consenting parent evidences, by written request or statement in the record, a desire for anonymity, the court must keep relevant documents pertaining to the inquiry required under this section confidential and under seal. A request for anonymity does not relieve the court, agency, or other party from any duty of compliance with ICWA, including the obligation to verify whether the child is an "Indian child." A Tribe receiving information related to this inquiry must keep documents and information confidential.

25 C.F.R. § 23.108 Who makes the determination as to whether a child is a member, whether a child to whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member of a Tribe?

(a) The Indian Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) determines whether the child is a member of the Tribe, or whether the child is eligible for membership in the Tribe and a biological parent of the child is a member of the Tribe, except as otherwise provided by Federal or Tribal law.

(b) The determination by a Tribe of whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member, is solely within the jurisdiction and authority of the Tribe, except as otherwise provided by Federal or Tribal law. The State court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe.

(c) The State court may rely on facts or documentation indicating a Tribal determination of membership or eligibility for membership in making a judicial determination as to whether the child is an "Indian child." An example of documentation indicating membership is a document issued by the Tribe, such as Tribal enrollment documentation.

-
1. Eligibility for membership in the tribe shall be determined in accordance with the Constitution of the Southern Ute Indian Tribe of the Southern Ute Indian Reservation.
 2. All questions of membership in the tribe or eligibility for membership in the tribe shall be decided by the tribe and such decisions shall be conclusive and irrebuttable. If the department has questions concerning the tribal membership of a particular individual, it shall communicate with the tribe to resolve those questions as set forth in this agreement. *Southern Ute-CO (II.C)*.
-

Identification Of Indian Children And Tribal Affiliation

- A. DCFS [Utah Division of Child and Family Services] shall make diligent efforts to identify every child who is subject to the ICWA.
 - B. DCFS intake workers and case managers shall inquire whether the child/parents are American Indian at **ALL** stages of the case.
 1. This will facilitate the proper management of ICWA cases as soon as there is any reason to believe that the child may be enrolled or eligible for enrollment as a member of the Tribe for involvement in the permanency planning process.
 2. It will eliminate the sudden "surprise discovery" that there is an Indian child involved.
 - C. If the child's parents are unavailable or unable to provide a reliable answer regarding the Indian heritage of their child, the DCFS caseworker shall use the following to determine the child's Indian heritage:
 1. A thorough review of all documentation in the file, including contact with the previous caseworker.
 2. Consultation with relatives/collaterals providing information that suggests the child/parent may be American Indian.
 3. Examination of any other information bearing on the determination of the child's Indian heritage, such as communication from other sources including Indian tribes and organizations.
 4. If the caseworker determines a child may be Indian, DCFS will immediately notify the Attorney General pursuant to the above notice requirement. The Tribe will provide written verification, via certified mail and fax that this case involves an "Indian child"; a child who is enrolled or eligible to be enrolled under ICWA.
 - D. The Tribal worker will:
 1. Serve as a liaison for receiving and accepting all ICWA inquiries from DCFS.
 2. Independently or collaboratively conduct research on eligibility for membership in the Tribe to determine whether the case shall be conducted in compliance with ICWA. *Skull Valley Goshute-UT (pp.2-3)*.
-

The parties agree to continue to explore computer matching of tribal census roles to

OHS computers so as to facilitate identification of tribal members. *Penobscot-ME (p.7)*.

b) Examination and Sharing of Documents

Promising Practices Note: ICWA requires that each party to a foster care placement or termination of parental rights proceeding shall have the right to examine documents filed with the court. 25 U.S.C. § 1912(c). Promising practices provides the sharing of information between a tribe and state child welfare staff more broadly to include pre-court proceeding referral and investigation documentation and information. In addition, a provision facilitating the right of the child to obtain records of his or her adoption once the child reaches 18 may be an important provision to include as part of an Agreement's document sharing provisions.

CYFD and the TRIBE recognize that when a Pueblo of Tesuque child is the subject of a child custody proceeding the free flow of information between CYFD and the TRIBE in relation to the Pueblo of Tesuque child is proper, necessary to the administration of the child protective services laws of the STATE OF NEW MEXICO and the TRIBE, and is in the best interests of the Pueblo of Tesuque child. CYFD will make information, reports and records relating to Pueblo of Tesuque children available to the TRIBE to the extent authorized by the New Mexico Children's Code, NMSA 32A-4-6 (C), CYFD policy and other state and federal confidentiality statutes and administrative rules. Pueblo of Tesuque will make information, reports and records relating to Pueblo of Tesuque children available to the CYFD to the extent authorized by Pueblo of Tesuque law, Pueblo of Tesuque policy and other federal confidentiality statutes and administrative rules. *Tesuque-NM (III.J)*.

At the commencement of any proceeding for the foster care placement of or termination of parental rights to an Indian child, DSHS, as part of the notice required to be sent under this Agreement to the parent(s), Indian custodian(s) and the Tribe, will inform those notified that, upon request, DSHS will furnish all case record material, reports or other documents which formed the basis for the decision to petition the court, as well as all reports or other documents which DSHS intends to provide the court in support of the petition. In addition, DSHS will inform those notified of their right to examine and receive copies of such other documents as may assist the Tribe in deciding whether to petition the superior court for a transfer of jurisdiction to the tribal court or to intervene in the superior court proceeding. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (V.5)*.

In any superior court proceeding, in which DSHS is a party, resulting in the court ordered foster care or preadoptive placement of an Indian child or in the termination of

the parent-child relationship between a parent and an Indian child, DSHS, when the Tribe has not been a party in the proceedings, will send the Tribe a copy of the order. Upon request, DSHS agrees to send the Tribe such other records of the proceeding as it may request. The records will be sent to the Tribe by certified mail return receipt requested within five (5) business days of receipt of the request. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (X.6).*

25 C.F.R. § 23.138 What are the rights to information about adoptees' Tribal affiliations? Upon application by an Indian who has reached age 18 who was the subject of an adoptive placement, the court that entered the final decree of adoption must inform such individual of the Tribal affiliations, if any, of the individual's biological parent and provide such other information necessary to protect any rights, which may include Tribal membership, resulting from the individual's Tribal relationship.

Under the Act, an adopted Indian individual who has reached the age of eighteen may petition the court which entered the final decree of adoption for information on the individual's tribal affiliation and other information, including the names and last known addresses of the individual's biological parents, as may be necessary to protect the rights flowing from the individual's tribal relationship. To carry out the provisions of the Act, the court may order DSHS to release to the adopted Indian child information contained in the adoption records maintained by DSHS.

In the case of an Indian child adopted after the effective date of this Agreement, DSHS, within thirty (30) days after receipt of notice of an adoption of an Indian child, will notify the child's adoptive parents of the right provided in the Act to obtain adoption record information.

In any case where DSHS is involved in a proceeding to voluntarily or involuntarily terminate the parental rights of a biological parent of an Indian child, DSHS will inform the biological parent of the right, under the Act, of the Indian child to obtain adoption record information. Whenever possible the Tribe will assist DSHS to provide the information to the parent. Such parent shall be informed that if he/she wishes to assist in the release of identifying information to a child who has reached eighteen and petitions the court for such information, such assistance may be provided by keeping the court informed of the parent's current address.

Upon written request of any person who has reason to believe that he/she is an Indian, DSHS will inform such person of the court which entered the person's final decree of adoption and of the right provided in the Act to obtain adoption record information.

In order to notify Indian adopted children over the age of eighteen of their right under the Act to obtain adoption record information, DSHS, in cooperation with the Tribe, will develop and employ appropriate television, radio and newspaper announcements and seek appropriate media reports. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (IX.13)*.

c) Invalidate Action

Promising Practices Note: In addition to the ICWA and regulatory requirements when a termination of parental rights or adoption decree must be set aside, the state and tribe may include provisions to collaboratively develop a written plan for the Indian child when a termination of parental rights or adoption has been set aside for any reason.

Whenever the parental rights of an Indian child's adoptive parents are voluntarily or involuntarily terminated, or whenever a final decree of adoption is vacated or set aside and the child has been placed in the custody of DSHS, or DSHS is a party to the proceeding, DSHS agrees to notify the Tribe and the natural parents of the child, or the child's prior Indian custodians, of the action taken. The notification will be provided within five (5) days from the date of entry of any court order terminating the parental rights of the adoptive parents or vacating or setting aside the adoption, and shall inform the parent or prior Indian custodian and the Tribe of the right of the parent or prior Indian custodian to petition the court for a return of custody of the child. The notice will also inform the parent or prior Indian custodian and the Tribe as to whether DSHS will oppose the child return to the custody of the parent or prior Indian custodian and, in the event of such opposition, the reasons therefor.

DSHS agrees not to oppose the return of the child to the custody of the parent or prior Indian custodian in the absence of a thorough investigation into and evaluation of the suitability of such parent or prior Indian custodian to reassume custody. The investigation will be completed within ninety (90) days following the termination of the adoptive parents' parental rights or the setting aside of the final decree of adoption. The Tribe and a qualified expert will be invited by DSHS to participate in any such investigation or evaluation. If upon completion of such investigation and evaluation, DSHS and the Tribe determine that remedial and rehabilitative programs designed to return the custody of the child to the parent or Indian custodian is in the child's best interests and is likely to result in the successful reunification of the child with the parent(s) or Indian custodians, DSHS in cooperation with the Tribe's social services program, will develop an appropriate service plan. The plan will be formulated with the direct collaboration of the parent or Indian custodian, the child, if of sufficient age, and whenever possible, a qualified expert. DSHS will not oppose the return of the child to the custody of the parent or prior Indian custodian unless the plan proves unsuccessful

or unless the return of the child to the custody of the parent or Indian custodian is likely to cause emotional or physical harm to the child.

DSHS, in cooperation with the Tribe's social services program, will assist the child to emotionally and psychologically adjust to the termination of the adoption and to any new placement, including return to the custody of the natural parent(s). This assistance will include a qualified expert and such other expert(s) as may be appropriate and necessary.

Whenever DSHS determines not to follow the recommendation of the Tribe or the qualified expert to develop a plan to return the child to the parent or Indian custodian, DSHS will document in the case record and in a written report to the court the recommendations of the Tribe or the qualified expert, the reasons for the recommendations, and the reasons for its determination not to follow these recommendations. Where the Tribe or qualified expert has provided DSHS with a written statement including recommendations, DSHS will provide the court with a copy of such statement.

Whenever an adoptive placement ends, DSHS, until such time, if any, as the child may be returned to the custody of the biological parent(s), agrees to place the child in accordance with the foster care or adoption placement preferences specified in Part IX, Section 1 and Section 6 of this Agreement. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (IX.11)*.

2. Provisions that Apply to Involuntary Proceedings Only

a) Emergency Proceedings

Promising Practices Note: Notice, time periods for emergency placements, placement preferences and how the tribe and state child welfare staff will work together to protect the Indian child during an emergency removal or placement are all terms that can be included in an ICWA Tribal-State Agreement. The terms in an Agreement should focus on what the parties can do to support the emergency proceedings; the state court's requirements are already provided in the Act and its regulations.

25 C.F.R. § 23.113 What are the standards for emergency proceedings involving an Indian child?

(a) Any emergency removal or placement of an Indian child under State law must terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(b) The State court must: (1) Make a finding on the record that the emergency removal or placement is necessary to prevent imminent physical damage or harm to the child; (2)

Promptly hold a hearing on whether the emergency removal or placement continues to be necessary whenever new information indicates that the emergency situation has ended; and (3) At any court hearing during the emergency proceeding, determine whether the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child. (4) Immediately terminate (or ensure that the agency immediately terminates) the emergency proceeding once the court or agency possesses sufficient evidence to determine that the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(c) An emergency proceeding can be terminated by one or more of the following actions: (1) Initiation of a child-custody proceeding subject to the provisions of ICWA; (2) Transfer of the child to the jurisdiction of the appropriate Indian Tribe; or (3) Restoring the child to the parent or Indian custodian.

(d) A petition for a court order authorizing the emergency removal or continued emergency placement, or its accompanying documents, should contain a statement of the risk of imminent physical damage or harm to the Indian child and any evidence that the emergency removal or placement continues to be necessary to prevent such imminent physical damage or harm to the child. The petition or its accompanying documents should also contain the following information: (1) The name, age, and last known address of the Indian child; (2) The name and address of the child's parents and Indian custodians, if any; (3) The steps taken to provide notice to the child's parents, custodians, and Tribe about the emergency proceeding; (4) 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 (see www.bia.gov); (5) The residence and the domicile of the Indian child; (6) 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; (7) The Tribal affiliation of the child and of the parents or Indian custodians; (8) A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action; (9) If the child is believed to reside or be domiciled on a reservation where the Tribe exercises exclusive jurisdiction over child-custody matters, a statement of efforts that have been made and are being made to contact the Tribe and transfer the child to the Tribe's jurisdiction; and (10) A statement of the efforts that have been taken to assist the parents or Indian custodians so the Indian child may safely be returned to their custody.

(e) An emergency proceeding regarding an Indian child should not be continued for more than 30 days unless the court makes the following determinations: (1) Restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm; (2) The court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian Tribe; and (3) It has not been possible to initiate a "child-custody proceeding" as defined in §23.2.

As soon as possible following DSHS knowledge of the need for an emergency foster care placement of an Indian child, DSHS will actively involve the Tribe's social services program in all matters pertaining to the emergency foster care placement. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (IV.5)*

When DCS assumes emergency custody of a child that is subject to the NATION's exclusive jurisdiction, both the NATION and DCS will coordinate efforts to have the NATION reassume custody of the child. *Navajo-AZ (VI.B.2)*.

A. Indian Child – Ward of Tribal Court/Domiciled Or Resident on Tribe's Reservation

In general, if an Indian child is a ward of the tribal court or is domiciled or resident on the Tribe's reservation DSHS or the superior court may not exercise any authority to place the child in foster care, unless authorized to do so under the laws of the Tribe.

However, if an Indian child, who is a ward of the tribal court or who is domiciled or resident on the Tribe's reservation, is located off the reservation, DSHS may take steps to obtain a superior court order authorizing an emergency placement of the child in foster care in order to prevent imminent physical damage or harm to the child, including sexual abuse.

Following placement, DSHS will undertake "[active¹⁰⁸] efforts" to make it possible to return the child to its home and shall take necessary steps to insure that the emergency foster care placement of the child terminates immediately when such placement is no longer necessary to prevent imminent physical damage or harm to the child, including sexual abuse. Upon termination of the placement, the child shall immediately be returned to his/her parent(s) or Indian custodian(s).

Whenever an Indian child is placed in emergency foster care, DSHS will seek tribal court approval of such placement at the earliest possible time but in no event shall an emergency foster care placement extend for a period longer than 72 hours excluding Saturdays, Sundays and holidays without an order of the tribal court approving such placement, or if the tribal court is unable to issue an order within the 72 hour period, a superior court order approving such placement. DSHS will immediately seek dismissal of the superior court proceeding as soon as the tribal court exercises jurisdiction over the child.

B. Indian Child – Not Ward of Tribal Court/Not Domiciled Or Resident on Tribe's Reservation

If an Indian child is not a ward of the tribal court and is not domiciled or resident on the Tribe's reservation, DSHS may take steps to obtain a superior court order authorizing placement of the child in emergency foster care. DSHS will not take steps to obtain a superior court order authorizing an emergency placement of an Indian child in foster

¹⁰⁸ This agreement uses the term "reasonable efforts" instead of "active efforts." ICWA requires the use of "active efforts" to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. 25 U.S.C. § 1912(d). Therefore, "active efforts" are inserted here in order to provide a promising practice provision.

care unless such placement is necessary to prevent imminent physical damage or harm to the child, including sexual abuse.

Following placement, DSHS will undertake “[active¹⁰⁹] efforts” to make it possible to return the child to its home and shall take necessary steps to insure that the emergency foster care placement of the child terminates immediately when such placement is no longer necessary to prevent imminent physical damage or harm to the child, including sexual abuse. Upon termination of the placement, the child shall immediately be returned to his/her parent(s) or Indian custodian(s).

Whenever an Indian child is placed in emergency foster care, DSHS will obtain judicial approval of such placement at the earliest possible time but in no event shall an emergency foster care placement extend for a period longer than 72 hours excluding Saturdays, Sundays and holidays unless the child is transferred to the jurisdiction of the Tribe and the tribal court orders a longer placement period, or unless DSHS obtains a superior court order approving a longer period of placement. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (IV.1)*.

Whenever DSHS concludes that emergency foster care is necessary for a period longer than 72 hours, DSHS will immediately seek a superior court order transferring the child to the jurisdiction of the Tribe unless DSHS reaches an agreement with the representatives of the Tribe’s social services program that under the circumstances of the particular case the matter would more appropriately be heard in superior court. Such an agreement will not constitute a waiver of the Tribe’s right to subsequently request transfer of the proceeding to tribal court.

If DSHS concludes that emergency foster care is necessary for a period longer than 72 hours and if the case has not previously been transferred to tribal court, a shelter care hearing will be held in superior court in accordance with RCW 13.34.060. If a qualified expert is available and is sufficiently knowledgeable regarding the facts of the case to have reached an informed opinion regarding the need for continued foster care placement of the child, DSHS will present the testimony of such expert at the initial shelter care hearing.

If the testimony of an expert witness¹¹⁰ is not presented at the initial shelter care hearing, DSHS will take immediate steps to involve the Tribe and a qualified expert in the case. Thereafter, unless DSHS has previously returned the child to the custody of the

¹⁰⁹ Id.

¹¹⁰ “Qualified expert witnesses” are dealt with in this Promising Practices section in the definitions section above at XI.C, as well as the qualified expert witness section below at XI.E.2.d.

parent(s) or Indian custodian(s), a subsequent shelter care hearing to determine whether foster care placement should be further extended will be held within thirty (30) days following entry of a foster care placement order at the initial shelter care hearing. If DSHS requests continued foster care at the subsequent shelter care hearing, DSHS will present the testimony of a qualified expert witness in support of the request for continued foster care placement.

If the court orders continued foster care placement following a shelter care hearing, DSHS will request the court to set a fact finding hearing as soon as possible. If at any time prior to the fact finding hearing, DSHS determines that foster care placement is no longer necessary to prevent imminent physical damage or harm to the child, including sexual abuse, DSHS shall immediately take necessary action including obtaining any necessary court orders, to return the child to the custody of his/her parent or Indian custodian. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (IV.1).*

As soon as possible following any action by DSHS to place any Indian child, including any Indian child who is a ward of a tribal court or resident or domiciled on the Tribe's reservation, in emergency foster care, DSHS will notify, by telephone and in writing, the Contact Person(s) designated in this Agreement and representatives of the Tribe's social services program of the actions taken or to be taken. Whenever possible, such notification should be provided prior to the placement of the child in emergency foster care and, in any event, shall be provided prior to the initial shelter care hearing.

Concurrently with filing a request in superior court for the emergency foster care placement of an Indian child, DSHS will personally serve, if possible, or send a copy of the court documents and any scheduling orders or notices to the child's parents, the child's Indian custodians, if any, and the Tribe.

Notice to the Tribe shall be sent to the Contact Person(s) designated in this Agreement and, if different, to the Tribe's designated agent as published in the Federal Register. If the child is believed not to be a member of any tribe and may be eligible for membership in more than one tribe, service of the petition and other notices shall be sent to each such tribe. If the identity or location of the parent or Indian custodian or the tribe cannot be determined, such notice must be given to the Bureau of Indian Affairs Portland Area Director (and to the BIA Agency Superintendent or such other Area Director of the Bureau and the LICWAC, if any, likely to be most proximate to the parent, Indian custodian or tribe). The notice to the BIA or LICWAC shall include a copy of the notice required to be sent to the parent, Indian custodian or tribe and all information pertaining to the background of the Indian child and his/her family that may assist in identifying the child's tribe. *1987 Washington Original Exclusive Jurisdiction Tribal State*

Agreement (IV.4).

Generally, unless the Tribe agrees to a change in the foster care placement preferences provided in the Act or agrees to waive the placement preferences in a particular case, DSHS, for emergency foster care placement purposes, will follow the foster care placement preferences established in the Act.

The Tribe recognizes that prior to obtaining a court order for the emergency placement of an Indian child, circumstances surrounding the need for emergency placement may not immediately lend themselves to placement of the child using the placement preferences established in the Act. In such circumstances, DSHS may make an emergency foster care placement without using the preferences established in the Act provided that DSHS, in cooperation with the Tribe's social services program, has made diligent and documented efforts to place the child in an emergency foster care placement consistent with the preferences in the Act. Whenever an Indian child is not placed according to the preferences, DSHS will continue efforts to place the child within the preferences, as specified in Part IX, Section 1 of this Agreement. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (IV.6).*

Once an Indian child has been placed in emergency foster care, DSHS, in cooperation with the Tribe's social services program, will actively provide reasonably available remedial and rehabilitative programs designed to return the child to the custody of the parents or Indian custodians. These programs shall focus on eliminating any risk to the child of imminent physical harm if returned to the custody of the parents or Indian custodians. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (IV.7).*

b) Notice

25 C.F.R. § 23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?

(a) When a court knows or has reason to know that the subject of an involuntary foster-care-placement or termination-of-parental-rights proceeding is an Indian child, the court must ensure that: (1) The party seeking placement promptly sends notice of each such child-custody proceeding (including, but not limited to, any foster-care placement or any termination of parental or custodial rights) in accordance with this section; and (2) An original or a copy of each notice sent under this section is filed with the court together with any return receipts or other proof of service.

(b) Notice must be sent to: (1) Each Tribe where the child may be a member (or eligible for membership if a biological parent is a member) (see §23.105 for information on how to contact a Tribe); (2) The child's parents; and (3) If applicable, the child's Indian custodian.

(c) Notice must be sent by registered or certified mail with return receipt requested.

Notice may also be sent via personal service or electronically, but such alternative methods do not replace the requirement for notice to be sent by registered or certified mail with return receipt requested.

(d) Notice must be in clear and understandable language and include the following: (1) The child's name, birthdate, and birthplace; (2) All names known (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and Tribal enrollment numbers if known; (3) If known, the names, birthdates, birthplaces, and Tribal enrollment information of other direct lineal ancestors of the child, such as grandparents; (4) The name of each Indian Tribe in which the child is a member (or may be eligible for membership if a biological parent is a member); (5) A copy of the petition, complaint, or other document by which the child- custody proceeding was initiated and, if a hearing has been scheduled, information on the date, time, and location of the hearing; (6) Statements setting out: (i) The name of the petitioner and the name and address of petitioner's attorney; (ii) The right of any parent or Indian custodian of the child, if not already a party to the child-custody proceeding, to intervene in the proceedings. (iii) The Indian Tribe's right to intervene at any time in a State-court proceeding for the foster-care placement of or termination of parental rights to an Indian child. (iv) That, if the child's parent or Indian custodian is unable to afford counsel based on a determination of indigency by the court, the parent or Indian custodian has the right to court-appointed counsel. (v) The right to be granted, upon request, up to 20 additional days to prepare for the child-custody proceedings. (vi) The right of the parent or Indian custodian and the Indian child's Tribe to petition the court for transfer of the foster-care-placement or termination-of- parental-rights proceeding to Tribal court as provided by 25 U.S.C. 1911 and §23.115. (vii) The mailing addresses and telephone numbers of the court and information related to all parties to the child-custody proceeding and individuals notified under this section. (viii) The potential legal consequences of the child-custody proceedings on the future parental and custodial rights of the parent or Indian custodian. (ix) That all parties notified must keep confidential the information contained in the notice and the notice should not be handled by anyone not needing the information to exercise rights under ICWA.

(e) If the identity or location of the child's parents, the child's Indian custodian, or 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 (see www.bia.gov). To establish Tribal identity, as much information as is known regarding the child's direct lineal ancestors should be provided. The Bureau of Indian Affairs will not make a determination of Tribal membership but may, in some instances, be able to identify Tribes to contact.

(f) If there is a reason to know that a parent or Indian custodian possesses limited English proficiency and is therefore not likely to understand the contents of the notice, the court must provide language access services as required by Title VI of the Civil Rights Act and other Federal laws. To secure such translation or interpretation support, a court may contact or direct a party to contact the Indian child's Tribe or the local BIA office for assistance in locating and obtaining the name of a qualified translator or interpreter.

(g) If a parent or Indian custodian of an Indian child appears in court without an attorney, the court must inform him or her of his or her rights, including any applicable right to appointed counsel, right to request that the child-custody proceeding be transferred to Tribal court, right

to object to such transfer, right to request additional time to prepare for the child-custody proceeding as provided in §23.112, and right (if the parent or Indian custodian is not already a party) to intervene in the child-custody proceedings.

25 C.F.R. § 23.112 What time limits and extensions apply?

(a) No foster-care-placement or termination-of-parental-rights proceeding may be held until at least 10 days after receipt of the notice by the parent (or Indian custodian) and by the Tribe (or the Secretary). The parent, Indian custodian, and Tribe each have a right, upon request, to be granted up to 20 additional days from the date upon which notice was received to prepare for participation in the proceeding.

(b) Except as provided in 25 U.S.C. 1922 and §23.113, no child-custody proceeding for foster-care placement or termination of parental rights may be held until the waiting periods to which the parents or Indian custodians and to which the Indian child's Tribe are entitled have expired, as follows: (1) 10 days after each parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and §23.111; (2) 10 days after the Indian child's Tribe (or the Secretary if the Indian child's Tribe is unknown to the party seeking placement) has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and §23.111; (3) Up to 30 days after the parent or Indian custodian has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and §23.111, if the parent or Indian custodian has requested up to 20 additional days to prepare for the child- custody proceeding as provided in 25 U.S.C. 1912(a) and §23.111; and (4) Up to 30 days after the Indian child's Tribe has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and §23.111, if the Indian child's Tribe has requested up to 20 additional days to prepare for the child-custody proceeding.

(c) Additional time beyond the minimum required by 25 U.S.C. 1912 and §23.111 may also be available under State law or pursuant to extensions granted by the court.

Whenever an Indian child is the subject of an involuntary child custody proceeding in superior court, DSHS, concurrently with filing a complaint or petition with the court, will send a copy of the complaint or petition and any scheduling orders or notices to the child's parents, the child's Indian custodians, if any, and the Tribe.

Notice to the Tribe shall be sent to the Contact Person(s) designated in this Agreement and, if different, to the Tribe's designated agent as published in the Federal Register. If the child is not a member of any tribe but may be eligible for membership in more than one tribe, service of the complaint or petition and other notices shall be sent to each such tribe.

If the identity or location of the parent or Indian custodian or the tribe cannot be determined, such notice must be given to the BIA Portland Area Director (and to the BIA Agency Superintendent or such other Area Director of the BIA and the LICWAC [Local

Indian Child Welfare Advisory Committee], if any, likely to be most proximate to the parent, Indian custodian or tribe). The notice shall include a copy of the notice required to be sent to the parent, Indian custodian or tribe and all information pertaining to the background of the Indian child and his/her family that may assist in identifying the child's tribe. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (V.4).*

Whenever an order of the superior court results in the involuntary removal of an Indian child from its parents or Indian custodians for placement in foster care or in the involuntary termination of the parent-child relationship, DSHS will forthwith notify extended family members of the circumstances and of their legal right to be preferentially considered for the foster care, preadoptive placement, or adoptive placement of the child. The notice will include information on the next scheduled court proceedings affecting the custody of the child and on the steps, if any, that the extended family member must take in order to be properly considered as a placement for the child. The notice shall be sent by certified mail return receipt requested. The notice shall be sent immediately following entry of the court order or at such time as the identity of extended family members becomes known. In carrying out the notice requirements of this section, the parties agree that DSHS will notify only those extended family members whose identities and addresses are known or, through the assistance of the Tribe, the BIA or other appropriate sources, can be reasonably ascertained. Upon the request of DSHS, the Tribe will assist whenever possible in providing the notice required in this section.

Where a parent or Indian custodian objects to notification of an extended family member, DSHS, in consultation with the Tribe, will consider the objection. If the objection is based upon the ground that the child would be harmed by contact with the extended family member, notice to that person will not be given as required in this section if DSHS, in consultation with the Tribe, determines that the objection is reasonably based. If the objection is based upon the parent's or Indian custodian's desire for anonymity or upon other considerations, DSHS will consult with the Tribe and if it is determined that notification of the extended family member would serve the Indian child's best interests, DSHS will take steps to provide notification as provided herein, including taking necessary steps to obtain court orders authorizing notification. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (V.8).*¹¹¹

The Department will: ... Give verbal notice to the Tribe before making an initial contact

¹¹¹ This provision is generally consistent with Title IV-E requirements for all children. See 42 U.S.C. 671(a)(29).

with a family or individual on the Tribe's reservation in the course of a child welfare investigation, unless notice is not feasible due to emergency circumstances. Give verbal notice to the Tribe before performing a removal pursuant to Texas Family Code Chapter 262 of an Alabama-Coushatta Tribe of Texas child who is on the Tribe's reservation, unless notice is not feasible due to emergency circumstances. If a removal occurs without prior notice under emergency circumstances, the Department will give the Tribe notice the first working day after removal.¹¹² *Alabama-Coushatta-TX (III.C.3-4)*.

1. In every case in which an allegation of abuse or neglect of a child who resides on the reservation is received by CA, the Tribe will be notified of the allegation. Notification will be in writing, or by phone, fax, or email, within 24 hours, including cases that are not screened in by CA for investigation. The method and time of notification will be documented by CA. The method preferred by the Tribe is by phone, fax and email. See appendix for Point of contact.
 2. If an allegation involves apparent criminal activity, Tribal/State/Local law enforcement in the jurisdiction where the alleged abuse or neglect occurred will be notified.
 3. The Tribe and CA each agrees to inform the other of the outcome of CPS investigations that result in a "founded" for abandonment, child abuse, or child neglect involving Indian children.
 4. If a child who is the victim of a CPS allegation does not live on the reservation, but is an Indian child of the tribe, and if the allegation is founded, or if CA determines the child is in danger in the home of the parent or other caregiver, CA will notify the Tribe of its intent to provide services or to file a dependency petition and give the Tribe an opportunity to file the petition in Tribal Court or to take primary responsibility for providing services. *Stillaguamish-WA (V)*.
-

Whenever an involuntary foster care placement is terminated and the child is returned to the custody of a parent or Indian custodian, DSHS will so notify any other parent or Indian custodian of the child, the Tribe and any other party to the involuntary foster care placement proceeding. Such notification will be in writing and will specify the name and address of the person to whom the child has been returned. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (V.11)*.

A. The TRIBE shall notify CYFD within twenty four (24) hours (excluding weekends and

¹¹² Considering that the State of Texas asserts concurrent jurisdiction over the Ysleta Del Sur Pueblo, see note 20, above, the Agreement's requirement that the State contact Tribal Police is appropriate. If such concurrent jurisdiction did not exist, the state would not normally be able to enter the reservation to perform these functions without the permission of the tribe.

holidays) from the time the TRIBE becomes aware of any emergency situation involving the care, safety or well being of a child placed by CYFD in a foster home licensed by the TRIBE. The TRIBE shall notify the Statewide Central Intake. Provided, however, that the TRIBE shall take whatever steps are necessary to insure the safety and well being of the child until CYFD can assume its responsibility.

- B. CYFD shall notify the TRIBE within twenty four (24) hours (excluding weekends and holidays) from the time CYFD becomes aware of any emergency situation involving the care, safety or well being of a Pueblo of Tesuque child placed by CYFD or the TRIBE in a foster home licenses by CYFD. CYFD shall place the Pueblo of Tesuque child in emergency foster care. CYFD shall notify the TRIBE's ICWA Office as provided in Section IV.B supra. Provided, however, that CYFD shall take whatever steps are . necessary to ensure the safety and well being of the child until the TRIBE can assume its responsibility. *Tesuque-NM (X)*.
-

c) Active Efforts

Promising Practices Note: A state court determines whether active efforts were made by Indian child welfare staff to provide remedial services and rehabilitative programs to prevent the breakup of an Indian family and whether those efforts were successful or unsuccessful. Such an inquiry is case specific and the regulations, below, provide eleven examples of possible facts and circumstances that can equate to active efforts, but this list is not conclusive. An ICWA Tribal-State Agreement can provide additional facts and circumstances that show active efforts.

25 C.F.R. § 23.2 Active efforts means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, 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. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

- (1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;
- (2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
- (3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;
- (4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to

provide family structure and support for the Indian child and the Indian child's parents;

(5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;

(6) Taking steps to keep siblings together whenever possible;

(7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;

(8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;

(9) Monitoring progress and participation in services;

(10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;

(11) Providing post-reunification services and monitoring.

DSHS will petition the superior court for an involuntary foster care placement or termination of parental rights only after it has undertaken active efforts, in accordance with Part V, Section 1 of this Agreement (Services to Indian Families Prior to Court Action), to prevent breakup of the Indian family and the efforts have proved unsuccessful. Prior to filing such petition, DSHS will consult with the Tribe and provide the Tribe with any records and documents that support the decision to petition the superior court.

Prior to filing a petition, DSHS will seek to formulate with the Tribe a mutually acceptable course of action in the best interests of the child and will make every effort to agree to family service plans and legal arrangements designed to eliminate the need for filing a petition in superior court. DSHS will consult with the Tribe to determine whether the Tribe wishes to assert jurisdiction over the matter.

DSHS will not petition the superior court for a foster care placement of an Indian child or for termination or severance of the relationship between an Indian child and its parents whenever the only ground for such a petition are evidence of community or familial poverty, crowded or inadequate housing, or alleged alcohol abuse or other nonconforming social behaviors on the part of a parent or Indian custodian. In initiating a petition, these factors may be considered only when it can be demonstrated that such factors are directly connected to evidence of serious emotional physical harm to the child. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (V.2)*.

Once an Indian child has been involuntarily placed in foster care in circumstances where parental rights have not been terminated, DSHS, in cooperation with the Tribe's social services program, will actively provide reasonably available remedial and rehabilitative

programs designed to return the child to the custody of the parent or Indian custodian.

The remedial and rehabilitative services to be provided will be based on a plan designed to effectively address and eliminate problems destructive to the family. At a minimum, the plan will include services for the family ordered by the superior court or by the tribal court, if such services would be provided if ordered by a superior court, as well as any other services DSHS is able and willing to provide. The plan will be formulated with the direct collaboration of the parents or Indian custodians, the child, if of sufficient age, grandparents, when appropriate, and the Tribe. Whenever possible, formulation of the plan will involve a qualified expert. The plan will serve as the plan required by RCW 13.34.130(2).

The plan will be designed in a way that takes into account the prevailing social and cultural conditions in the child's Indian community. The plan shall encourage maintenance of an ongoing familial relationship between the parents or Indian custodians and the child, as well as between the child, its siblings, and other members of the child's extended family throughout the time that DSHS is engaged in efforts to prevent family breakup.

The plan shall encourage maximum visitation between the parents or Indian custodians and the child, as well as between the child, its siblings, and other members of the child's extended family. Whenever possible, visitation shall occur in the home of the parent or Indian custodian, the home of other family members or some other non-institutional setting that permits the child and those with whom the child is visiting to have a natural and unsupervised interaction. If parental indigency precludes frequent visitation, DSHS will provide, subject to availability of funds, financial or other assistance so as to enable the parent to maintain frequent visitation.

Implementation of the plan will stress the use and involvement, where available, of community services and resources specifically for Indian families. These include the extended family, tribal social services and other programs, tribal organization programs aimed at preventing family breakup, traditional Indian therapy administered by traditional practitioners, where available and appropriate, individual Indian caregivers who have skills to help the family, and the resources of the Bureau of Indian Affairs and Indian Health Service. Whenever possible, implementation will also involve a qualified expert(s). [1987 Washington Original Exclusive Jurisdiction Tribal State Agreement \(V.9\).](#)

The remedial and rehabilitative services to be provided shall be based on a plan designed to effectively address and eliminate problems destructive to the family. The plan shall be designed to insure that reasonable efforts are made to prevent or

eliminate the need for removal of the child from the family home. The plan shall be formulated with the direct collaboration of the parents or Indian custodians, the child, if of sufficient age, grandparents, when appropriate, and the Tribe. Whenever possible, formulation of the plan shall involve a qualified expert(s).

The plan shall be designed in a way that takes into account the prevailing social and cultural conditions in the child's Indian community. The plan will encourage maintenance of an ongoing familial relationship between the parent or Indian custodian and the child, as well as between the child, its siblings and other members of the child's extended family throughout the time that DSHS is engaged in efforts to prevent family breakup. The plan will encourage maintenance of the Indian child in his/her own familial residence.

Implementation of the plan will stress the use and involvement, where available, of community services and resources specifically for Indian families. These include the extended family, tribal social services and other programs, tribal organization programs aimed at preventing family breakup, traditional Indian therapy administered by traditional practitioners, where available and appropriate, individual Indian caregivers who have skills to help the family, and the resources of the Bureau of Indian Affairs and Indian Health Service. Whenever possible, implementation will also involve a qualified expert(s). *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (V.1). (This Agreement also provides provisions regarding post-placement services when an Indian child has been voluntarily placed in foster care, see VI.9; and post-placement services when there has been a voluntary termination of parental rights, see VII.11.)*

d) Qualified Expert Witness¹¹³

25 C.F.R. § 23.122 Who may serve as a qualified expert witness?

(a) A qualified expert witness 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 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.

(b) The court or any party may request the assistance of the Indian child's Tribe or the BIA office serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses.

(c) The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child-custody proceedings concerning the child.

¹¹³ Qualified expert witnesses are used in emergency proceedings as well. See the Emergency Proceedings section XI.E.2.a, above, for an example.

The Tribe and DSHS agree to collaborate in a joint effort to establish a mutually acceptable written list of qualified experts or qualified expert witnesses, and qualified experts in the interracial placement of Indian children. The listing shall identify the expert by name, tribal affiliation, if any, current employment, professional, education and experiential background, areas in which the person is deemed qualified as an expert, whether the person is willing to serve as an expert in such areas and the fees, if any, charged by such person.

The parties agree to employ experts from outside the agreed upon list only when the list does not contain an expert in the area for which an expert is needed, or when the experts on the list are unavailable, or when other factors or circumstances make it unreasonable or burdensome to use a listed expert.

Nothing in this Agreement shall bar DSHS or the Tribe, in a court proceeding, from challenging the competency of a qualified expert. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (II.19)*.¹¹⁴

3. Provisions that Apply to Voluntary Proceedings Only

a) Notice

Promising Practices Note: ICWA does not require notice in voluntary proceedings. However, the Guidelines recommend "that the Indian child's Tribe be provided notice of voluntary proceedings involving that child to allow the Tribe's participation in identifying preferred placements and to promote the child's continued connections to the Tribe. As discussed above, communication with the Tribe may be required in order to verify the child's status as an Indian child. States may choose to require notice to Tribes and other parties in voluntary proceedings."¹¹⁵ Providing notice for voluntary proceedings is a promising practice.

Whenever DSHS intends to request state court validation or a voluntary consent to relinquishment/termination of parental rights or the placement of the child for adoption, DSHS will provide the tribe with at least ten (10) business days written notice of the date, time and place of any proceeding in court to validate the consent. The notice shall be sent by certified mail return receipt requested. If exceptional circumstances necessitate a shorter notice period, DSHS will provide the Tribe's Contact Person(s), designated in this Agreement, with telephone notice in a time sufficient to permit a tribal representative to communicate with the parent or Indian custodian, if

¹¹⁴ This provision may reference the definitions section of a Tribal-State Agreement, see Definitions section V, above.

¹¹⁵ Guidelines, section I.3, p. 65.

possible, and to appear in court at any subsequently scheduled validation hearing. The Tribe will be provided a copy of the signed consent and a copy of any petitions or other court documents filed by DSHS in the proceeding.

The notice to the Tribe will contain the following information:

1. A statement of the right of the Tribe to intervene in any superior court proceeding for the voluntary termination of parental rights and in any superior court adoption proceeding through which parental rights are to be terminated.
2. A statement of the right of the Tribe, in a superior court proceeding involving the adoption of an Indian child but not involving the termination of the parental rights of the Indian child's parents, to ask the superior court to grant the Tribe intervention under the civil procedure laws of the State.
3. A statement of the right of the Tribe to request that any superior court proceeding that may result in the termination of parental rights be transferred to the tribal court.
4. The location, mailing address and telephone number of the clerk of the superior court before which the proceeding is to be held and the name and telephone number of the judge of the superior court assigned to the case, if known.

The notice will include a statement that if the Tribe petitions for intervention in a superior court proceeding involving the relinquishment/termination of parental rights or adoption of an Indian child, DSHS will not oppose the Tribe's request for intervention. The notice will also include a statement that if the Tribe requests a transfer to tribal court of a superior court proceeding that may result in the termination of parental rights, DSHS will support the Tribe's request, unless there exists grounds to object to the transfer, as specified in Part II, Section 18 of this Agreement. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (VII.7). (This Agreement also contains a provision similar to this one that provides notice for the non-consenting parent and extended family in a voluntary proceeding, see VII.8-9.)*¹¹⁶

Upon filing the [parental or Indian custodian's] consent [for voluntary placement] with the court DSHS will notify the Tribe as soon as possible by telephone of the date, time, and place of any scheduled validation hearing and will also provide the Tribe with a copy of any petitions or other court documents filed in the proceeding. DSHS will also notify the Tribe of the location, mailing address and telephone number of the clerk of the superior court before which the proceeding is to be held and the name and telephone number of the judge of the superior court assigned to the case, if known.

Notice to the Tribe will include a statement that if the Tribe petitions for intervention in

¹¹⁶ This provision may also be considered under the intervention section above at XI.D.3.

a superior court proceeding for the voluntary foster care placement of an Indian child, DSHS will not oppose the Tribe's request for intervention. Notice to the Tribe will also include a statement that if the Tribe petitions to transfer the proceeding to the tribal court, DSHS will support the Tribe's petition, unless there exists grounds to object to transfer as, specified in Part II, Section 18 of this Agreement. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (VI.6). (This Agreement also provides notice of a voluntary foster care placement to the non-consenting parent and the extended family, see VI.7-8.)*

Whenever voluntary foster care placement is terminated and the child is returned to the custody of a parent or Indian custodian, DSHS will so notify any other parent or Indian custodian of the child, the Tribe, and any other party to the voluntary foster care placement proceeding. Such notification will be in writing and will specify the name and address of the person to whom the child has been returned. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (VI.10).*

b) Consent for Placement

Promising Practices Note: The regulations provide requirements for accepting consent from a parent or Indian custodian in a voluntary proceeding. Promising practices would include how the state child welfare agency will obtain consent outside the voluntary proceeding, or to support the voluntary proceeding, including how the agency will handle withdrawal of consent from a parent or Indian custodian. In addition, the promising practice would include collaboration with the tribe.

25 C.F.R. § 23.125 How is consent obtained?

(a) A parent's or Indian custodian's consent to a voluntary termination of parental rights or to a foster-care, preadoptive, or adoptive placement must be executed in writing and recorded before a court of competent jurisdiction.

(b) Prior to accepting the consent, the court must explain to the parent or Indian custodian: (1) The terms and consequences of the consent in detail; and (2) The following limitations, applicable to the type of child-custody proceeding for which consent is given, on withdrawal of consent: (i) For consent to foster-care placement, the parent or Indian custodian may withdraw consent for any reason, at any time, and have the child returned; or (ii) For consent to termination of parental rights, the parent or Indian custodian may withdraw consent for any reason, at any time prior to the entry of the final decree of termination and have the child returned; or (iii) For consent to an adoptive placement, the parent or Indian custodian may withdraw consent for any reason, at any time prior to the entry of the final decree of adoption, and have the child returned.

(c) The court must certify that the terms and consequences of the consent were 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 were fully understood by the parent or Indian

custodian.

(d) Where confidentiality is requested or indicated, execution of consent need not be made in a session of court open to the public but still must be made before a court of competent jurisdiction in compliance with this section. (e) A consent given prior to, or within 10 days after, the birth of an Indian child is not valid.

25 C.F.R. § 23.126 What information must a consent document contain?

(a) If there are any conditions to the consent, the written consent must clearly set out the conditions.

(b) A written consent to foster-care placement should contain, in addition to the information specified in paragraph (a) of this section, the name and birthdate of the Indian child; the name of the Indian child's Tribe; the Tribal enrollment number for the parent and for the Indian child, where known, or some other indication of the child's membership in the Tribe; the name, address, and other identifying information of the consenting parent or Indian custodian; the name and address of the person or entity, if any, who arranged the placement; and the name and address of the prospective foster parents, if known at the time.

25 C.F.R. § 23.127 How is withdrawal of consent to a foster-care placement achieved? (a) The parent or Indian custodian may withdraw consent to voluntary foster-care placement at any time. (b) To withdraw consent, the parent or Indian custodian must file a written document with the court or otherwise testify before the court. Additional methods of withdrawing consent may be available under State law. (c) When a parent or Indian custodian withdraws consent to a voluntary foster-care placement, the court must ensure that the Indian child is returned to that parent or Indian custodian as soon as practicable.

Whenever DSHS obtains a written consent for foster care placement from a parent or Indian custodian of an Indian child, DSHS will immediately send a copy of the consent to the Tribe. The consent shall be sent by certified mail, return receipt requested. Whenever possible, DSHS will not commence the court process for validation of the voluntary consent until at least five (5) business days after the consent is sent to the Tribe. If the circumstances necessitate a shorter period, DSHS will provide the Tribe's Contact Person(s), designated in this Agreement, with telephone notice of the consent in a time sufficient to permit a tribal representative to communicate, if possible, with the parent or Indian custodian and to appear in court at any subsequently scheduled validation hearing.

25 C.F.R. § 23.128 How is withdrawal of consent to a termination of parental rights or adoption achieved?

(a) A parent may withdraw consent to voluntary termination of parental rights at any time prior to the entry of a final decree of termination.

(b) A parent or Indian custodian may withdraw consent to voluntary adoption at any time prior to the entry of a final decree of adoption.

(c) To withdraw consent prior to the entry of a final decree of adoption, the parent or Indian custodian must file a written document with the court or otherwise testify before the

court. Additional methods of withdrawing consent may be available under State law.

(d) The court in which the withdrawal of consent is filed must promptly notify the person or entity who arranged any voluntary preadoptive or adoptive placement of such filing, and the Indian child must be returned to the parent or Indian custodian as soon as practicable.

A. Indian Child - Ward of Tribal Court/Domiciled or Resident on Tribe's Reservation

Whenever a parent or Indian custodian seeks to voluntarily place in foster care an Indian child who is a ward of the tribal court or who is domiciled or resident on the Tribe's reservation, DSHS will inform the parent or Indian custodian that the Tribe has exclusive jurisdiction to approve such placements. DSHS, in cooperation with the Tribe's social services program, will assist the parent or Indian custodian to place the child in foster care or make such other arrangement as may be appropriate under the circumstances.

B. Indian Child - Not Ward of Tribal Court/Not Domiciled or Resident on Tribe's Reservation

If a parent or Indian custodian seeks to voluntarily place an Indian child in foster care, DSHS will advise the individuals involved of the provisions of the Act governing such placements, including the required placement preferences and notices. DSHS will also advise the parent that the child may not be placed in foster care unless the consent to foster care placement is validated by a tribal or superior court of competent jurisdiction. If consistent with the practice and procedures of the tribal court, DSHS will encourage the parent or Indian custodian to execute any consent to voluntary foster care placement before a judge of the tribal court.

Whenever a parent or Indian custodian consents to voluntary foster care placement, DSHS will encourage the consenting parent or Indian custodian to contact an Indian interpreter or a representative of the Tribe's social services program to participate in order to assure that the consent is voluntary and does not involve fraud or duress. The efforts of DSHS to secure the involvement of an Indian interpreter or a representative of the Tribe's social services program will be documented. Upon request, the documentation shall be provided to the Tribe.

The parent's consent will be in writing, and the consent form will explain in plain language that the parent may revoke the consent to placement at any time and that, upon revocation, the child must be returned to the parent or Indian custodian unless a court order continuing foster care placement has previously been entered in accordance with 25 U.S.C. Section 1912 or unless the return of custody would likely cause an emergency resulting in imminent physical harm to the child. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (VI.1)*.

If a parent or Indian custodian withdraws consent to relinquishment/termination of

parental rights or adoption of an Indian child prior to entry of a final decree of termination or adoption, as the case may be, the child will promptly be returned to the custody of the parent or Indian custodian unless:

1. The parent or Indian custodian voluntarily consents to foster care placement of the child. (The procedures set forth in Part VI of this Agreement, regarding voluntary foster care placement, shall be followed.); or
2. A court order for foster care placement has previously entered in accordance with 25 U.S.C. 1912 remains in effect. (Services shall be provided to the family as set forth in Part V, Section 9, of this Agreement.); or
3. Return of custody would likely cause an emergency resulting in imminent physical harm to the child. (The procedures set forth in Part IV of this Agreement, regarding emergency foster care placements, shall be followed.)

If the child is returned to the custody of the parent or Indian custodian following withdrawal of the consent to relinquishment/termination or adoption, DSHS, in cooperation with the Tribe's social services program, shall assist the child to make as successful a return as possible to the custody of the parent(s). Assistance shall include helping the child to adjust emotionally and psychologically to the change in placement and helping the parent to understand and effectively meet the needs of the child. Assistance will also include help to the foster care or preadoptive family or facility in assisting the child to make a successful transition back to parental custody. As may be necessary, a qualified expert shall be engaged to help the parent(s), the child, and the foster care or preadoptive family or facility. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (VII.12).*

Whenever a parent petitions under the Act to vacate a decree of voluntary termination or adoption due to fraud or duress in obtaining the consent to termination or adoption, DSHS, in cooperation with the Tribe's social services program, will examine the circumstances surrounding any consent in which DSHS was involved. Where the Tribe was involved in obtaining the consent, DSHS will consult with the Tribe and seek to obtain the Tribe's concurrence in any representations that DSHS intends to make in court. Whenever the Tribe provides DSHS with a written statement regarding the consent, DSHS will submit the Tribe's statement to the court.

DSHS will notify the Tribe of all scheduled hearings on the petition and will, upon receipt of the petition, send a copy of the petition to the Tribe.

In the event that the petition to vacate the termination or adoption is granted, DSHS will notify the Tribe and the natural parents of the child, or the child's prior Indian custodians, in accordance with the requirements of Part IX, Section 11 of this

Agreement.

If the child is to be returned to the custody of the natural parent(s), DSHS, in cooperation with the Tribe's social services program, will assist the child to make as successful a return as possible to the custody of the parent. Assistance shall include helping the child to adjust emotionally and psychologically to the change in placement and helping the natural parent(s) to understand and effectively meet the needs of the child. Assistance will also include help to the adoptive parent(s) in adjusting to the loss of the child and in assisting the child to make a successful transition to the custody of the natural parent(s). As may be necessary, a qualified expert shall be engaged to help the child, the natural parents and the adoptive parents. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (VIII.5).*

c) Termination of Parental Rights

Promising Practices Note: Although a termination of parental rights is handled through court proceedings, promising practices in an ICWA Agreement could include how the tribe and state child welfare staff will work together to assure that the Indian child and family are provided proper services.

A. Indian Child - Ward of Tribal Court/Domiciled or Resident of Tribe's Reservation

Whenever a parent or Indian custodian voluntarily consents to relinquishment and termination of parental rights or voluntarily consents to the adoption of an Indian child who is a ward of the tribal court or who is domiciled or resident on the Tribe's reservation, DSHS will inform the parent or Indian custodian that the Tribe has exclusive jurisdiction to approve the termination of parental right or adoption.

B. Indian Child - Not Ward of Tribal Court/Not Domiciled or Resident on Tribe's Reservation

If a parent or Indian custodian, of an Indian child not a ward of the tribal court and not domiciled or resident on the Tribe's reservation, seeks to voluntarily relinquish and terminate parental rights or place an Indian child for adoption, DSHS shall advise the individuals involved of the provisions of the Act governing such matters, including the required placement preferences and the inapplicability of the notice and appearance waiver provisions of RCW 26.33.310.

DSHS will advise the parent or Indian custodian and, if known, the prospective adoptive parents, that they may be able to relinquish and terminate parental rights or pursue the adoption of the Indian child through a proceeding in tribal court. Such advice will include informing the parent or Indian custodian and, if known, the prospective adoptive parents, that:

1. Tribal court law and procedures may differ from state law.
2. Tribal court termination of parental rights and adoption orders are entitled to full faith and credit in all the states;
3. The requirements of the Indian Child Welfare Act may not apply in tribal court proceedings, and that this may facilitate completion of the termination or adoption; and
4. DSHS will issue an amended birth certificate in compliance with the order of the tribal court when an adoption decree is issued.

DSHS will provide the parent or Indian custodian, and if known, the prospective adoptive parents, with the name, address, and phone number of the Tribe's contact person.

When a validation of a voluntary consent to relinquishment and termination of parental rights or adoption is to proceed in superior court, DSHS agrees to encourage the consenting parent or the court to engage an Indian interpreter or a representative of the Tribe's social services program to participate in order to assure that the consent is voluntary and does not involve fraud or duress. The efforts of DSHS to secure the involvement of an Indian interpreter or a representative of the Tribe's social services program will be documented. On request, the documentation shall be provided to the Tribe. [*1987 Washington Original Exclusive Jurisdiction Tribal State Agreement \(VII.1\).*](#)

Prior to seeking validation of voluntary consent to relinquishment/termination of parental rights or adoption before a state court judge, DSHS will encourage the parent or Indian custodian to contact the Tribe regarding available services to assist the parent or Indian custodian to retain custody of the child or to consider some other arrangement for the child that would further the child's familial and tribal relationship. DSHS will document its efforts to have the parent or Indian custodian contact the Tribe concerning such services. If the parent or Indian custodian is referred by DSHS to an identifiable individual within the Tribe for provision of social services, the date of the referral and the identity of the individual to whom the referral was made will be included in the case documentation. Upon request, the documentation will be provided to the Tribe. [*1987 Washington Original Exclusive Jurisdiction Tribal State Agreement \(VII.2\).*](#)

d) Adoption

***Promising Practices Note:** Though an adoption proceeding is a court proceeding, promising practices require that the tribal and state child welfare staff work together to ensure that the adoption is truly voluntary, that the adoption plan is developed collaboratively, provide all the relevant information to the court, and that transition services are provided to assist the Indian child and family.*

Whenever DSHS is a party in any superior court adoption proceeding involving an Indian child, DSHS will provide the following information to the court:

1. The name and tribal affiliation of the child;
2. The name and location of the Indian child's tribe;
3. The names and addresses of the child's biological parents;
4. The names and addresses of minor biological siblings where the parent-child relationship between the siblings and biological parents has not previously been terminated;
5. If ascertainable upon inquiry to the biological parent in circumstances where the parent-child relationship has been previously terminated, a statement indicating whether the child has other biological siblings and if so, the number and sex of the siblings; and
6. The names and addresses of the adoptive parents, if any, of the child's siblings if such adoptive parents request that their identities be made known. DSHS shall have no affirmative duty to ascertain the identity of such adoptive parents or their wishes regarding inclusion of their names/addresses in the adoption decree.
7. The names and addresses of extended family members, including adult siblings, who request that their identities be made known. Although DSHS shall have no affirmative duty to inform family members of their opportunity to make this request, neither shall DSHS intentionally conceal or withhold this information.
8. The names and addresses of the child's adoptive parents; and
9. The identity and business address of any agency having files or information relating to such adoptive placement.

DSHS will provide the above information to the court in writing and will request that the court include such information in the final adoption decree wherever possible. In cases involving a voluntary consent to adoption by the natural parents, DSHS will request that the court include in the final decree of adoption a statement that the natural parents have been advised of their rights under the Indian Child Welfare Act to petition the court, within two years following entry of the decree, to vacate the adoption on grounds that the consent to adoption was obtained through fraud or duress.

If all the parties to the adoption have reached a clear agreement regarding continuing contact between the child, the natural parents and/or extended family members, DSHS will assist the parties to set forth the terms of the agreement in an order of visitation separate and apart from the adoption decree. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (VIII.3)*.

DSHS, prior to consenting to the adoption of any Indian child in its custody, will advise the prospective adoptive parents that they may have the option of filing the adoption proceeding in tribal court. DSHS will provide the prospective adoptive parents with the

name, address and phone number of the Tribe's contact person. DSHS will also inform the prospective adoptive parents that:

1. Tribal court law and procedures may differ from state law.
2. Tribal court adoption orders are entitled to full faith and credit in all the states;
3. The requirements of the Indian Child Welfare Act may not apply in tribal court proceedings, and that this may facilitate completion of the adoption;
4. DSHS will issue an amended birth certificate in compliance with the order of the tribal court when an adoption decree is issued.

Whenever DSHS has permanent custody of an Indian child following termination of parental rights, DSHS will actively involve the Tribe in any deliberations and decisions as to whether DSHS should consent to the adoption of the child. If the Tribe objects to the plan for adoption, DSHS, with the involvement of the Tribe's social services program, will conduct a detailed review of the caseplan, and if DSHS determines to consent over the Tribe's objection, DSHS will document in writing the basis for such determination.

When the Tribe objects to the plan, DSHS will so advise the court in writing and will attach any written statement from the Tribe expressing the basis of the objection. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (VIII.2).*

4. Other Promising Practices That Apply More Broadly

The State shall review all cases currently active in OHS [Maine Department of Human Services] to ensure that proper notice was given to the Tribe under ICWA and this Agreement. The State will take corrective action in cases where no notice or improper notice was given to notify the Tribe immediately of the error. *Houlton Band of Maliseet-ME (IX.B).*

CYFD shall make reasonable efforts to determine whether any child taken into custody is a Pueblo of Tesuque child and, if so, CYFD must give notice to the TRIBE in accordance with Section 1912 of the ICWA.

A. Type of Proceeding

CYFD shall notify the TRIBE, as provided in section IV.B of this Agreement, of any instance where CYFD has received physical custody of or initiated a protective services action regarding a child that CYFD knows or has reason to believe is a Pueblo of Tesuque child of the following actions known to CYFD:

1. Involuntary proceedings involving placement of a Pueblo of Tesuque child: foster care placement or a change in foster care placement, termination of parental rights proceeding, permanent guardianship and pre-adoptive placement;
2. Voluntary proceedings involving placement of a Pueblo of Tesuque child: foster

care placement, pre-adoptive placement, relinquishments, permanent guardianship and consent to termination of parental rights;

3. Judicial hearings in all proceedings to which the TRIBE is entitled to notice under (a) and (b) above, and any change in hearing dates and times;
4. Any disrupted or dissolved adoption of a Pueblo of Tesuque child who has been placed from CYFD custody.

B. CYFD shall provide notice of the actions listed in Section IV.A of this Agreement when such proceedings involve a Pueblo of Tesuque child to:

Pueblo of Tesuque

Social Services Department/ICWA RR 42, P.O. Box 360-T

Santa Fe, New Mexico 87506

Telephone: 505-690-8152 FAX: 505-955-7791

C. Time Limits

CYFD shall give notice in the circumstances described in Section IV-A as follows:

1. When a child CYFD knows or has reason to believe is a Pueblo of Tesuque child is taken into custody pursuant to NMSA 1978 32A-4-6, CYFD shall give notice by telephone within 24 hours (excluding weekends and holidays) of taking physical custody of the child, or within 24 hours after subsequently learning that the child is believed to be a Pueblo of Tesuque child CYFD shall give written notice to the TRIBE contact office by registered mail, return receipt requested, within five (5) days of the telephone notice (excluding weekends and holidays).
2. At the time of filing a neglect/abuse or Families In Need of Court Ordered Services petition in State court involving a child CYFD knows or has reason to believe is a Pueblo of Tesuque child, CYFD shall give notice by telephone within 24 hours (excluding weekends and holidays) of commencing the action. Notice shall include information about the scheduled court appearances. In addition, CYFD shall give written notice to the TRIBE contact office by registered mail, return receipt requested, as soon as possible after commencing the action, but in no event, no later than five (5) days after the telephone notice (excluding weekends and holidays).
3. CYFD shall notify by telephone of any changes in scheduled hearings as soon as possible, involving a child CYFD knows or has reason to believe is a Pueblo of Tesuque child, but in any event, no later than 24 hours (excluding weekends and holidays) after learning of the change.
4. CYFD shall notify by telephone within 24 hours (excluding weekends and holidays) of taking custody of a child CYFD knows or has reason to believe is a Pueblo of Tesuque child to extended family members known to CYFD who may be suitable to provide care for the child. In individual cases, the TRIBE and CYFD may agree that the TRIBE will assume responsibility for notifying the extended family members.

5. CYFD shall intervene on referrals that are imminently life threatening and shall notify the TRIBE within 24 hours (excluding weekends and holidays) from the time CYFD obtains custody. CYFD will consult with the TRIBE about alternative placement options.
6. CYFD shall notify the adoption court when CYFD receives notice pursuant to an independent adoption of a child CYFD knows or has reason to believe is a Pueblo of Tesuque child, pursuant to 32A-5-6 NMSA 1978.
7. Within five (5) days (excluding weekends and holidays) of CYFD learning of a disrupted or dissolved adoption of a Pueblo of Tesuque child placed by CYFD, CYFD shall notify the TRIBE. If the adoptive placement was a result of a voluntary relinquishment, the TRIBE shall assist CYFD in identifying and locating the child's parent(s) and extended family members. If the adoptive placement was a result of a termination of parental rights, the TRIBE shall assist CYFD in identifying and locating the child's extended family members.

D. Contents of Notice

The oral and written notices required by this Agreement shall include the information required in the ICWA Notice form prepared by CYFD, to the extent such information is available upon reasonable inquiry. In addition, the following information shall be provided:

1. With the consent of the court, a copy of all pleadings, such as orders, motions and petitions, in the child custody proceeding;
 2. Information about the child's circumstances, including the name and date of birth of the child, the basis for the juvenile court's jurisdiction over the child, the date and time of any juvenile court proceeding regarding the child and the reason for placement of the child;
 3. Identification of any special needs of the child; and,
 4. Names of all parties participating in the proceeding and the addresses and phone numbers of the parties or their attorneys. *Tesuque-NM (IV)*.
-

F. Documentation of Notice

All contacts and attempts to contact the TRIBE shall be documented in CYFD's case file. *Tesuque-NM (IV)*.

The Act only applies to unwed fathers where paternity has been acknowledged or established. Whenever DSHS, in circumstances where paternity has not been acknowledged or established, knows or has reason to believe that a particular person may be the unwed father of an Indian child who is the subject of a child custody proceeding in which DSHS is involved, DSHS agrees to send a notice to the putative father

Whenever a child custody proceeding in which DSHS is involved is commenced, DSHS will also notify the Tribe of the putative father's identity and, if known, address. In the event that the putative father's identity or whereabouts are unknown, DSHS will seek the assistance of the Tribe in obtaining the information. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (X.4).*

G. Placement Preferences

Promising Practices Note: In addition to ICWA's order of placement preferences, the tribe and state have many opportunities to collaborate to assure the placements are available. In addition, a state can support a tribe's position as to whether there is good cause to depart from placement preferences and how the issue can be resolved in collaboration, and with all parties involved.

25 C.F.R. § 23.131 What placement preferences apply in foster-care or preadoptive placements?

(a) In any foster-care or preadoptive placement of an Indian child under State law, including changes in foster-care or preadoptive placements, the child must be placed in the least-restrictive setting that: (1) Most approximates a family, taking into consideration sibling attachment; (2) Allows the Indian child's special needs (if any) to be met; and (3) Is in reasonable proximity to the Indian child's home, extended family, or siblings.

(b) In any foster-care or preadoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (c) of this section, preference must be given, in descending order as listed below, to placement of the child with: (1) A member of the Indian child's extended family; (2) A foster home that is licensed, approved, or specified by the Indian child's Tribe; (3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (4) An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

(c) If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, 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 paragraph (a) of this section.

(d) The court must, where appropriate, also consider the preference of the Indian child or the Indian child's parent.

25 C.F.R. § 23.130 What placement preferences apply in adoptive placements?

(a) In any adoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (b) of this section, preference must be given in descending order, as listed below, to placement of the child with: (1) A member of the Indian child's extended family; (2) Other members of the Indian child's Tribe; or (3) Other Indian families.

(b) If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply.

(c) The court must, where appropriate, also consider the placement preference of the Indian child or Indian child's parent.

In any voluntary or involuntary foster care or preadoptive placement of an Indian child pursuant to tribal court or superior court order or certification (25 U.S.C. Section 1913(a)), DSHS will place the child in accordance with an order of preference established by the Tribe,....

If the Tribe has not established an order of preference, DSHS, whenever possible, will place the child in the least restrictive setting which most approximates a family and in which the child's special needs, if any, may be met. Whenever possible, the child will also be placed within reasonable proximity to his/her home taking into account any special needs of the child. When more than one sibling is the subject of a foster care or preadoptive placement, the siblings will be placed together whenever possible, or in close proximity unless such placement is likely to cause serious physical or emotional harm to one or more of the children. In circumstances where a child's best interests require placement in a non-family setting, or in a placement not within reasonable proximity to his/her home, or in a placement where siblings are separated and not placed in close proximity, DSHS will take reasonable steps to assure that the child is placed in accordance with the preferences prescribed in this section.

In any foster care placement and, wherever possible, in any voluntary preadoptive placement, the location of the placement will provide the parent or Indian custodian with an opportunity to have regular access to the child without undue hardship considering the parent's or Indian custodian's economic, physical and cultural circumstances. The location will also be situated so as to enable siblings to have regular contact with one another and allow other family members to have regular access to the child.

In seeking to place a child within the order of preference established by the Tribe or within the alternative order of preference established in this Agreement, DSHS will make a diligent search for a suitable placement within the order of preference before considering a non-preferred placement. At a minimum, a diligent search will involve the Tribe's social services program, and if necessary, the Bureau of Indian Affairs, in identifying possible preference order placements and in evaluating their suitability. In the event that the Tribe and the Bureau are unable to identify a suitable preference order placement, DSHS will seek such a placement through examination of Washington State and county listings of available Indian homes and through nationally known Indian and other placement programs.

Except when not possible in emergency circumstances, DSHS will not make any foster care or preadoptive placement of an Indian child prior to review and, wherever possible, approval of the proposed placement by the Tribe's social services program. The Tribe agrees to promptly notify DSHS when it would not be in the best interests of a child to be placed in a foster or preadoptive home proposed by DSHS. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (IX.1). (This Agreement provides similar provisions for adoption placement priorities at IX.6.)*

Where an Indian child is of sufficient age and maturity so as to be able to express a knowledgeable and reasoned opinion regarding his/her placement preference, and where otherwise appropriate under all surrounding circumstances DSHS will take the child's placement preference into consideration in determining placement within the preference categories. Where appropriate, DSHS will also take into consideration the placement preference of the parent.

Whenever a parent, who has voluntarily consented to the foster care or preadoptive placement of an Indian child, requests that his/her identity not be disclosed to those receiving the child, DSHS will give weight to such request in seeking to place the child within the preference categories set forth in this Agreement.

DSHS will not consider the placement preference of the parent or child or give weight to a parent's request for non-disclosure of identity if to do so is contrary to the best interest of the child or contrary to the underlying purposes and goals of the Indian Child Welfare Act and to this Agreement. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (IX.1.B). (The Agreement also provides similar provisions for parental and child input for adoption placement preferences, see IX.6.D.)*

Whenever the foster care placement of an Indian child is changed, the new placement shall be in accordance with Part IX, Section 1 of this Agreement, regarding foster care placement priorities, unless the child is returned to the parent or Indian custodian from whose custody the child was originally removed. The Tribe, and the parents or the Indian custodian whose familial rights have not been terminated, shall be notified in writing of the decision to change the Indian child's foster care placement. The notification shall be provided at least seven (7) business days prior to the change in placement, unless exceptional circumstances make a shorter notice period necessary. The notification will explain to the Tribe and the parent or Indian custodian the available procedures for having input into the decision making process and for contesting any decision not to return the child to the custody of the parent or Indian custodian.

DSHS, in cooperation with the Tribe's social services program, agrees to assist the child to emotionally and psychologically adjust to the change in foster care placement and to any new placement. This assistance will include a qualified expert and such other expertise as may be appropriate. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (IX.5)*.

1. Tribal Order of Preference

Promising Practices Note: Adoptive, foster care and pre-adoptive placement preferences are mandated by ICWA, unless the Tribe has established its own placement preferences. This section sets forward some Tribal placement preferences, however these are only for example and should not be duplicated. In other words, it is up to a Tribe, according to its culture and values, what preferences achieve its community's goals.

An out-of-home placement of an Indian Child with her or his siblings or half siblings in a non-relative, non-Indian home does not meet the Act's placement preference requirements. This type of placement does not constitute a placement with "family" or with "relatives." The child's family, relatives, or kinship relationships must be determined with reference to the Parent(s) and/or Indian Custodian(s), and not with reference to other children in the placement home. *Saginaw Chippewa-MI (II.EE)*.

If CA has placement authority for a Lummi child (i.e. the dependency action is in state court) placement shall always take into account the child's extended family and cultural affiliation and shall be made in accordance with the priorities set out in Title 8 of the Lummi Code of Laws (Children's Code) as amended from time to time. At present those priorities are:

With grandparents;

With other adult relatives;

With tribal members of the child's tribe;

With members of other tribes;

With community members; and

With non-tribal members who are sensitive to and committed to encourage and maintain the child's access to the child's inherent tribal heritage, culture, traditions and history; and contact with the child's tribe. *Lummi-WA (VI.3)*.

2. Good Cause to Depart from Placement Preferences

Promising Practices Note: The new regulations provide five considerations that a court should utilize to determine whether there is good cause to depart from placement preferences. A promising practice would be limited to these five considerations, and that the state child welfare agency will not argue beyond these limitations.

25 C.F.R. § 23.132 How is a determination of “good cause” to depart from the placement preferences made?

(a) If any party asserts that good cause not to follow the placement preferences exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties to the child-custody proceeding and the court.

(b) The party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is “good cause” to depart from the placement preferences.

(c) A court’s determination of good cause to depart from the placement preferences must be made on the record or in writing and should be based on one or more of the following considerations:

(1) The request of one or both of the Indian child’s parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;

(2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;

(3) The presence of a sibling attachment that can be maintained only through a particular placement;

(4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;

(5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child’s parent or extended family resides or with which the Indian child’s parent or extended family members maintain social and cultural ties.

(d) A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement.

(e) A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

In any proceeding in which DCFS [Utah Division of Child and Family Services] is unable to comply with placement preferences established by this Agreement, the DCFS social worker assigned to the case shall send a report explaining the active efforts made to comply with the ICWA placement preference requirements, pursuant to the ICWA, Section 1912(d). DCFS shall contact the NATION within five days (excluding weekends and holidays) of the placement. The Nation may request that DCFS re-evaluate its placement decision. *Navajo-UT (VIII.C)*.

Whenever DSHS determines not to place a child in accordance with the Tribe's recommendation or whenever DSHS decides to place a child in a home or institution unacceptable to the Tribe, DSHS will provide the Tribe with a statement detailing its efforts to reach agreement with the Tribe on an appropriate placement and describing the basis for its decision. The statement will be provided to the Tribe within ten (10) days following the placement decision.

A. Placement Outside of Preference Categories

DSHS will seek to place an Indian child outside the preference categories prescribed in this Agreement only when one or a combination of the following circumstances exists:

1. The Tribe concurs that the best interests of the child require placement with a non-Indian family or in another setting not within the preference categories.
2. The child has extraordinary physical or emotional needs, attested to by a qualified expert witness, that cannot be addressed by a placement within the preference categories. In such circumstances, DSHS will provide the Tribe with a statement explaining why the child's needs cannot be met by a placement within the preference categories.
3. A diligent search for a placement within the preference categories has been completed and no suitable placement within such categories is available. In determining the suitability of a family, DSHS will evaluate the family in accordance with the social, economic and cultural standards prevailing in the Indian community in which the parent or extended family members maintain social and cultural ties.

A determination that suitable families or institutions within the preference categories do not exist shall be based on the unavailability of an appropriate home for the child but shall not be based on any difference between tribal and State standards for licensing and approval of foster homes or institutions. In complying with the foster or preadoptive home preference requirements of this Agreement, DSHS will use the social and cultural standards for such homes prevailing in the Tribe's community. The Tribe will provide DSHS with a written statement of such standards. The statement will be attached as an exhibit to this Agreement.

Whenever DSHS places an Indian child in foster care outside the preference categories, DSHS in cooperation with the Tribe's social services program, will continue to diligently seek a suitable placement within the preference categories and, at the earliest possible time, will place the child within such preference categories. In determining whether a change of placement would harm the child, DSHS will seek evaluation by a qualified expert.

The Tribe agrees to assist families to make application for financial assistance and DSHS will inform families when an evaluation is fully completed. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (IX.1). (This Agreement also provides a similar provision for adoptive placement outside of preference categories at IX.6.C.)*

3. Tribal and State Cooperation to Seek Placement

A. DCS and the Nation shall actively assist one another in identifying a placement that complies with the placement preferences listed in Section IX, supra.

B. The NATION shall, with authorization of the applicants, provide DCS with the names and home studies of prospective adoptive homes in order to assist DCS in complying with the placement preferences established in this Agreement, Section 1915 of the ICWA, and those of Navajo custom. DCS may conduct home studies of tribal members who wish to be adoptive placements. The NATION shall assist in the assessment process, which may include conducting a home study. *Navajo-AZ (XII).*

CYFD and the TRIBE shall coordinate efforts in locating the most suitable foster care and pre-adoptive placement for Pueblo of Tesuque children in accordance with the placement preference described in the ICWA and as provided in accordance with this Agreement. *Tesuqe-NM (X.C).*

After the effective date of this Agreement, the Department must provide ACFS with information on all SCIT Children or SCIT Descendant Children who are currently in placement within the State, who have been sent under the Compact to another state, or who have been sent from another state to the DHS of Michigan. The Department must provide an annual written report to ACFS regarding all such placements. The report must include all information received by the Department regarding each child's placement, including the Interstate Compact Application Request to Place Child Form used by the Department for the interstate placement of children. If SCIT learns of a placement of a SCIT Child that does not meet the placement preferences set forth in the Act or this Agreement, upon notice from SCIT, the Department must cooperate with SCIT to remedy the placement so that it conforms with the Act, or the Department must show Good Cause Not to Follow the Placement. *Saginaw Chippewa-MI (V.B.2).*

If a Navajo child is involved in an independent adoption proceeding in which the state is involved in any manner, the state shall oppose waiver of the ICWA placement preferences, absent good cause to the contrary. The state shall immediately notify the NATION when it becomes aware of any independent adoption involving a Navajo child, whether or not the state is a party to the adoption proceeding. In the event the state becomes aware of a private independent adoption of a Navajo child, the state will notify the adoption agency of the ICWA requirements. *Navajo-UT (X.C).*

Placement by Tribe's Social Services Program as DSHS Agent

In seeking to place a child within the order of preference established by the Tribe or within the alternative order of preference established in this Agreement, DSHS agrees to primarily use the Tribe's social services program in identifying possible preference order placements and in evaluating their suitability.

In order to assist the Tribe in identifying suitable preference order placements, DSHS will provide the Tribe's social services program with comprehensive background information on the child's social and psychological history and development including information on all prior placements of the child, the experience of the child in such placements, the extent of the child's relationship with siblings, extended family members and, in the case of a voluntary consent to adoption, with the non-consenting parent. DSHS will also provide the Tribe's social services program with information concerning the interest, if any, of the child's foster parents in adopting the child, information on the current or planned custody and placement of siblings, the child's minority status other than Indian, and other factors that might affect the placement decision.

Within ten (10) days following receipt of an adoption placement referral, the Tribe's social services program shall notify DSHS whether the Tribe will undertake an effort to identify a suitable adoption placement for the Indian child.

If the Tribe agrees to undertake the task of identifying a suitable placement for the Indian child, the Tribe's social services program, within twenty (20) days following receipt of an adoption placement referral, shall notify DSHS:

1. That the Tribe has identified a suitable family and anticipates placement within sixty days; or
2. Regarding a time frame for recruitment of an appropriate family and placement.

Upon request, DSHS agrees to assist the Tribe in identifying a suitable adoption placement for the child. If within sixty (60) days following receipt of an adoption placement referral, the Tribe is unable to identify a suitable placement for the child, the Tribe shall so notify DSHS.

Direct Placement by DSHS

Whenever the Tribe notifies DSHS that it will not undertake or has been unable to identify a suitable placement for the child, DSHS will make a diligent search for a suitable placement within the order of preference before considering a non-preferred placement. This search will involve, if necessary, the Bureau of Indian Affairs in identifying possible preference order placements, include examination of Washington State and county listings of available Indian homes, and utilize the placement resources of nationally known Indian and other placement programs, including adoption resource

exchanges. DSHS will keep the Tribe informed of its progress in seeking an adoption placement for the child and will pursue placement recommendations offered by the Tribe.

DSHS will provide the Tribe on a confidential basis with all adoptive home studies of homes under consideration for placement of the child. A home study will identify whether the adoptive home applicant(s) has a tribal affiliation and, if so, shall identify such affiliation.

DSHS will not make any adoption placement of an Indian child prior to review and, wherever possible, approval of the proposed placement by the Tribe's social services program. The Tribe agrees to promptly notify DSHS when it would not be in the best interest of a child to be placed in an adoptive home proposed by DSHS.

Whenever DSHS determines not to place a child in accordance with the Tribe's recommendation or whenever DSHS decides to place a child in an adoption home unacceptable to the Tribe, DSHS will provide the Tribe with a statement detailing its efforts to reach agreement with the Tribe on an appropriate placement and describing the basis for its decision. The statement will be provided to the Tribe within five (5) working days following the placement decision and prior to placement. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (IX.6.A and B).*

DSHS, in cooperation with the Tribe's social services program, will assist the child in adjusting emotionally and psychologically to the foster care placement. As may be necessary, this assistance shall include a qualified expert and such other expertise as may be appropriate. When the foster care placement is interracial, DSHS, when necessary, will provide an expert in the interracial placement of Indian children to assist the child in dealing with or overcoming adjustment problems unique to such interracial placements.

DSHS, in cooperation with the Tribe's social services program, will also provide the foster care home or facility with information on the background and special needs, if any, of the child. Where necessary, the foster care home or facility will be instructed in foster care parenting skills, in how best to meet the child's special needs and in how to best assist the child's adjustment to foster care. When the foster care placement is interracial, the foster care home or facility will be instructed by a qualified expert(s) in the interracial placement of Indian children on the special developmental and social problems common in such placements and in how best to handle such problems.

During the Indian child's placement in foster care, DSHS, in cooperation with the Tribe's

social services program and upon request of the foster care home or facility, the child, if of sufficient age, or as necessary, shall provide the child and the foster care home or facility with help in resolving socio-psychological problems related to the foster care placement. The foster care home or facility and the child, if of sufficient age, will be informed of this service.

DSHS, in cooperation with the Tribe's social services program, will regularly monitor the foster care home or facility for overall suitability and to assure that the child is not the object of abuse or neglect, that the child's special needs are addressed and that the child's relationship with its parents, siblings, extended family members and the Tribe is encouraged. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (V.9).*

Within thirty (30) days after placing an Indian child in the home of prospective adoptive parents, DSHS agrees to conduct a review of the adoptive home placement. Thereafter, DSHS will conduct a review at least every ninety (90) days following the placement, continuing until termination of the placement or entry of the final decree of adoption. In any DSHS review of the adoptive home placement of an Indian child, the Tribe shall have notice of and a right to participate in the review, including access to all files and documents pertaining to the placement. With the concurrence of the Tribe, the LICWAC may participate in the review. Unless mentally or physically rendered incapable of doing so, a child over the age of twelve will also have a right to participate in the review.

At a minimum, the review will evaluate the suitability of the adoptive home placement and, in cases where the parent(s) has the right to withdraw consent to termination of parental rights or to the adoptive placement, whether the best interests of the child are met by adoption or by restoration of the parent-child relationship. Whenever possible, DSHS agrees to involve a qualified expert(s) to participate in the review. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (IX.8).*

DSHS agrees to conduct a review of all voluntary and involuntary foster care placements and preadoptive placements of Indian children not less than every six months unless such reviews are being conducted by tribal or superior court. In any DSHS review of the foster care or preadoptive placement of an Indian child, the Tribe will have notice of and a right to participate in the review, including access to all files and documents pertaining to the placement. Unless mentally or physically rendered incapable of doing so, a child over the age of twelve shall also have a right to participate in the review. In reviews of voluntary foster care placements and involuntary foster care placements where parental rights have not been terminated, the parents or Indian custodians of the child will also be notified of the review and be accorded a right to participate in it.

If parental participation on the review is precluded by indigency, DSHS subject to availability of funds, will cover such reasonable expenses as may be necessary to assure meaningful participation by the child's parents.

At a minimum, the review will evaluate the suitability of the foster care or preadoptive placement, the necessity of continuing the child in foster care or in preadoptive placement, and the prospects for terminating the placement and returning the child to the custody of its parent(s) or Indian custodian or permanent placement of the child. The review will also evaluate the suitability and effectiveness of the services rendered to the child and its family and, where applicable, the factors specified in RCW 13.34.130(3)(b). Whenever possible, DSHS agrees to involve a qualified expert(s) to participate in the review. When the foster care or preadoptive placement is interracial, DSHS agrees, whenever possible, to involve a qualified expert in the interracial placement of Indian children. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (X.1)*.

4. Licensing and Recruitment of Foster Home Providers

CYFD shall recognize foster home certified, approved or licensed by the TRIBE as meeting the foster home licensing requirements under State law and the TRIBE shall recognize CYFD foster home licensing as meeting the requirements of the TRIBE. CYFD may place children in foster homes licenses by the TRIBE and the TRIBE may place Pueblo of Tesuque children in foster homes licensed by CYFD if such placement is mutually agreed upon by CYFD and the TRIBE.

The TRIBE shall utilize its own foster care licensing, approval or certification standards in determining the suitability of homes to provide foster care on the Pueblo of Tesuque and its own procedure for the approval of Indian foster homes. *Tesuque-NM (X.A & D)*.

SCIT Approved Foster Care Homes Master List

The Department agrees to accept from SCIT a master list of all the available SCIT licensed and approved foster-care homes that may be available to receive state-court wards where the ward is: (a) a SCIT Child or a SCIT a Descendant Child; (b) a sibling of a SCIT Child or a SCIT Descendant; or (c) the minor parent of a SCIT member of a SCIT Descendant. The Master List must identify the name, address, tribal affiliation of the home, and whether the home is available for Foster Care, Adoptive Placement, or both. The Master List must also identify for each home any preconditions to the acceptance of a child (such a willingness to only accept a relative, a member of SCIT, or a child without mental or physical handicap) or state that the home has not indicated any preconditions. SCIT retains the absolute right to deny any attempt by the State to place a state-court ward in a SCIT licensed home. The State agrees to make the Master List

available to all the County DHS Offices as placement resource for SCIT connected children.

Before DHS places any child with SCIT licensed foster family, it must first contact SCIT to request additional information regarding the family and must first secure a Borrowed-Bed Agreement with SCIT, as described in Part III.F of this Agreement.

Where placement with a tribally licensed foster home is not available, ICWA's third placement preference is "in an Indian foster home licensed or approved by an authorized non-Indian licensing authority." The Parties recognize that the state has a legal obligation to identify other Indian foster homes for placement of Indian Children. To the extent it does not already do so, the State must identify which State-licensed foster homes meet the third placement preference by recording any tribal affiliation of all its foster care providers on an ongoing basis. *Saginaw Chippewa-MI (V.A.2)*.

State DHS will work with the county DHS office to increase awareness of the acceptability of Borrowed-Bed Agreements, which continue a longstanding tradition of allowing the State Court wards to be housed in SCIT-licensed foster-care home that comply with SCIT licensing requirements, but not necessarily DHS licensing requirements. Borrowed-Bed Agreements are favored in cases where both the DHS and SCIT agree to the placement. Borrowed-Bed Agreements do not change ICWA placement preferences, but enable the placement together of non-Indian children with their Indian siblings, or a minor Parent and Indian Child together in a Tribally licensed foster home. *Saginaw-Chippewa-MI (III.F)*.

The Tribe is authorized¹¹⁷ to develop and implement Tribal foster home standards, conduct Tribal foster home studies, certify or license a Tribal foster home, and place an Indian child in a licensed or certified Tribal home in accordance with the ICWA. The State shall give full faith and credit to the Tribe's certification or licensure of Tribal foster homes according to Tribal foster home standards. *Confederated Goshute and Northwestern Shoshone-UT*.

DCFS and the Tribe will work cooperatively to make greater efforts to recruit Indian foster care and adoptive homes and develop programs to recruit and license Indian foster care and adoptive homes. *Paiute-UT (18) and Skull Valley-UT (B)*.

¹¹⁷ If the phrase "the Tribe is authorized" means that the Tribe is authorized by its inherent sovereignty to license foster care placements, then this provision is a promising practice. However, if the phrase represents that the state has agreed to authorize the Tribe to license foster care, then this is not a promising practice.

DSHS and the Tribe agree to jointly seek to recruit and license or approve Indian foster and adoptive homes. Recruitment will utilize the media, Indian organization resources, mailings to members of such organizations, door-to-door solicitation within Indian communities, national and regional adoption resource exchanges, and such other means as may be likely to succeed in securing Indian foster and adoptive homes for Indian children. Recruitment shall include assisting potential homes to comply with tribal or state licensing or approval standards for foster or adoptive homes. Such assistance will, whenever necessary and subject to the availability of funds, include training of potential and other Indian foster parents.

DSHS also agrees to pay the costs of any foster and adoptive home recruitment jointly undertaken by DSHS and the Tribe.

Within one year from the effective date of this Agreement, DSHS agrees to establish and maintain a registry of all Indian homes in the State of Washington licensed and approved and available to receive Indian children for foster care or adoption. The registry will identify the name, address and tribal affiliation of the home, whether the home is licensed by DSHS, the Tribe, or a private agency, and whether the home is available for foster care or adoptive placement or both. The registry will also identify for each home any preconditions to the acceptance of a child, such as willingness to only accept a relation or a member of the same tribe or a child without mental or physical handicap, or that the home has indicate no preconditions. The registry shall also include for each home any home studies that may have been prepared. Upon request, and with the consent of the registered home, the Tribe will have access to any of the records maintained as part of the registry. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (X.3)*.

5. Record of Placement

Record of Placement Determination

For each foster care or preadoptive care placement determination, DSHS will prepare a record summarizing the efforts to provide the parent(s) with remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and describing fully and in detail the factual and other bases, if any, for the determination. Whenever siblings are not placed together, the record will explain in detail the reasons justifying separation of the siblings and the steps taken to maintain the sibling relationship following placement. Where the placement is with a family or institution not within any of the preference categories, the efforts to find a suitable placement within such categories shall be stated in detail (including the names and addresses of the extended family and the tribally licensed or approved homes contacted). The record will also document in detail the efforts of DSHS to comply with the placement requirements

specified in this Agreement and the Act. The record of any preadoptive placement shall be sent to the Tribe at least seven (7) business days prior to any placement of the child. The record of any foster care placement shall be sent to the Tribe prior to such placement, whenever possible, or within seven (7) business days following the placement of the child.

Post-Placement Records

From time to time as they may be prepared, DSHS will provide the Tribe with reports and records, prepared subsequent to a foster care or preadoptive placement, describing and evaluating the child's adjustment to the placement, the relationship of the child following placement to siblings, natural family members and the Tribe, and such other matters as may be considered in any administrative or judicial review of the placement. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (IX.1.C and D). (This Agreement also provides for the record of placement and post-placement regarding adoptive placement, see IX.6.E and F.)*

6. Interstate Placements

If the Department receives child-transfer request, the Department is governed by the Best Interests of an Indian Child as set forth in this Agreement. If the child is an Indian Child, and the proposed placements not within the order of preference identified in the Act, the Department must not accept the child for placement in Michigan unless the placement meets the good-cause exception to the placement preferences as set forth in the Act, and under this Agreement. In determining whether the good-cause exception to the placement preferences applies in a particular case, the Department must contact the sending state and request a letter from the Indian Child's Tribe providing the tribe's views of the placement. Where the Indian Child is a SCIT Child or SCIT Descendant Child, the Department must consider SCIT's position before making any final decision.¹¹⁸ *Saginaw Chippewa-MI (V.B.1).*

DSHS will establish and maintain a record of all Indian children currently placed in foster care in the State of Washington by DSHS or by certified child placing agencies. The record will include Indian children placed in foster care in the State of Washington through the Interstate Compact on the Placement of Children or placed by the State of Washington in foster care in another state through said compact. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (IX.15.A).*

¹¹⁸ This provision is a promising practice concerning the interstate placement of children because it complies with certain provisions in the ICWA Tribal-State Agreement. However, the last sentence is not a promising practice because the State will merely "consider" the Tribe's position regarding its Indian children placed from outside of the state. For a promising practice, the phrase could instead provide that the State will collaborate with and support the Tribe's position.

Whenever DSHS is considering whether to place an Indian child in another state, DSHS will follow the provisions of Part IX of this Agreement regarding placement of Indian children.

DSHS will provide the Tribe with information on all Indian children currently in placement who have been sent under the compact to another state or who have been sent by another state to the State of Washington. The information shall include the name of the child, the child's age, the child's current address, the name and address of those with physical custody of the child, the name of the person(s) or agency with legal custody of the child, whether parental rights have been terminated, the names and addresses of the child's natural parents, the tribal affiliation, if any, of the child's natural parents, the purpose for or the reasons causing the placement, the expected duration of the placement, the location and name of the court before which any proceedings involving the child may be pending, and the date and nature of the next scheduled administrative or judicial review of the placement.

DSHS agrees to review each interstate placement of Indian children and determine, in cooperation with the Tribe, whether such placement should continue. If it is concluded by DSHS and the Tribe that a child placed by DSHS in another state should be returned to the State of Washington, DSHS will terminate the interstate placement pursuant to the provisions of the interstate compact and have the child returned to the State of Washington unless to do so would be likely to cause physical or emotional harm to the child.

If it is concluded by DSHS and the Tribe that the placement of an Indian child in the State of Washington by another state should be terminated, DSHS, in cooperation with the Tribe and pursuant to the provisions of the interstate compact will seek to terminate the placement and have the placing state follow the Tribe's recommendations with respect to the child.

In circumstances where the Tribe is not a member of the compact and all necessary requirements of RCW 26.34 and applicable state regulations have been or can be satisfied, DSHS, upon request by the Tribe, will assist the Tribe to utilize the interstate compact for the placement of Indian children in another state in a placement designated by the Tribe. In order for DSHS to make foster care payment for an Indian child placed in another state through the interstate compact, the placement must have been arranged through a certified or licensed child placement agency, or custody of the child must have been granted to DSHS prior to out-of-state placement. Notwithstanding a request of the Tribe for compact placement in another state, whenever any other tribe in which an Indian child is eligible for membership informs DSHS that it objects to

compact placement of the child in another state, the requirement that DSHS assist the Tribe to arrange for compact placement will not apply in such circumstances unless no suitable placement exists within the State of Washington.

In circumstances where the Tribe is not a member of the compact, DSHS, upon request of the Tribe, agrees to receive Indian children through the compact who are the subject of child custody proceedings in another state and who are not in parental custody and to place such children in such placement as may be designated by the Tribe and the sending state/agency. Pursuant to the requirements of the interstate compact, prior to receiving the child for placement, DSHS must document in writing that the proposed placement does not appear to be contrary to the interest of the child. Unless DSHS so documents, the child shall not be sent to the State of Washington for such placement nor will DSHS receive the child for such placement.

In sending an Indian child to another state for placement or in receiving an Indian child from another state for placement in the State of Washington, DSHS will evaluate any proposed placement in cooperation with the Tribe's social services program and in accordance with the provisions of this Agreement governing placement preferences and standards. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (X.7).*

H. Division of Roles and Responsibilities between the Tribe and State

1. What Happens When a Referral is Received

DCFS shall involve the Tribe's Social Services/ICWA at the earliest possible point in social service intervention with Indian families, to:

- a. Facilitate communication with the Indian family.
 - b. Prevent unnecessary removal of Indian children from their caretakers.
 - c. Secure emergency placement with an Indian relative or an Indian foster home whenever possible.
 - d. Assist in compliance with the notification requirements of the ICWA.
 - e. Assist in securing reliable identification of Indian children.
 - f. Assist in the placement of Indian children in appropriate homes. *Confederated Goshute-UT (4).*
-

To reduce the potential for cultural bias in evaluating home and family conditions and making decisions affecting Indian children and families, DSHS will involve the Tribe or tribally designated Indian organizations at the earliest possible point prior to undertaking and carrying out any child abuse or neglect investigation under RCW 26.44

and prior to and in providing protective services intervention with Indian families. If emergency circumstances necessitate investigation or protective services intervention prior to involving the Tribe, DSHS will involve the Tribe as soon as possible following initiation of such investigation or intervention.

In order to enable the Tribe or tribally designated organizations to constructively participate in such investigation or protective services, DSHS will furnish the Tribe or its designated organization with all case record material, reports, family social histories, or other documents which formed the basis for the DSHS decision to conduct such investigation or provide protective services.

Whenever possible and practicable, upon receipt of a complaint or referral including matters involving child abuse/neglect regarding an Indian child, the CPS worker will contact a person to serve as an Indian interpreter....

The purpose of involving an Indian interpreter is:

- A. To assist the CPS worker in
 - 1. Communicating with the Indian family.
 - 2. Avoiding unnecessary protective services intervention or removal of children.
 - 3. Securing emergency placement in a related or another Indian home in accordance with the placement preference requirements of the Tribe or the Act.
 - 4. Complying with the notification requirements of the Act, 25 U.S.C. Section 1912(a).
 - 5. Securing reliable identification of the child as an Indian child.
 - B. To assist the Tribe and its members in
 - 1. Communicating with and securing appropriate services from DSHS and other non-tribal service providing agencies. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (III.3).*
-

Prior to filing a petition, DSHS will seek to formulate with the Tribe a mutually acceptable course of action in the best interests of the child and will make every effort to agree to family service plans and legal arrangements designed to eliminate the need for filing a petition in superior court. DSHS will consult with the Tribe to determine whether the Tribe wishes to assert jurisdiction over the matter. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (V.2).*

The Makah Tribe will respond to allegations of child abuse or neglect occurring on Tribal lands, unless the Tribe makes a specific written request that CA respond to the referral.

- 1. CA's CPS Intake will notify the Tribe within 24 hours if a child abuse or neglect referral has been received by CA, alleging the abuse or neglect occurred on Tribal

lands.

2. CA will advise the referent (including mandated reporters) that the Tribe investigates or responds to allegations of abuse or neglect which reportedly occurred on Tribal lands and that the Tribe will be notified of the allegation.
 3. At the conclusion of the Tribe's investigation, the Tribe will notify CA regarding founded allegations, providing names, allegations and outcomes so that the information may be included in the state SACWIS system or FamLink. *Makah-WA (V)*.
-

2. Case Management

Promising Practices Note: Promising practices are achieved with case management arrangements that pertain to state court proceedings and also, in part, where the state agency has agreed to assist in the implementation of tribal court orders to effectuate appropriate case management for an Indian child. The 1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (III.6), cited to in this section below, provides this promising practice.

The Tribal and CA [Washington State Department of Social and Health Services Children's Administration] social workers will work collaboratively to develop a case plan for the child. *Cowlitz-WA (XII), Samish-WA (IX), Jamestown S'Klallam-WA (XII)*.

QFS and CA will work together to develop a plan for any Indian child who is placed in a non-Tribal foster home to assist the child in developing or maintaining an understanding of the Tribe's customs, traditions and history. *Quinault-WA (VII.5)*.

DSHS agrees to assist in the implementation of tribal court orders regarding services and placement where requested by the Tribe. Such implementation may include assumption by DSHS of the care, custody, and supervision of a child pursuant to tribal court order. If DSHS is unable to implement the order, DSHS agrees to notify the tribal court in writing as soon as possible.

If the Tribe wishes to request DSHS assistance in implementing caseplan services and placement, DSHS will be notified of any hearing to consider court approval of such caseplan, and DSHS will be given an opportunity to address the propriety of the caseplan in writing or through testimony. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (III.6)*.

When the Tribes requests child welfare services for children and youth being served by the Tribes, CA will:

- a. Assign the case to Tribal payment only social worker¹¹⁹, who recognizes that the Tribes has custody of and decision making authority over the child, and who is willing to accept the customs and traditions of the Tribes. The CA social worker will not be responsible for case management, but instead will assist the Tribal case manager in accessing services.
 - b. Maintain a child file consisting of the referral information, the Tribal case plan, Tribal Court documents, and payment information.
 - c. Work with the Tribal case manager to determine what services would best meet the needs of the child and, at the request of the Tribes, pursue intensive services for the child, using established CA procedures. The CA social worker will help make the Tribes aware of appropriate services available through CA, as well as how to access those services. *Tulalip (X.4)*.
-

Whenever DSHS undertakes to prepare a social study or a predisposition study pursuant to RCW 13.34.120, DSHS will invite the Tribe and a qualified expert(s) to play an active role in the preparation of such study. The study will describe in detail the role of the Tribe and will fully state the Tribe's recommendations and such other information provided by the Tribe in accordance with RCW 13.34.120.

If the Tribe declines participation, DSHS agrees to involve a qualified expert in the preparation of said study. An Indian interpreter may also be engaged to assist in the study.

Upon filing with the court, DSHS will send the Tribe a copy of the social study or, if necessary, will request the court's permission to provide the Tribe with a copy.

DSHS agrees to cooperate with and, in its report to the court, to follow the recommendations of the Tribe, the qualified expert or the Indian interpreter as the case may be unless there are compelling reasons not to do so. Such reasons must be related to: 1) the child's health and safety, or 2) the unavailability of funds to carry out the Tribe's recommendations or 3) lack of legal authority to carry out the Tribe's recommendations. Whenever DSHS determines not to follow the recommendations of the Tribe, the qualified expert, or the Indian interpreter, DSHS will set forth such recommendations in its report to the court and the reasons for its determination not to follow these recommendations. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (V.7)*.

¹¹⁹ The Tribal payment only social worker assists the Tulalip Tribes in accessing support services and work with the Tribes to clarify eligibility for services, to expedite services and to verify payment. See *Tulalip-WA (VIII.4.e)*.

3. Providing Services to the Indian Child and Indian Family

Services in the community specifically designed for Indian families are to be used where available, including resources of the extended family, the tribe, urban Indian organizations, tribal family service programs and individual Indian caregivers, e.g. medicine men or women, and other individual tribal members who may have developed special skills that can be used to help the child's family succeed. *Paiute-UT (Active Efforts 32); Confederated Goshute-UT (30); Northwestern Shoshone-UT (Active Efforts 4).*

In addition to services specifically established for Indian families in this Agreement or otherwise, the Department recognizes the responsibility of the State and local social service agencies to make available to Indian families all of the other services available to any other family in the circumstances covered by this Agreement. Existing services must not be reduced because of the availability of services through this Agreement. The parties agree that local social service agencies must honor tribal court orders for placement and provision of services in compliance with Title 25 of the United States Code, section 1911(d), which requires every state to give full faith and credit to the public acts, records and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings. The exercise of tribal court jurisdiction does not mean a withdrawal, decrease, or denial of county social services. *Minnesota (II.C).*

All Indian children and families residing within the Tribe's reservation are entitled to receive CPS services to the same extent as provided to all other children and families within the state.

DSHS and the Tribe or a tribally designated Indian organization will consult and cooperate in the development and delivery of CPS services. Whenever possible, DSHS and the Tribe or a tribally designated Indian organization will enter into specific written agreements and/or contracts regarding development and delivery of CPS services.

Even if the Tribe or a tribally designated Indian organization and DSHS do not enter into such agreements or contracts, the DSHS administrator responsible for delivery of CPS services within the region where the Tribe's reservation is located will develop, in consultation with the Tribe or a tribally designated Indian organization, a written procedure for CPS service delivery of Indian children and families residing within the reservation. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (III.2).*

Whenever an Indian child is in foster care or a preadoptive placement following an involuntary termination of parental rights, DSHS, in cooperation with the Tribe's social

services program, will develop a plan for the child's future care, custody and control consistent with the best interests of the child, any special needs of the child, and the culture and customs of the child's Indian community. The plan will be formulated with the direct collaboration of the child, if of sufficient age, and, whenever possible, other members of the child's extended family. Formulation of the plan will involve a qualified expert(s). The principal focus of the plan will be to identify the most suitable permanent living arrangement for the child including a determination as to whether long-term foster care, guardianship, or adoption is most suitable for the child.

The plan will encourage maintenance of an ongoing familial relationship between the child, its siblings and other members of the child's extended family.

In addition, DSHS, in cooperation with the Tribe's social services program, will assist the child and the natural parent(s) in adjusting emotionally and psychologically to the termination of parental rights and to the foster care or preadoptive placement. This assistance will involve a qualified expert and such other expertise as may be appropriate. When the foster care or preadoptive placement is interracial, DSHS, when necessary, will provide a qualified expert in the interracial placement of Indian children to assist the child in dealing with or overcoming adjustment problems unique to such interracial placements.

DSHS, in cooperation with the Tribe's social services program, will also provide the foster care home or facility or preadoptive home with information on the background and special needs, if any, of the child. Where necessary, the foster care home or facility or preadoptive home shall be instructed in foster care parenting skills, in how best to meet the child's needs, and in how to assist the child's best adjustment to foster care or preadoptive placement. When the foster care or preadoptive placement is interracial, the foster care home or facility or preadoptive home shall be instructed by a qualified expert(s) in the interracial placement of Indian children on the special developmental and social problems common in such placements and in how best to handle such problems.

During the Indian child's placement in foster care or in a preadoptive placement, DSHS, in cooperation with the Tribe's social services program and upon request of the foster care home or facility or preadoptive home, the child, if of sufficient age, or as necessary will provide the child and the foster care home or facility or preadoptive home with help in resolving socio-psychological problems related to the foster care or preadoptive placement. The foster care home or facility or preadoptive home and the child, when of sufficient age, will be informed of this service.

DSHS, in cooperation with the Tribe's social services program, will regularly monitor the

foster care home or facility or preadoptive home for overall suitability and to assure that the child is not the object of abuse or neglect, that the child's special needs are addressed, and that the child's relationship with its siblings, biological family and the Tribe is encouraged.

Whenever an Indian child eligible for membership in the Tribe is in foster care or preadoptive placement following an involuntary termination of parental rights, DSHS will seek to secure tribal membership for the child at the earliest possible time following the foster care placement or preadoptive placement. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (V.12). (This Agreement also provides post-placement services for guardianship placements, see X.2.)*

Prior to accepting a voluntary consent to foster care placement DSHS will encourage the parent or Indian custodian to contact the Tribe regarding available services to assist the parent or Indian custodian to retain custody of the child or to further the parent-child relationship during placement. DSHS will document its efforts to have the parent or Indian custodian contact the Tribe concerning available services. If the parent or Indian custodian is referred by DSHS to an identified individual within the Tribe for provision of social services, the date of the referral and the identity of the individual to whom the referral was made will be included in the case documentation. Upon request, the documentation will be made available to the Tribe. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (VI.2).*

4. Services Provided for an Adoptive Placement

Whenever an Indian child eligible for membership in the Tribe is placed for adoption, DSHS will seek to secure tribal membership for the child prior to entry of a final decree of adoption.

Whenever an Indian child is placed for adoption, DSHS, in cooperation with the Tribe's social services program, will, until entry of a final decree of adoption, regularly evaluate the overall suitability of the placement and shall specifically monitor the placement to assure that the child is not the object of abuse or neglect, that the child's special needs are addressed, that the child's relationship with its siblings and, where applicable, other members of the child's birth extended family is encouraged, that the child's relationship with the Tribe is properly advanced, and that all other conditions and commitments of the placement are being met.

DSHS, in cooperation with the Tribe's social services program, will assist the child and the adoptive parents and, in the case of a voluntary consent to adoption, the natural parent(s) to emotionally and psychologically adjust to the adoptive placement. This

assistance shall include a qualified expert and such other expertise as may be appropriate. When the adoptive placement is interracial, DSHS, when necessary will provide a qualified expert in the interracial placement of Indian children to assist the child and the adoptive parent(s) in dealing with or overcoming adjustment problems unique to such interracial placements.

DSHS, in cooperation with the Tribe's social services program, will also provide the adoptive parents with information on the background and special needs, if any, of the child. Where necessary, the adoptive parents shall be instructed in how best to meet the child's special needs and in how to assist the child's best adjustment to the adoptive placement. When the adoptive placement is interracial, the adoptive parent(s) shall be instructed by a qualified expert(s) in the interracial placement of Indian children on the special developmental and social problems common in such placements and in how best to handle such problems.

Whenever an Indian child is the first child of the adoptive parents or whenever the adoptive parents are assessed to be non-interracially oriented or otherwise unable to meet any special needs of the child, DSHS in cooperation with the Tribe's social services program, will provide training to the adoptive parents in interracial or special needs parenting skills.

Prior to and following the entry of a final decree of adoption and continuing throughout the Indian child's minority, the Tribe's social service program, whenever possible and upon the request of the adoptive parents or child, will provide the adoptive family with assistance in resolving problems related to the adoption. The Tribe will notify the adoptive family and the child, when of sufficient age, regarding the availability of this service.

In the event that the parent(s) of an Indian child withdraws a voluntary consent to the adoptive placement prior to entry of a final decree of adoption, DSHS in cooperation with the Tribe's social services program, will assist the child to make as successful a return as possible to the custody of the parent. Assistance shall include helping the child to adjust emotionally and psychologically to the change in placement and helping the natural parent(s) to understand and effectively meet the needs of the child. Assistance will also include help to the adoptive parents in adjusting to the loss of the child and in assisting the child to make a successful transition to the custody of the natural parent(s). As may be necessary, a qualified expert will be engaged to help the child, the natural parent(s) and the adoptive parent(s). *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (VIII.1)*.

5. Providing Services to the Non-Indian Child

- A. In any case involving non-Indian children who are residing with a Mohegan family, the Tribe will immediately notify DCF of any child protective referral it receives.
 - B. DCF will conduct an investigation of the allegations of the referral pursuant to state law.
 - C. Although DCF has primary jurisdiction over a non-Indian child residing with a Mohegan family, DCF will work cooperatively with the Tribe to provide services to the Indian family.
 - D. The Tribe will be entitled to any information on the case which is in any way relevant to the welfare of the Mohegan family, to the extent permitted by federal, state, and Tribal law. [Mohegan-CT \(II.6\)](#).
-

6. Funding for Services

Promising Practices Note: Tribal-State ICWA Agreements can provide mechanisms for funding of Indian child welfare work. Other funding is also available through Title IV-E direct funding, and Title IV-E tribal-state agreements, which pass through state funding received from the federal government to tribes.¹²⁰ There are approximately 98 Title IV-E tribal-state funding agreements representing 267 Indian nations from 16 states.¹²¹

The State and or OHS will do the following to assist with funding: To the extent possible, assist the Tribe in obtaining state and federal funding to facilitate the Tribe's ability to provide services that address the conditions in a child's home to (1) support the goal of family preservation. This means that the State will do the following: (a) Promote access by the Tribe to services available with providers who have contracted with the State by providing information and any necessary authorizations; (b) Advocate for direct funding to the Tribe by the federal government through Title IV-E of the Social Security Act,^[122] and/or work to develop an agreement to pass through IV-E funds to the tribe; and (c) Assist the Tribe to maximize funding available through Medicaid, including the provision of technical assistance. [Houlton Band of Maliseet-ME \(VIII.B\)](#).

Whenever DSHS initiates an involuntary foster care placement or termination of parental rights proceeding in superior court and a request for transfer of the proceeding to the jurisdiction of the Tribe is subsequently granted, DSHS will pay the costs of transporting the child to the Tribe's reservation, to the extent that the parents are unable to do so.

¹²⁰ See note 30, above.

¹²¹ Id.

¹²² This provision was drafted prior to the Fostering Connections to Success and Increasing Adoptions Act of 2008 (Pub. L. 110-351) amended Title IV-E of the Social Security Act to allow Indian tribes to apply for direct federal funding for their own foster care, adoption assistance, and guardianship assistance programs.

Provided that the child remains eligible for foster care payment, DSHS will also pay the costs of any out-of-home care of such child. Payment will be made in accordance with Part IX, Section 2 of this Agreement (Foster Care Payment for Indian Children). *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (V.6)*.

DSHS agrees to pay for the foster care of Indian children who are placed in foster care by DSHS or who are placed by the Tribe in foster homes licensed by DSHS or a state certified child placing agency. The duty to pay for foster care is contingent upon satisfaction of the eligibility criteria set forth in federal and state law and applicable administrative regulations, including the requirements of WAC 388-70.

DSHS also agrees to pay, through contracts between DSHS and the Tribe, for the foster care of Indian children who are placed by the Tribe in foster homes licensed by the Tribe. The obligation of DSHS to enter contracts with the Tribe is subject to the availability of funds and subject to the same eligibility standards and rates of support applicable to other children for whom DSHS pays foster care.^[123]

Foster care payment contracts shall be separately negotiated agreements to be renegotiated as specified in such contracts. Prior to July 1, 1987, DSHS agrees to provide the Tribe a timely opportunity to participate in the formulation of the 1987-1989 biennial budget proposal and enter into contracts if agreed. Budget formulation participation shall be limited to matters pertinent to securing funds to finance foster care payment contracts with the Tribe.

Following execution of this Agreement, DSHS agrees, in cooperation with the Tribe, to explore whether foster care payment contracts can be entered into prior to July 1, 1987.

For cross-reference purposes only, foster care payment contracts will be attached to this Agreement as exhibits. The contracts will not form part of this Agreement. Should any provisions of this Agreement and the contracts conflict, the provisions of the contracts shall govern.

Whenever a tribal foster care placement is funded by DSHS, the Tribe agrees to comply with all federal and state laws and regulations governing the utilization of such funds and to cooperate with DSHS, whenever necessary, in documenting such compliance. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (IX.2)*.

¹²³ Where the Tribe and State have a Title IV-E Agreement, the state is funding the tribe's share of foster care programs.

DSHS, in coordination with the Tribe's social services program, agrees to provide adoption assistance payments to adoptive parents who have obtained the adoption of a child through the tribal court, provided that the child and the adoptive parents meet all of the program eligibility requirements of the federal Adoption Assistance Program set forth in 42 U.S.C. 673¹²⁴] and the requirements of RCW 74.13.100-145, as well as applicable federal and state regulations. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (IX.9).*

Subject to the availability of funding, DSHS agrees to pay the reasonable and necessary expenses of the Tribe's social services program in performing adoptive home studies, evaluations of the adoption placement needs of Indian children, and in carrying out such other activities generally recognized as essential to the adoptive placement of Indian children. Payment of such expenses will be made with respect to Indian children on behalf of whom the Tribe incurs adoption placement costs covered by this section.

It is agreed that any obligation by DSHS to pay for the above specified adoptive placement costs must be set forth in a purchase of service contract between DSHS and the Tribe. The contract will be negotiated separately from this Agreement and will be attached to this Agreement as an exhibit. See Part II, Section 4, of this Agreement, regarding purchase of child welfare, social, and other services. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (IX.10).*

7. Staffing

The Tribe shall be given the opportunity to participate in the selection of any CA staff who will have responsibility for carrying and/or supervising cases involving Snoqualmie Tribal children. *Snoqualmie-WA (XI).*

When the Tribe requests child welfare services for children and youth being served by the Tribe, CA will: Assign the case to a specific social worker, selected by CA, but who recognizes that the Tribe has custody of, and decision-making authority, over the child, and who is willing to accept the customs and traditions of the Tribe. The CA social worker will not be responsible for case management, but instead will assist the Tribal social worker in accessing services, unless a contract for case management services for the child has been separately entered into. *Jamestown S'Klallam-WA (VIII.1).*

DSHS will seek to involve the Tribe in the selection of DSHS caseworkers or social workers to be assigned to cases involving Indian children, so that workers will be

¹²⁴ Adoption assistance payments may be provided through a tribal-state agreement regarding Title IV-E of the Social Security Act.

assigned who are sensitive to cultural and tribal issues.

Whenever the Tribe is concerned that the worker assigned to a case involving an Indian child is not sensitive to the cultural and tribal issues involved in a case, the Tribe will discuss its concerns with the worker and supervisor. If appropriate, DSHS will, with the assistance of the Tribe, provide training and direction designed to assist the worker to understand the importance of cultural and tribal issues. DSHS will also take additional action appropriate to the situation, which may include reassignment of the case (consistent with the Union-Management Agreement and applicable personnel rules). *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (III.4).*

DSHS will seek to recruit and hire Indian professional staff proportional to the local Indian service population. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (III.5).*

8. Group Coordination Meetings

It is mutually agreed that there shall be established a Coordination Committee of representatives of DCFS and the NATION that shall meet quarterly or as needed to address such issues as:

1. Coordination and communication between parties.
 2. Clarification of interpretation of this Agreement.
 3. Reviews of policies and procedures.
 4. Caseload trends and their implications.
 5. Matters of mutual concerns.
 6. Navajo customs.
 7. Federal, state, and tribal laws and regulations. *Navajo-UT (III.H).*
-

The Tribe and DSHS agree to coordinate with other agencies affected by the terms of this Agreement. Such coordination will include training, on-going consultation, development and negotiation of agreements with other agencies, and other appropriate measures to ensure that this Agreement is understood and effectively implemented. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (II.8).*

9. Training

*Promising Practices Note: In addition to Tribal-State ICWA Agreements, enhanced training and funding for training can be provided through Title IV-E direct funding, or through tribal-state agreements that pass through federal funding to the tribes.*¹²⁵

¹²⁵ See note 30.

-
1. The Department will provide reasonable technical assistance to aid the Tribe in complying with Federal and State Child Welfare laws, policies and regulations. This will include the Department providing an overview of program operations, reporting procedures and compliance with the terms and conditions of this Agreement on an annual basis.
 2. The Department agrees to offer overview training for the [Tribe], including:
 - a. Roles and responsibilities;
 - b. Stages of service;
 - c. Available child protective services; and,
 - d. Available legal services and resources.
 3. The Department also agrees to notify the Tribe Social Service Director, Department of Human Services, of trainings on sexual abuse dynamics, Department trainings, resource availability trainings and other relevant trainings available in the community of which the Department is aware.
 4. The Tribe agrees to notify the Department's Regional Director of all Indian Child Welfare specific training. The Regional Director will designate which staff will attend the training.
 5. The Tribe and the Department agree to provide joint trainings each year. These joint presentations will include two (2) sessions on abuse/neglect overview and two (2) sessions on foster home recruitment, to be scheduled with the [Tribe] and limited to one (1) hour in length. *Ysleta Del Sur-TX (VI)*.
-

CA will advise beda?chelh¹²⁶ of professional training opportunities as they arise and will furnish beda?chelh with literature and information regarding programs and services available through CA, including any scholarships available for trainings through the CA. Notification of programs and services will occur on at least an annual basis.

CA shall ensure that all staff assigned to work with the Tulalip Tribes have received Indian Child Welfare Act training, and have met with beda?chelh staff and received training from beda?chelh about the Tulalip Community. CA and beda?chelh shall work together to create training opportunities\webinars. *Tulalip-WA (VII)*.

DCS agrees to continue providing cultural competency training at initial hire or shortly thereafter for DCS employees assigned to these proceedings. DCS will coordinate periodically with the NATION to provide specific cultural awareness training regarding

¹²⁶ "Beda?chelh" is the name of the social services division charged by the Tulalip Tribes with the responsibility to foster and protect the health and welfare of the Indian families and their children and to carry out the purpose of ICWA and this Agreement. See *Tulalip-WA (VI.1)*.

working with Navajo children and families. *Navajo-AZ (XIII)*.

Establish a system of regularly scheduled training for OHS staff that will emphasize the importance of identifying an Indian Child's Tribal affiliations and extended family for placement purposes. Make training programs for caseworkers and foster parents available to any potential foster parents or caseworkers for the Tribe.

...

Whenever possible the State shall assist the Tribe in training and preparing staff for the ICWA caseload. The State and the Tribe will work collaboratively to make training available at least two times per year. OHS caseworkers, at the request of the Tribe, shall work directly with counselors from Tribal Social Services to ensure a smooth transition for the families. *Houlton Band of Maliseet-ME (VIII.A.2-3 and IX.D)*.

DSHS and the Tribe cooperatively agree to sponsor a program to educate judges, lawyers, and law enforcement personnel who are involved in Indian child custody proceedings about the provisions of this Agreement and the Act and the special cultural and legal considerations pertinent to such proceedings. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (II.7)*.

DSHS agrees to require its professional employees who have direct service responsibility with respect to Indian children and families to receive at least eight (8) hours of training annually in child welfare services pertinent to an Indian clientele, from Indian and other professionals qualified to provide such training. All other employees whose service area includes the Tribe shall receive information on providing child welfare services to Indian children and families. The Tribe and DSHS shall cooperatively develop and sponsor appropriate training.

DSHS agrees to notify the Tribe of child welfare services training provided by DSHS or others for DSHS employees. Such training will be open to the Tribe's child welfare services employees.

The Tribe agrees to notify DSHS of child welfare services training provided by the Tribe or others for tribal employees. Such training shall be open to DSHS child welfare services employees.

Indian child welfare services training will include, but not be limited to the following areas:

1. Procedures to be followed in compliance with this Agreement.
2. Provision of protective services.
3. Provision of emergency foster care placement services.
4. Legal requirements to complete involuntary foster care placement or termination

of parental rights.

5. Voluntary foster care placement.
 6. Applicability of placement preference standards.
 7. Records maintenance.
 8. Adoption of Indian children. DSHS and the Tribe agree to assist each private child placing agency serving Indian children to develop and deliver annual training in Indian child welfare services. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (II.9).*
-

10. Incorporation of Culture and Values

The SSD [Ysleta Del Sur Social Services Department] shall, upon request by CPS [Texas Child Protection Service], provide a native-speaking translator who will be present and/or available from the time of, if possible given time restraints, the first visit of an investigation and as needed throughout the period services are provided. The translator will be particularly necessary when a written Service Plan is developed with the family to ensure the family understands the content of the written Service Plan. *Ysleta Del Sur-TX (IV.9).*

11. Application to Private Agencies Licensed by the State

Promising Practices Note: When a state delegates its responsibility to deliver services to a private agency, or the state licenses agencies to perform certain functions relating to child welfare proceedings that do not necessarily involve state agencies directly, the private agency is bound by ICWA and the Tribal-State Agreement. Thus, a Tribal-State Agreement can make clear that ICWA supersedes state law and is applicable to the private agency, provide notice to all parties of these obligations under federal law, and finally, commit the state to ensure that the private agency complies with ICWA and the Tribal-State Agreement.

DSHS agrees to include the applicable provisions of this Agreement as part of the minimum requirements for the state licensing of private child placement agencies that serve Indian children, and to publish the necessary additions to the minimum licensing requirements, as required by RCY 74.13.031 and RC'I 74.15, within 150 days following the effective date of this Agreement.

DSHS agrees that within 180 days following the effective date of this Agreement, private child placement agencies licensed by DSHS shall be subject to the applicable provisions of this Agreement.

Immediately following approval of this agreement by DSHS and the Tribe, each party shall designate a representative(s) to work together in identifying all provisions of this

Agreement to be applied to State licensed child placement agencies and, based on such provisions, in preparing for publication the new minimum licensing requirements for such agencies. Except for those provisions of this Agreement that pertain to DSHS as a governmental agency and, therefore, can only be carried out by DSHS, it is the intent of the parties that all provisions of this Agreement be made applicable to State licensed child placement agencies.

Reports required by this Agreement to be prepared by DSHS shall, for matters handled by State licensed child placement agencies, be prepared by such agencies and filed with DSHS.

The Tribe agrees to designate a representative to assist DSHS in monitoring a child placing agency's compliance with the licensing requirements based on this Agreement. Such compliance shall be monitored in a manner mutually acceptable to the parties' designated representative(s). Reports on agency compliance will be filed with DSHS and the Tribe. DSHS will enforce compliance with the minimum licensing requirements based on this Agreement and, when necessary, agrees to impose appropriate sanctions on any agency that refuses to maintain such compliance. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (II.6)*.

I. Other General or Standardized Terms of the Agreement

1. Construction and Interpretation of the Agreement

This agreement is to be liberally construed in the full spirit of cooperation with the goal of carrying out the stated policy of the Indian Child Welfare Act of 1978, USC 1901 et seq. *Shoalwater-WA (Introduction section)*.

Interpretation of Agreement. This Agreement shall be construed liberally so as to achieve results consistent with ICWA and this Agreement. The following guidelines shall be followed:

A. Indian Families should be preserved;

B. Cases involving the Tribe's children should be heard in a Tribal Court whenever possible. Indian children who must be removed from their homes should have placements within their own families or Tribe.

C. The State and the Tribe will collaborate on child welfare and custody decisions for children who remain in the custody of the State. The State will defer to Tribal determinations on child welfare and custody, unless the State believes that such Tribal determinations pose a risk to the child. Where the State disagrees with the Tribal determination and makes a different determination, the Tribe retains the right to raise the issue in the appropriate forum. *Houlton Band of Maliseet-ME (VI)*.

2. Provisions to Amend, Modify or Terminate the Agreement

This is a working document to guide the Tribe and CA in supporting Indian children in need of services. Its description of services, policies, procedures and processes may be changed as programs are added, changed or deleted, eligibility requirements are added, changed or deleted, or as circumstances otherwise warrant. This MOA may be modified at any time by mutual written agreement of the Tribe and CA. *Jamestown S'Klallam-WA (XIV)*.

A duly designated representative(s) of DSHS and the Tribe, on a case-by-case basis, may agree in writing to waive any of the provisions of this Agreement. The waiver shall identify the provision(s) to be waived, the case or circumstances to which the waiver is applicable, the reasons for the waiver and the duration of the waiver.

Any provision of this Agreement may be waived generally by agreement of DSHS and the Tribe, i.e. without regard to a particular case or circumstance. A general waiver of any provision of this Agreement shall take effect upon the date the parties agree to the waiver. *1987 Washington Original Exclusive Jurisdiction Tribal State Agreement (II.10)*.
