

10-521. ICWA notice.

[For use with Rules 10-312 and 10-315 NMRA]

STATE OF NEW MEXICO
COUNTY OF _____
_____ JUDICIAL DISTRICT
IN THE CHILDREN’S COURT

STATE OF NEW MEXICO ex rel.
CHILDREN, YOUTH AND FAMILIES DEPARTMENT

No. _____

In the Matter of

_____, (a) Child(ren), and Concerning,
_____, Respondent(s).

ICWA NOTICE AS TO _____ (CHILD(REN))¹

COMES NOW the New Mexico Children, Youth and Families Department (CYFD) by _____, Children’s Court Attorney, and gives the following notice under 25 U.S.C. § 1912(a) and 25 C.F.R. §§ 23.11 and 23.111:

1. An Abuse/Neglect Petition was filed in _____ County, New Mexico, _____ Judicial District Court on _____, in the above-captioned and numbered cause.

2. _____ (name of child(ren)), is/are unmarried, under eighteen (18) years of age, and may be
[] member(s) of the _____ tribe(s); or
[] eligible for membership in the _____ tribe(s) and the biological child(ren) of member(s) of the _____ tribe(s).

3. The child(ren) is/are, or there is reason to know² that the child(ren) is/are, [an] Indian child(ren) based on the following information:

_____.

4. This proceeding may result in the termination of the parental and/or custodial rights of the child(ren)’s parents and/or Indian custodian(s).

5. The following information about _____ (name of child(ren)) is known (repeat or modify as necessary if more than one child):

- a. Full name of child _____;
- i. Birth date _____;
- ii. Birthplace _____;

- b. Full name of child's biological mother (*including maiden, married, and former names or aliases*) _____;
 - i. Birth date _____;
 - ii. Place of birth and death (*if applicable*) _____;
 - iii. Tribal enrollment number _____;
 - iv. Other identifying information _____;
 - v. All known current and former addresses _____;
- c. Full name of child's biological father (*including married and former names or aliases*) _____;
 - i. Birth date _____;
 - ii. Place of birth and death (*if applicable*) _____;
 - iii. Tribal enrollment number _____;
 - iv. Other identifying information _____;
 - v. All known current and former addresses _____;
- d. (*Provide the information above, if known, for the child's other direct lineal ancestors, such as grandparents*).

6. The child(ren) is/are currently in the custody of CYFD, and contact with CYFD may be made by contacting either undersigned counsel or _____, the child(ren)'s case worker, at _____ (address) or at the following telephone number: _____.

7. The child(ren) is/are currently placed in _____ (type of placement, e.g., non-relative foster care).

8. The Indian child(ren)'s parent(s), Indian custodian(s), and tribe(s) have the right to intervene in this case.

9. If the Indian child(ren)'s parent(s) or Indian custodian(s) is/are unable to afford counsel, counsel will be appointed upon a finding of indigency.

10. The address and telephone number of the _____ Judicial District Court for _____ County, New Mexico is: _____. The cause is assigned to the Honorable _____.

11. The Indian child(ren)'s parent(s), Indian custodian(s), and tribe(s) shall have the right to petition the court for transfer of the proceeding to the Tribal court as provided by 25 U.S.C. § 1911 and 25 C.F.R. § 23.115.

12. You must keep confidential the information contained in this notice, and this notice should not be handled by anyone not needing the information to exercise rights under ICWA.

13. Except for emergency proceedings, no hearing on the petition in the involuntary child custody proceeding shall be held sooner than ten (10) days from the date of receipt of this

notice by the Indian child(ren)'s parent(s), Indian custodian(s), and tribe(s). The Indian child(ren)'s parent(s), Indian custodian(s), and tribe(s) have the right to be granted, upon request, up to twenty (20) additional days to prepare for the child custody proceedings.³

14. The Indian child(ren)'s parent(s), Indian custodian(s), and tribe(s) shall have the right to request up to twenty (20) additional days to prepare for a hearing on the petition.

15. Request is hereby made of the _____ tribe(s) to respond to the undersigned or to the Court if and when ICWA may be applicable to this action, and the undersigned will distribute to the parties of record and to the Court.

Name of Attorney, CCA
CYFD Protective Services
Address
Telephone Number

CERTIFICATE OF MAILING⁴

I hereby certify that a true and correct copy of this Notice, along with a copy of the Abuse/Neglect Petition and Affidavit of _____, were sent by registered/certified mail, return receipt requested, to *(check all that apply)*

- the designated Tribal Agent⁵ of the _____ tribe(s) at _____ *(address)*;
- _____ *(name of parent/Indian custodian)* at _____ *(address)*;
- the appropriate Regional Director of the Bureau of Indian Affairs⁶ at _____ *(address)*.

Name of Attorney, CCA

USE NOTE

1. This form is intended for use in the early stages of a child-custody proceeding. *See* Rule 10-315 (F)(1)(c) NMRA (providing that the court shall ensure that the department provides notice under ICWA when the court determines at a custody hearing that the child is an Indian child or that there is reason to know that the child is an Indian child); *see also* Rule 10-312 NMRA (providing that the department shall provide the notice required under ICWA of the filing of the petition when the child is enrolled or eligible for enrollment in an Indian tribe). This form should be modified as necessary when the duty to provide notice under ICWA arises later in the proceeding. *See* Rule 10-315(G) (providing that the court shall order the participants to inform the court if they receive information after the custody hearing that provides reason to know that the child is an Indian child).

2. See 25 C.F.R. § 23.107(c) and Rule 10-315(E) NMRA for circumstances that

provide reason to know that the child is an Indian child.

3. The law is unsettled about whether the time-related restrictions set forth in this paragraph, which are required under ICWA, 25 U.S.C. § 1912(a), apply to ex parte and custody hearings. The Supreme Court has held that ex parte and custody hearings are emergency proceedings under ICWA and therefore are exempt from the requirements of § 1912. *See State ex rel. Children, Youth and Families Dep't v. Marlene C.*, 2011-NMSC-005, 34, 149 N.M. 315, 248 P.3d 863 (“New Mexico’s ex parte and custody hearings are emergency proceedings under [25 U.S.C.] § 1922 to which the requirements of [25 U.S.C.] § 1912 do not apply.”).

Recently adopted federal regulations, however, clarify the standards imposed in emergency proceedings under ICWA and are difficult to reconcile with the procedures allowed under New Mexico law. *Compare, e.g.*, 25 C.F.R. § 23.113(b) (providing that the emergency removal or placement of an Indian child must be based on a finding that the removal or placement “is necessary to prevent imminent physical damage or harm to the child”), *and id.* § 23.113(e) (providing that an emergency proceeding should not be continued for more than 30 days without a finding, *inter alia*, that “restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm”), *with* NMSA 1978, § 32A-4-18(C) (providing that custody may be awarded to the department based upon a showing that, *inter alia*, “the child will be subject to injury by others if not placed in the custody of the department”), *and id.* § 32A-4-19(A) (providing that an adjudicatory hearing shall commence within 60 days of service on the respondent).

Regardless of the continued validity of *Marlene C.*, the committee views the new regulations, taken as a whole, as a directive to engage potentially interested Tribes as early as possible in a child-custody proceeding in which an Indian child may be affected. *See* 25 C.F.R. § 23.101. The committee therefore encourages all participants in an abuse and neglect proceeding—including the court—to work with and accommodate the needs of interested Tribes to the fullest extent possible under the circumstances.

4. ICWA and its regulations require this Notice to be sent via registered or certified mail, return receipt requested, to the individuals identified in the certificate of mailing. *See* 25 C.F.R. §§ 23.11, 23.111(c). A copy of this Notice also must be served on the parties, as required by Rule 10-104 NMRA.

5. The CCA must send a copy of this Notice to the designated Tribal Agent of the Indian child’s tribe(s), who may be identified by contacting the Bureau of Indian Affairs or by consulting the Bureau’s annually published listing of Designated Tribal Agents for Service of Notice. The CCA may also determine the identity of the designated tribal representative(s) by contacting the tribe(s), subject to the confidentiality required by law.

6. The CCA must send this Notice or a copy to the appropriate Regional Director of the Bureau of Indian Affairs identified in 25 C.F.R. § 23.11(c). Service requirements may vary based upon whether the identity of the child’s parents, Indian custodian, or Tribe can be ascertained. *See* 25 C.F.R. § 23.11(a), (b).

[Adopted by Supreme Court Order No. 14-8300-009, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-038, effective for all cases pending or filed on or after November 28, 2016.]