

Montana ICWA/HB 317	Federal ICWA		Legislative Intent	
*Sections red-lined were removed by amendments and are not part of the final bill.				
Sec. 4 (9) Definitions	<ul style="list-style-type: none"> Defines an “Indian child” as an unmarried person under 18 who is either: (1) a member of an Indian tribe; or (2) eligible for membership in an Indian tribe. 	25 USC § 1903(4)	<ul style="list-style-type: none"> Defines an “Indian child” as an unmarried person under 18 who is: (1) member of an Indian child; or (2) eligible for membership and the biological child of a member of an Indian child. 	<ul style="list-style-type: none"> Promotes uniform application of the law across the State. Strengthens existing law by expanding definition of Indian child, thereby bringing more Indian children under the protection of the law. Recognizes Tribes retain exclusive jurisdiction to determine tribal membership and that such determinations are unique to each Tribe (e.g., some tribes may recognize descendants as members without requiring the parent be a member.)
Sec. 3(9)(b) Definitions	<ul style="list-style-type: none"> Expands definition of “extended family” to include all cousins & stepparents and recognizes family connections after dissolution of marriage. 		<ul style="list-style-type: none"> Limits definition, in part, to first and second cousins and does not include step grandparents. Does not expressly recognize family relations after dissolution. 	<ul style="list-style-type: none"> Strengthens existing law by recognizing Tribes have expanded view of extended family connections that may include kinship and non-kinship. Defers to Tribes to make this determination.
Sec. 5 (8) Determination of Indian child	<ul style="list-style-type: none"> A tribe’s non response to a request for verification of a child’s membership status does not constitute evidence that child does not meet definition of an Indian child. 	25 CFR § 23.107	<ul style="list-style-type: none"> When there is reason to know a child may be an Indian child, a District Court must apply the ICWA unless and until it is determined that the child does not meet the definition of an Indian child. 	<ul style="list-style-type: none"> Strengthens existing law by recognizing that a District Court may not substitute its own judgment for determining a child’s membership (or eligibility for membership) status. Strengthens requirement for State agencies to use due diligence to identify and work with all of the child’s potential Tribes to verify the child’s membership status and recognizes that due diligence to verify membership may require on-going efforts throughout the proceeding.
Sec. 7(3) Transfer	<ul style="list-style-type: none"> Parent, Indian Custodian, Tribe and Indian children 12 years of age or older can request case be transferred to Tribal Court. 	25 USC § 1911(b)	<ul style="list-style-type: none"> Parent, Indian Custodian and Tribe can request case be transferred to Tribal Court. 	<ul style="list-style-type: none"> Strengthens protections for Indian children, especially in cases in which Indian child’s parents are not engaged in reunification process. Recognizes Indian child’s connection to family, Tribe, and culture is in Indian child’s best interest.
Sec. 7(4) Transfer	<ul style="list-style-type: none"> Provides time period of 75 days for Tribal Court to consider request to transfer case to Tribal Court. 	25 USC § 1911(b)	<ul style="list-style-type: none"> Does not provide timeframe. 	<ul style="list-style-type: none"> Prevents delays in court proceedings when transfer is requested. Encourages District Courts and Tribal Courts to timely communicate when transfer to Tribal Court is requested.

Still Good law

<p>Sec. 6(6)(b)(i) Transfer</p>	<ul style="list-style-type: none"> District Court cannot consider whether case is at an advanced stage when determining if good cause exists to deny a request to transfer case to Tribal Court. 	<p>25 CFR § 23.118</p>	<ul style="list-style-type: none"> District Court cannot consider whether case is at an advanced stage IF State did not provide notice to Tribe until proceeding is at an advanced stage. 	<ul style="list-style-type: none"> Narrows good cause exception, recognizing tribes have valid reasons why they may choose to not transfer a case until later in the proceedings. Recognizes tribes, as sovereigns, have exclusive jurisdiction over proceedings involving Indian child at all stages of the proceeding.
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Sec. 7(2)(d) Notice	<ul style="list-style-type: none"> State must provide notice to Indian child’s tribe(s) with all petitions filed with Court. Cert: first or last First class mail: all other 	25 USC § 1912(a)	<ul style="list-style-type: none"> Notice required when Indian child is removed and if State petitions to terminate parental rights. 	<ul style="list-style-type: none"> Allows Indian child’s tribe to participate at all stages of the proceedings to improve outcomes for families. Provides additional opportunity for meaningful state-tribal consultation for family placements, case management and permanency planning.
Sec. 7(2)(e) Notice	<ul style="list-style-type: none"> Clarifies that notice to parent or Indian Custodian by personal service (or alternative means if personal service cannot be accomplished) of initial petition and petition for termination of parental rights takes the place of certified mail. 	25 USC § 1912(a)	<ul style="list-style-type: none"> Requires State to serve parent or Indian Custodian by certified mail of foster care or termination of rights proceedings. 	<ul style="list-style-type: none"> Recognizes that State law (M.C.A. § 41-3-422(6)) requiring personal service provides higher protection for parents and Indian Custodians and notice by both means (personal and certified mail) is duplicative and does not provide a greater level of due process.
Sec. 11(2) Qualified Expert Witnesses	<ul style="list-style-type: none"> State must consult with Tribe to determine whether Tribe has list of preferred experts, and State must, to extent possible, utilize such individuals as QEW in proceeding. 	25 USC § 1912(e),(f)	<ul style="list-style-type: none"> No consultation required. 	<ul style="list-style-type: none"> Strengthens state-tribal consultation by recognizing tribes are best situated to determine who has knowledge of and can ably testify about the Tribe’s childrearing practices, customs, and traditions. Codifies best practices.
Sec. 11(4) Qualified Expert Witnesses	<ul style="list-style-type: none"> The social worker assigned to the case <i>and the social worker’s supervisor assigned to the case</i> may not serve as QEW. 	25 USC § 1912(e),(f); 25 CFR § 23.122	<ul style="list-style-type: none"> The social worker assigned to the case may not serve as QEW. 	<ul style="list-style-type: none"> Provides additional protection for parents by further ensuring District Court decisions are based on a culturally informed, opinion of someone other than the social worker.
Sec.12(4)(b) Active Efforts	<ul style="list-style-type: none"> Clarifies that a referral to a service or program is not an active effort if the referral was the sole action taken. 	25 USC § 1912(d); 25 CFR § 23.2	<ul style="list-style-type: none"> Does not include this clarification. 	<ul style="list-style-type: none"> Codifies best practices by providing additional guidance to State agency in implementing active efforts and to District Courts in considering whether active efforts have been made.
Sec. 15(1) Consent	<ul style="list-style-type: none"> Involuntary proceedings – District Court must certify, on the record, a parent’s stipulation or consent to foster care placement, for such consent to be valid. 	25 USC § 1913(a)	<ul style="list-style-type: none"> No requirement for certification-written or verbal-in involuntary foster care placement hearings. 	<ul style="list-style-type: none"> Expands protections for parents currently under federal and state law (M.C.A. § 41-3-432(4)) by ensuring parents understand their rights and consequences of consenting or stipulating to a foster care placement even when parent is represented by counsel. Ensures parents receive effective assistance of counsel.

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Sec. 15(3) Evidentiary Requirements	<ul style="list-style-type: none"> • District Court may not rely solely on bond or attachment Indian child has with foster care provider in determining whether to continue foster care placement or terminate parental rights. 	25 USC § 1912 (e)(f)	<ul style="list-style-type: none"> • Does not include this clarification. 	<ul style="list-style-type: none"> • Recognizes fundamental assumption that it is in Indian child's best interest to maintain connection to family, culture, and Tribe.
Sec. 20(3) Placement Preferences	<ul style="list-style-type: none"> • Adoptive placement preferences include: (1) member of the family; (2) other members of the Indian child's tribe; (3) <i>an Indian family that is of a similar culture to the Indian child's tribe</i>, and (4) other Indian families. 	25 USC § 1915(a)	<ul style="list-style-type: none"> • Adoptive placement preferences include (1), (2) and (4), but do <i>not</i> include <i>an Indian family that is of a similar culture to the Indian child's tribe.</i> 	<ul style="list-style-type: none"> • Expands categories of preferred adoptive placements, recognizing many tribes have similar histories and culture, and, therefore, a shared political identity in relationship to the federal government.
Sec. 20(8) Placement Preferences	<ul style="list-style-type: none"> • District Court <i>cannot</i> rely solely on ordinary bonding when determining whether to approve a non-preferred placement. 	25 CFR § 23.132	<ul style="list-style-type: none"> • District Court <i>can</i> rely on ordinary bonding or attachment to approve non-preferred placement <i>IF State violated ICWA.</i> 	<ul style="list-style-type: none"> • Recognizes fundamental assumption that it is in Indian child's best interest to maintain connection to family, culture, and Tribe (consistent with existing policy for all children in MT, set forth in M.C.A. § 41-3-101(1)(f) and (3), to maintain a child's connection to extended family, culture, religion and ethnicity). • Recognizes child's relationship with non-preferred placement may be outweighed by long term best interest of Indian child in maintaining connection to family, culture, and Tribe.