JUDICIAL COUNCIL
OF CALIFORNIA
TRIBAL COURT–STATE COURT FORUM

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TRIBAL COURT–STATE COURT FORUM

OPEN MEETING AGENDA

Open to the Public (Cal. Rules of Court, rule 10.75(c)(1))
THIS MEETING IS BEING CONDUCTED BY ELECTRONIC MEANS
THIS MEETING IS BEING RECORDED

Date:	December 15, 2016
Time:	12:15–1:15 p.m.
Location:	Conference Call
Public Call-In Number	1-877-820-7831 and enter Listen Only Passcode: 4133250

Meeting materials will be posted on the advisory body web page on the California Courts website at least three business days before the meeting.

Agenda items are numbered for identification purposes only and will not necessarily be considered in the indicated order.

I. OPEN MEETING (CAL. RULES OF COURT, RULE 10.75(C)(1))

Call to Order and Roll Call

II. PUBLIC COMMENT (CAL. RULES OF COURT, RULE 10.75(K)(2))

Public Comment
This meeting will be conducted by teleconference. As such, the public may only submit written comments for this meeting.

Written Comment
In accordance with California Rules of Court, rule 10.75(k)(1), written comments pertaining to any agenda item of a regularly noticed open meeting can be submitted up to one complete business day before the meeting. For this specific meeting, comments should be e-mailed to forum@jud.ca.gov or mailed or delivered to 455 Golden Gate Avenue, San Francisco, CA 94102, attention: Jennifer Walter. Only written comments received by 12:15 p.m. on December 14, 2016 will be provided to advisory body members.

III. Discussion and Possible Action Items (Items 1-8)

Item 1
Approval of Minutes for October 6, 2016

Item 2
Cochairs Report

- Update on ICWA Roundtables
- Job Aid: New Federal Regulations on ICWA
- Truth and Reconciliation
- Next Forum Meeting: February 16, 2017, 9:30 a.m.–4:30 p.m. in San Francisco

Item 3
Update on Information Bulletin re Enforcement of Tribal Court Protection Orders
Presenter: Mr. Olin Jones

Item 4
Tribal Representation in ICWA Cases and Pro Hac Fees

- Proposed Court Rule in Michigan to Waive Pro Hac Fees and Other Limits for Out of State Tribal ICWA Attorneys by Kate Forte
- CA State Bar FAQs Pro Hac
- CA Court Rule 9.40 Pro Hac

Presenter: Judge Abinanti

Item 5
Protecting Children and Tribal Access to Child Abuse Central Index
Presenter: Jenny Walter

Item 6
Rule and Form Proposals

- Revise California Rule of Court, rule 5.552 to conform to the requirements of subparagraph (f) of section 827 of the Welfare and Institutions Code which was added effective January 1, 2015 to clarify the right of an Indian child's tribe to have access to the juvenile court file of a case involving that child. At that time, no changes were made to California Rules of Court rule 5.552 which implements section 827 of the Welfare and Institutions Code. Contrary to section 827 as amended, rule 5.552 continues to require that representatives of an Indian child's tribe petition the juvenile court if the tribe wants access to the juvenile court file. This inconsistency has created confusion.

Presenter: Ann Gilmour

- Revise California Rule of Court, rule 5.372 that was first adopted by the Judicial Council effective January 1, 2014 to implement in California the requirements of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 authorizing federally recognized tribes to develop their own tribal title IV-D child

support programs when the Yurok Tribe became the first California tribe to begin accepting child support cases. Since initial implementation, the need for revisions to streamline and improve the process have been identified and should be undertaken in light of additional tribal title IV-D programs commencing operations in California. This proposal grew out of the cross-court educational exchanges.

Presenters: *Judge Abby Abinanti*
Judge Christopher Wilson

- Concept Proposal: Judge to Judge Communications

Presenter: *Judge Joseph Wiseman*

Item 7 (as time permits)
ICWA Legislation- Strategy Discussion

Presenters: *Judge Leonard P. Edwards, Ret.*
Judge Patricia Lenzi

Item 8 (as time permits)
Recognition and Enforcement of NonMoney Judgments- Banishment, Other?

[Note: SB 406 survey respondents recommended the following case types: probate case, trespass cases, conservatorship cases, contract cases, and family law cases.]

Presenters: *Judge Lester Marston*
Judge Mark Radoff

IV. ADJOURNMENT

Adjourn

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TRIBAL COURT–STATE COURT FORUM

MINUTES OF OPEN MEETING

October 6, 2016
12:15-1:15 p.m.
By Conference Call

Advisory Body Members Present:	*Hon. Abby Abinanti, Co-chair, and Hon. Dennis M. Perluss, Co-chair*, Hon. April Attebury, Hon. Gail Dekreon, Hon. Leonard Edwards, Hon. William Kockenmeister, Hon. Anthony Lee, Hon. David Nelson, Hon. John Sugiyama, Hon. Christine Williams Hon. Patricia Lenzi, Hon. Lester Marston, Hon. Mark Radoff, Hon. Sunshine Sykes, Hon. Joseph Wiseman, and Hon. Zeke Zeidler
Advisory Body Members Absent:	Ms. Jacqueline Davenport, Hon. Michael Golden, Hon. Cynthia Gomez, Mr. Olin Jones, Hon. Mark Juhas, Hon. Suzanne Kingsbury, Hon. Allen Sumner, Hon. Juan Ulloa, Hon. Claudette White, and Hon. Christopher Wilson
Others Present:	Ms. Carolynn Bernabe, Ms. Vida Castaneda, Ms. Ann Gilmour, Ms. Delia Parr, and Ms. Jennifer Walter

OPEN MEETING

Call to Order and Roll Call
The co-chairs called the meeting to order at 12:18 am

Approval of Minutes
The committee approved the June 9, 2016 minutes.

DISCUSSION AND ACTION ITEMS (ITEMS 1–8)

Item 1
Cochairs Report
Justice Dennis Perluss and Judge Abby Abinanti welcomed new and reappointed forum members and gave the following report:

- *Next In-Person Meeting of the Forum: February 16, 2017, San Francisco*
  Members were invited to mark their calendars and to send agenda items to staff.
- *Forum Letter of Support for Federal Funding for Tribes in California Mailed to Senator Diane Feinstein*
  A copy of this letter, requesting that California tribes receive their fair share of the 10 million dollars in federal funding, was shared.
- *An American Genocide: The United States and the California Indian Catastrophe by Benjamin Madley (see book review: Naming America's Own Genocide)*

Both Justice Perluss and Judge Abinanti recommended members read this book by Professor Benjamin Madley. It is the first book of its kind that comprehensively documents the genocide of Native Americans in California from 1846 to 1873. The author makes the case for how genocide was perpetrated at the highest levels of state government and was institutionalized through state actors, laws, and policies.

- *Native American Indian Court Judges Association (NAICJA) Pre-Institute on ICWA (October 18th) and Conference (October 19-21)* at *Morongo (Cabazon, Riverside County).* . Members were encouraged to attend this conference, sponsored by NAICJA and Casey Family Programs.

Item 2
Pre-Institute: Judicial Roundtable on the Indian Child Welfare Act (ICWA), a Complement to the ICWA Workshop at the Juvenile Law Institute
December 5, 2016, Garden Grove, California
(Sponsored by the Casey Family Programs, the National American Indian Court Judges Association, and the Forum)

Judge Wiseman and Jenny Walter described the ICWA Roundtable and encouraged members to attend. Cosponsored by the forum, NAICJA, and Casey Family Programs, this Roundtable will be held the day before the Juvenile Law Institute. Casey Family Programs has given NAICJA funds to pay for hotel and mileage for up to 20 judges to attend. The Roundtable will delve into the history and context for ICWA, explore issues relating to historical trauma and illustrate regulatory and guideline changes through a discussion of dependency case scenarios. Faculty include the following forum members: Judge Edwards, Judge White, Judge Wiseman, and Judge Ulloa. Judge Sykes volunteered to assist with this and any other judicial educational program, and in particular to develop content on the historical context for ICWA.

Item 3
Forum's Presentation to the Commission on Access to Justice

Justice Perluss and Judge Williams reported on their presentation to the Commission on Access to Justice. They covered the following topics: California's tribal communities, principles of tribal sovereignty, California's tribal justice systems, overview of jurisdiction, innovative practices, like the joint jurisdictional court, and generally the forum's accomplishments. The presentation sparked interest, dialogue, and a desire on the part of commission members to support the forum's work.

Item 4
Report on Tribal Access to Child Abuse Central Index

Ms. Delia Parr described a mutual problem faced by tribal and state justice systems addressing child abuse. Because tribes do not have access to the Child Abuse Central Index (CACI), substantiated child abuse reports by tribal and county social services are not shared statewide. Providing access to this database will address child safety issues posed by the potential placement of children in homes with known abusers. The California Department of Justice (DOJ) administers CACI, which was created by the Legislature in 1965 as a tool for state and local agencies to help protect the health and safety of California's children.

Ms. Parr reported that tribal access to CACI is denied for the same reason that tribes are denied access to the California Restraining and Protection Order System and the California Law Enforcement Telecommunications System: tribes are not considered public agencies under the Government Code. She explained that the problem came to light when tribes negotiated with the California Department of

Social Services (CDSS) title IV-E agreements that would permit them to operate tribal child welfare programs. In practice, if the tribal or county social service agency receives a child abuse report, it is investigated by the agency receiving the report using structured decision-making. If the tribal agency is the one receiving the report, then if it is substantiated, the tribal agency completes the appropriate DOJ form, forwards it to the county child welfare agency, which submits it to DOJ in order to have it entered into CACI.

Action Item: Staff will prepare a memo describing the problem and presenting solutions to be discussed at the next forum meeting in December.

Item 5
Update on SB 406 Study

Ms. Walter described briefly the California Law Review Commission report that recommended that the Legislature lift the sunset provision in SB 406. She reported that the study conducted in collaboration with UC Davis School of Law, although very positive of the streamlined process for the recognition of tribal money judgments, did not provide the data needed to ask the Legislature to expand the scope of SB 406 to non-money judgments. Upon the advice of the Judicial Council's Office of Governmental Affairs, the forum is in an excellent position to have CLRC carry its message to lift the sunset. Ms. Walter recommended the following policy approach. First, the Tribal Court Judges Association identify the predominant case type heard by tribal courts and the specific judgment within that case type that would benefit from a streamlined process like the one specified in SB 406. Second, after the Legislature lifts the sunset, the forum in collaboration with the Tribal Court Judges Association and UC Davis School of Law collect the type of data needed to persuade the Legislature to expand the scope of SB 406.

Action Item: Staff will propose this approach to California Indian Legal Services (staff to the Tribal Court Judges Association) so that it can be placed on the Tribal Court Judges Association agenda for discussion. Staff will talk to Professor Katherine Florey at UC Davis to explore continued collaboration on this project.

Item 6
California Implementation of the New Federal Regulations and Proposed Guidelines- Forum Discussion

Facilitator: Judge Leonard Edwards

Judge Edwards gave a brief background and context for the new federal ICWA regulations. After ICWA was passed in 1978, the Bureau of Indian Affairs (BIA) issued Guidelines for state court child custody proceedings in 1979. Those Guidelines had not been revised until new, much more comprehensive Guidelines were published in February 2015. A month later, in March 2015, the BIA published proposed comprehensive federal ICWA regulations that addressed many of the same areas and were very similar to the new Guidelines. BIA received many comments on the proposed regulations and published the final proposed rule concerning the ICWA Regulations in June of 2016. Those final regulations will become effective December 12, 2016. The final regulations are scaled back and different from both the Guidelines issued in February 2015 and the proposed regulations issued in March 2015. In some areas, the new regulations are inconsistent with California law and practice. The forum will need to examine the definitions for active efforts, proceedings versus hearing, and voluntary versus involuntary proceedings, procedures for emergency removals, restrictions on what can be considered "good cause" for

deviating from placement preferences, the higher California standard for qualified expert witness, and transfer to tribal court. The forum will also need to consider the recent decisions by the California Supreme Court and recommendations contained in the ICWA Task Force report issued by the California Department of Justice. Tribes may want to take the lead in any implementing legislation as they did when SB 678 was passed in 2006.

Action Item: Staff directed to prepare a memo summarizing the regulations and guidelines and highlighting the issues raised for California practice. ICWA Roundtable discussion relating to case scenarios will serve to explore these issues. Forum to continue the dialogue at its December and February meetings.

ADJOURNMENT

There being no further business, the meeting was adjourned at 1:18 p.m.

Pending approval by the advisory body on _____.

Cochairs Report

Pre-Institute Judicial Roundtable on the Indian Child Welfare Act (ICWA)

Agenda | Monday, December 5, 2016

Location: Hyatt Regency Orange County, Garden Grove, CA Room: Plaza Terrace B-F

The goal of this Roundtable is to draw from the experiences of the participants and share information on new and emerging developments of the Indian Child Welfare Act and to continue the dialogue at the Juvenile Law Institute.

8:30 AM	**Welcome and Introductory Remarks** Presenters: Ms. A. Nikki Borchardt Campbell, Executive Director, NAICJA Mr. Sheldon Spotted Elk, Director, Casey Family Programs Hon. Abby Abinanti, Tribal Court State Court Forum Cochair & Chief Judge of the Yurok Tribal Court Hon. Dennis M. Perluss, Tribal Court-State Court Forum Co-Chair, Justice Court of Appeal, Second Appellate District
9:00 AM	**Session One: History and Context: ICWA and Historical Trauma** Presenter: Hon. William A. Thorne, Utah Court of Appeals (ret.)
10:00 AM	**Networking Break**
10:15 AM	**Session Two: Case Scenarios Illustrating New ICWA Regulations and Recent California Case Law** Presenters: Tribal Court Judges and State Court Judges Hon. Joseph J. Wiseman and Judge Leonard P. Edwards; Judge Juan Ulloa and Judge Claudette White Moderator: Mr. Jack Trope, Executive Director Association on American Indian Affairs
11:45 AM	**Wrap-up, Evaluations**
12:00 PM **12:30 PM**	**Networking Lunch Hosted by Casey Family Programs and** **Presentation on National Context and Introduction of Juvenile Law Institute Workshop on ICWA**
1:15 PM	**Juvenile Law Institute**

HISTORY AND CONTEXT

Periods in Federal Indian Policy Towards Indians & Tribes

Period	U.S. Government Policies	Impacts and Outcomes
Early Indian/U.S. Relations **(1776 - 1810s)**	▪ Northwest Ordinance (1786) ▪ Commerce Clause added to the U.S. Constitution (1789) ▪ First Indian agents assigned under the Department of War to negotiate treaties with tribes (1789) ▪ Indian Trade and Intercourse Act (1790)	U.S. government treats some Indians as sovereign nations; makes treaties with some; makes war with others; establishes federal jurisdiction in dealings with Indian people; promises to protect them from settler encroachment; an era of incredible wholesale expropriation and physical violence.
Eastern U.S. Wars, Removal, and Relocation **(1820s – 1848)**	▪ Indian Office established in the Department of War (1824) ▪ Indian Removal Act (1830) ▪ *Johnson vs. McIntosh* (1823) ▪ *Cherokee Nation vs. Georgia* (1831) ▪ *Worcester vs. Georgia* (1832) ▪ *Seminole Nation vs. U.S* (1842)	Forcible relocation of Indian tribes of the Eastern states to west of the Mississippi River; opening of Indian lands for colonization; Indian title to lands extinguished; Indians become wards of federal government as "domestic dependent nations;" Federal government assumes trusteeship of Indian lands, resources, and affairs.
Western U.S. Removal, Reservations, Wars and Treaty Making **(1849 - 1870s)**	▪ Oregon Trail Opens (1847) ▪ End of Mexican American War (1848) ▪ Indian Office shifted to newly created Department of Interior (1849) ▪ Settlement of Native people on reservations became common practice (1849) ▪ Systematic military campaigns to destroy subsistence base of Plains people (1850s-70s)	Massive Western migrations of U.S. settlers beginning in late 1840s leading to horrific violence between colonizers and Native people; U.S. uses military might and treaties to forcibly relocate Indian people to Indian Territory or onto reservations and expropriates their lands; Indian Affairs is transferred to the Dept. of the Interior which manages public lands expropriated from Native people.
Allotment and Civilization/Assimilation Projects **(1870s-1934)**	▪ Military agents stationed to live on, surveillance, and oversee welfare disbursements and assimilation policies on reservations (1870s) ▪ Regular Congressional appropriations for Indian education and assimilation begin (1870s) ▪ Treaty making abolished (1871) ▪ Indian Police Force created (1878) ▪ "Civilization Regulations" outlaw Native religions, healing practices, and leaving of reservations (1880) ▪ Dawes Act (1887)	Congress abolishes treaty making with Indian nations, turns to Congress and Executive to make unilateral decisions concerning Indians and their resources; Indian lands and resources are expropriated at unprecedented rates and redistributed to settlers; large-scale attempts are made to dismantle tribes and assimilate Indian people into the "mainstream" through land reform (Dawes Act), forced reeducation, outlaw of their cultures; results in widespread poverty, loss of lands/resources, abuse and neglect; most communities take culture and languages underground
Reform and Tribal Reorganization	▪ Indian Citizenship (1924) ! Miriam Report (1928)	Indians are granted citizenship in most states; allotment ended; poverty is recognized;

(1920s-1945)	▪ Indian Reorganization Act (1934)	Western style constitutional forms of government are imposed that displace traditional tribal social and political organization and leadership; great authority given to Secretary of Interior as trustee to oversee development of Indian people.
Termination & Relocation **(1945-1961)**	▪ Indian Land Claims Commission Act (1946) ▪ House Concurrent Resolution 108 (1953) ▪ BIA Direct Employment Program	Post-WWII political backlash against Indian New Deal, difference, and perceived "communism;" government attempt to rapidly assimilate Indians into mainstream by terminating special status, reservations, and public services; Congress terminates federal trusteeship over 100 tribes deemed to be "civilized" and ready to be "on their own;" opens reservations for economic exploitation by private companies; relocates over 100,000 Native people to urban areas away from reservations to supposed job training and placement programs; reservation poverty deepens; pan-Indian identity and activist movement gains momentum.
Civil Rights and Self-Determination Era **(1960s – 1970s)**	▪ Economic Development and War on Poverty (1960s) of Pres. Kennedy and Johnson ▪ Indian Civil Rights Act (1968) ▪ Indian Education Act (1972) ▪ Indian Self-Determination and Education Assistance Act (1975) ▪ American Indian Religious Freedom Act (1978) ▪ Indian Child Welfare Act (1978) ▪ *Santa Clara v. Martinez* Supreme Court Decision (1978) ▪ Federal Acknowledgment Project (1978)	An end to the more coercive forms of displacement; government first under Kennedy admin. turns to economic development on Indian reservations to deal with Indian poverty; federal government under Nixon officially renounces termination policies and declares self-determination with federal assistance and protection; trust status and public assistance programs reinstated and created; many tribes assume control over programs and education previously administered by federal government intended for assimilation; courts recognize Indian tribal sovereignty; legislation recognizes religious freedom; Indian people form national civil rights organizations and activism sweeps the country; quality of life indicators on reservations improve through the 1970s; cultural revitalization programs undertaken by most tribes.
New Era of Economic Development and Indian Nationalism **(1980s – Present)**	▪ Indian Mineral Development Act (1982) ▪ *Seminole Tribe v. Butterworth* Supreme Court Decision (1982) ▪ *California v. Cabazon* Supreme Court (1987) ▪ Indian Gaming Regulatory Act (1988) ▪ Native American Languages Act (1990) ▪ Indian Arts and Crafts Act (1990) ▪ Native American Grave Protection and Repatriation Act (1990) ▪ Native American Free Exercise of Religion Act (1994) ▪ Executive Order on Indian Sacred Sites (1996)	Cutbacks in government programs under the Reagan administration causes increased unemployment and hardships for tribes; tribes undertook new economic development strategies in 1980s to bring in badly needed revenue including gaming enterprises; Clinton admin. in 1990s showed renewed interest in strengthening tribal sovereignty and self-determination and supported a slew of legislation that strengthened tribal control over their own affairs; 1990s – present many tribes, especially those with gaming enterprises have undertaken massive community development programs; become economically prosperous; and gained access to a political machinery that had worked to exclude and marginalize them for over two hundred years.

CRB

Early California Laws and Policies Related to California Indians

By Kimberly Johnston-Dodds

Prepared at the request of Senator John L. Burton, President Pro Tempore

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Early California Laws and Policies Related to California Indians

By Kimberly Johnston-Dodds

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Acknowledgements

The primary documents and sources reviewed for this report are located at the California State Archives, California State Library, Sacramento Archives and Museum Collection Center, and the Bancroft Library at the University of California, Berkeley. The secondary sources are located in the California State Library and University of California library collections.

Many people that work in these special collections and archives shared their knowledge, expertise and extended assistance in locating original bill files, legislative reports and rare documents, county records, and legal notices and accounts in California newspapers that were reviewed for this report. Their individual and collective efforts deserve mention and sincere thanks.

First, I especially thank Susan Hanks, Librarian in the Information Services Unit of the California Research Bureau, for her all her efforts related to this project, in particular for her tireless work searching the newspaper collections of the California History Section of the California State Library.

I thank all the librarians and staff of the California History Section, California State Library, for their assistance with my many, many requests for collection materials and searches. Special thanks are sent to John Gonzales, Catherine Hanson-Tracy, Ellen Harding, Jenny Hoye, Vickie Lockhart, and Lara Miyazaki. Special thanks are also sent to Gary Kurutz, Curator of Special Collections for the California State Library, for sharing with me his wisdom and encyclopedic memory of historic California sources and documents. I also sincerely thank David Cismowski, Librarian in the Government Publications Section, and Beth Owens, Senior Librarian in the Witkin State Law Library, California State Library, for sharing their expertise and assistance with the rare books and documents in these collections.

I thank the archivists and staff at the California State Archives for their extensive efforts and assistance related to my review of original bill files and legislative documents. I especially thank Melodi Andersen, Sydney Bailey, Jeff Crawford, Stephanie Hamishin, Linda Johnson, and Genevieve Troka.

Most importantly, many thanks to Roz Dick, Judy Hust, Trina Dangberg, and Joshua Mann for their professional editing, formatting and preparation of this report.

Contents

Executive Summary

Did the State of California enact laws that prohibited California Indians from practicing their religion, speaking their languages or practicing traditional ceremonies and customs? Senator John L. Burton requested that the California Research Bureau research this question.[1]

The initial investigation and research contained in this report[2] led to a focus on four examples of early State of California laws and policies that significantly impacted the California Indians' way of life:

- The 1850 *Act for the Government and Protection of Indians* and related amendments;
- California militia policies and "Expeditions against the Indians" during 1851 to 1859;
- The State of California's official response to federal treaties negotiated with California Indians during 1851 to 1852; and
- Early and current state fish protection laws that exempt California Indians from related prohibitions.

The 1850 *Act for the Government and Protection of Indians* facilitated removing California Indians from their traditional lands, separating at least a generation of children and adults from their families, languages, and cultures (1850 to 1865). This California law provided for "apprenticing" or indenturing Indian children and adults to Whites, and also punished "vagrant" Indians by "hiring" them out to the highest bidder at a public auction if the Indian could not provide sufficient bond or bail.

The California Legislature created the laws that controlled California Indians' land, lives and livelihoods, while enforcement and implementation occurred at the county and local township levels. Some examples include:

- County-level Courts of Sessions and local township Justices of the Peace determined which Indians and Indian children were "apprenticed" or indentured pursuant to the 1850 *Act for the Government and Protection of Indians*.
- Under the same act, Justices of the Peace, mayors or recorders of incorporated towns or cities, decided the status and punishment of "vagrant" Indians.
- Under the California Constitution and state militia laws, California governors ordered local sheriffs to organize the men to conduct the "Expeditions against the Indians."

From 1851 to 1859, the California Legislature passed twenty-seven laws that the State Comptroller relied upon in determining the total expenditures related to the Expeditions against the Indians. The total amount of claims submitted to the State of California Comptroller for these Expeditions against the Indians was $1,293,179.20.

The California Legislature was involved in influencing the U.S. Senate's ratification process of the 18 treaties negotiated with California Indians during 1851 to 1852. These treaties were never ratified, and kept secret from 1852 until 1905. Prior to the President submitting the treaties to the Senate, the California Legislature conducted considerable debate, made reports, drafted and passed resolutions that mostly opposed ratification of the treaties.

The California Legislature also enacted laws during the first fifteen years of statehood that accommodated Indian tribes' traditional fishing practices. California laws exist today that continue to protect fish and exempt California Indians from related prohibitions.

The First California Constitution, Suffrage and the California Indians

The creation of the first California Constitution and its governing framework set the stage for early laws related to California's justice system, and California Indians.

In late 1849, the delegates to the California Constitutional Convention met to form the first constitution of California. At the Convention, the delegates debated the issue of whether California Indians should have the right to vote. A minority advocated that the Indians should have the right to vote, as was recognized by the prior Mexican regime, especially if the Indians were going to be taxed. The minority delegates cited principles in the Declaration of Independence declaring that taxation and representation go together. However, other delegates in the majority argued that certain influential white persons who controlled Indians would "march hundreds [of wild Indians] up to the polls" to cast votes in compliance with such persons' wishes.[3]

In the end, the majority prevailed and the Convention agreed to the following constitutional provisions regarding suffrage and California Indians:

> Every white male citizen of the United States, and every white male citizen of Mexico, who shall have elected to become a citizen of the United States, under the treaty of peace exchanged and ratified at Queretaro, on the 30th day of May, 1848, of the age of twenty-one years, who shall have been a resident of the State six months…shall be entitled to vote at all elections which are now or hereafter may be authorized by law:
>
> Provided, that nothing herein contained shall be construed to prevent the Legislature, by a two thirds concurrent vote, from admitting to the right of suffrage, Indians or the descendants of Indians, in such special cases as such a proportion of the legislative body may deem just and proper.[4]

The California Legislature never passed legislation that allowed California Indians to vote.

In 1870, Congress ratified the 15th Amendment of the U.S. Constitution affirming the right of all U.S. citizens to vote:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous conditions of servitude.

However, even after the 15th Amendment was ratified, most American Indians, including California Indians, did not have the right to vote until the federal Citizenship Act of 1924 was passed.[5]

1850: An Act for the Government and Protection of Indians

Soon after the creation of the California Constitution and before the U.S. Congress granted California statehood, the first California Legislature reviewed an important piece of Indian legislation: the first version failed to become law, the second version became law on the last day of the session.

The first California Legislature passed *An Act for the Government and Protection of Indians* on April 22, 1850. Initially introduced as Senate Bill No. 54 - *An Act relative to the protection, punishment and government of Indians* on March 16, 1850, by Senator Chamberlin, at the request of Senator Bidwell,[6] Senate Bill No. 54 was "laid on the table," on March 30, and went no further in the legislative process.[7]

On April 13, 1850, Assemblyman Brown introduced Assembly Bill No. 129, *An Act for the government and protection of Indians*. The Legislature passed the bill on April 19, after the Senate amended Section 16 to decrease the whipping punishment for Indians from 100 to 25 lashes. The Governor signed it into law on April 22,[8] four months before California became the 31st state in the Union (on September 9, 1850). The *Act for the Government and Protection of Indians* was not repealed in its entirety until 1937.[9]

LOSS OF LANDS AND CULTURES

The 1850 Act and subsequent amendments[10] facilitated removing California Indians from their traditional lands, separating at least a generation of children and adults from their families, languages, and cultures (1850 to 1865), and indenturing Indian children and adults to Whites.*

The relevant sections provided that:

- White persons or proprietors could apply to the Justice of the Peace for the removal of Indians from lands in the white person's possession.

- Any person could go before a Justice of the Peace to obtain Indian children for indenture.† The Justice determined whether or not compulsory means were used to obtain the child. If the Justice was satisfied that no coercion occurred, the person obtained a certificate that

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* All of the provisions contained in the initial Act of 1850 are described in Appendix 1, which also contains footnoted comparisons of the language contained in the enacted law and amendments, and original Assembly and Senate bill language that was not incorporated into the 1850 Act.

† *Webster's Dictionary* defines "indenture" as a contract by which a person is bound to service. It is well known that the Hispanic missions in California that governed before the United States and the State of California, used forced Indian labor to build the missions and work in the surrounding agricultural lands.

authorized him to have the care, custody, control and earnings of an Indian minor, until their age of majority (for males, eighteen years, and females, fifteen years).

- If a convicted Indian was punished by paying a fine, any white person, with the consent of the Justice, could give bond for the Indian's fine and costs. In return, the Indian was "compelled to work until his fine was discharged or cancelled." The person bailing was supposed to "treat the Indian humanely, and clothe and feed him properly." The Court decided "the allowance given for such labor."

ABSENCE OF LEGAL RIGHTS

In 1850 and 1851, the California Legislature enacted laws concerning crimes and punishments that prohibited Indians, or black or mulatto persons, from giving "evidence in favor of, or against, any white person."[11] The 1850 statute defined an Indian as having one-half Indian blood. The 1851 statute defined an Indian as "having one fourth or more of Indian blood."

Inequitable Due Process

The 1850 *Act for the Government and Protection of Indians* evidences further absence of legal rights for California Indians. The 1850 Act provided that:

- Justices of the Peace had jurisdiction in all cases of complaints related to Indians, without the ability of Indians to appeal at all, including to higher courts of record such as district courts or courts of sessions.

- While Indians or white persons could make complaints before a Justice of the Peace, "in no case [could] a white man be convicted of any offen[s]e upon the testimony of an Indian, or Indians."

- Justices of the Peace were to "instruct the Indians in their neighborhood in the laws which related to them." Any tribes or villages refusing or neglecting to obey the laws could be "reasonably chastised."*

- If an Indian committed "an unlawful offen[s]e against a white person," the person offended was not allowed to mete out the punishment. However, the offended white person could, without process, bring the Indian before the Justice of the Peace, and on conviction the Indian was punished.

* The term "reasonably chastised" became a basis of a state policy empowering and paying the militia to attack Indians, as discussed in the next section.

Justices of the Peace

The first California Constitution provided that the "Legislature shall determine the number of Justices of the Peace, to be elected in each county, city, town, and incorporated village of the State, and fix by law their powers, duties, and responsibilities."[12]

In 1850, the first California Legislature provided that the jurisdiction of Justices of the Peace was limited to the township where they were elected.[13] Some of the powers and responsibilities conferred upon the first Justices of the Peace

- authorized them to hear, try and determine civil cases when the amount claimed was $200 or less (later raised to $500 in 1853).
- required them to take an oath and give a bond "in the penalty of five thousand dollars, conditioned for the faithful performance of [their] duties."[14]
- empowered them to be a magistrate, an "officer having power to issue a warrant for the arrest of a person charged with a public offence."[15]

Throughout the period from 1850 into the 1860s, Justices of the Peace also presided over Justice Courts within their township jurisdictions. These courts were not courts of record, and had both civil and criminal jurisdiction to hear actions on

- contracts for payment of money,
- injuries to a person or taking or damaging personal property,
- statutory fines, penalties and forfeitures,
- mining claims within their jurisdiction,
- petty larceny, assault and battery (if not committed on a public officer), and
- breaches of the peace, riots, and all misdemeanors punishable by fine not exceeding $500 or imprisonment not exceeding three months, or both.[16]

The Justice Courts also held proceedings related to "vagrants and disorderly persons."[17]

Justices of the Peace for Indians

The first bill introduced related to the 1850 Act (Senate Bill No. 54) provided for Justices of the Peace for Indians, but it was not enacted. These Justices of the Peace were to be elected by the Indians directly, at the order and direction of the Court of Sessions.* The

* See Appendix 3 for discussion of the Court of Sessions.

bill provided that the Inspectors of Elections appointed by the Court "procure one or more interpreters to be at the polls during the election who shall ask every Indian who is entitled to vote, whom he prefers for Justice for the Indians the ensuing year, and his vote shall be recorded for the person he prefers."[18] This language that created Justices of the Peace for Indians was not contained in the companion bill proposed by the Assembly, nor the final law enacted in 1850. (As previously discussed in an earlier section, the first California Constitution excluded Indians from the right to vote.)

VAGRANCY AND PUNISHMENT UNDER "AN ACT FOR THE GOVERNMENT AND PROTECTION OF INDIANS"

Section 20 of the 1850 Act defined "vagrant" Indians and prescribed their punishment:

> Any Indian able to work and support himself in some honest calling, not having wherewithal to maintain himself, who shall be found loitering and strolling about, or frequenting public places where liquors are sold, begging, or leading an immoral or profligate course of life, shall be liable to be arrested on the complaint of any resident citizen of the county, and brought before any Justice of the Peace of the proper county, Mayor or Recorder of any incorporated town or city, who shall examine said accused Indian, and hear the testimony in relation thereto, and if said Justice, Mayor, or Recorder shall be satisfied that he is a vagrant…he shall make out a warrant under his hand and seal, authorizing and requiring the officer having him in charge or custody, to hire out such vagrant within twenty-four hours to the best bidder, by public notice given as he shall direct, for the highest price that can be had, for any term not exceeding four months.[19]

Monies received from hiring such Indians, after deducting housing and clothing costs, were to be deposited into an "Indian fund" administered by the County Treasury (if he did not have a family). The "vagrant" Indian, after arrest but before judgment, could post a bond with a condition that for the next 12 months he would "conduct himself with good behavior, and betake some honest employment for support."[20]

AMENDMENTS TO "AN ACT FOR THE GOVERNMENT AND PROTECTION OF INDIANS"

In 1855, Section 6 of the 1850 Act was amended to read "Complaints may be made before a Justice of the Peace, by white men or Indians, and in all cases arising under this Act, Indians shall be competent witnesses, their credibility being left with the jury."[21] However, California legal treatises of the 1860s continued to cite the general civil procedure laws that excluded Indians from being witnesses at court as valid law.[22]

In 1860, the California Legislature amended Sections Three and Seven of the 1850 Act. These amendments granted broad powers to county and district judges to, when requested, execute articles of indenture of apprenticeship on behalf of Indians. The 1860

amendments to the Act also provided that male Indian children under fourteen years could be indentured until they were twenty-five, and females under fourteen until they were twenty-one years old. If they were over fourteen but under twenty, males were indentured until they were thirty, and females until they were twenty-five years. Indians over twenty years old could be indentured for an additional ten years.[23] Due in part to a decade of state-financed expeditions against the Indians, there were many young Indian children without parents.

In 1863, Section Three of the 1850 Act was repealed. However, historical accounts drawn from primary sources indicate that this system of Indian indentured servitude continued, even after Section Three was repealed (see page 11).

In 1865, the California Supreme Court ruled that the section of the 1850 Act related to whipping was unconstitutional because the punishment was cruel and unusual.[24]

HISTORICAL ACCOUNTS ABOUT INDENTURES, KIDNAPPING AND SELLING OF INDIANS

Articles of Indenture

I reviewed original indentures of Indians dated 1861, in the Sacramento County Archives.[25] The original text of one of the indentures follows:

> In the Matter of the Indenture of…the Indian boy Bill (aged 15 years or thereabouts) to William Moorhead
>
> To the Hon Robert Robinson County Judge of the City & County of Sacramento –
>
> William Moorhead of the City & County of Sacramento in the State of California respectfully shows that he has an Indian boy called "Bill" under his control and management & that he has faithfully provided for said boy Bill for the last five years or thereabouts. That he formerly belonged to a Tribe called "Cottonwood" tribe in Shasta County in said State that the said boys [sic] parents, as petitioner is informed, and believes, have been dead for several years, and that the said boy has been living with petitioner in the City of Sacramento & working about petitioners [sic] livery stable. Petitioner further shows that he has provided said boy with all the necessaries of life & rendered him happy & contented.
>
> Petitioner further shows that he has reason to believe & does believe that unless the said boy shall be apprenticed in accordance with the provisions of an act entitled "an act amendatory of an act entitled an act for the government and protection of Indians passed passed [sic] April 22, 1850" approved April 18, 1860 some persons will induce the said Indian boy to leave petitioner, & that he may become a vagrant, & addicted to dissolute habbits[sic].

> Petitioner therefore prays that Indentures may be made in accordance with said act and the said boy forthwith apprenticed to petitioner until he shall attain the age of thirty years.[26]

The County Judge, Robert Robinson, approved and signed the document with the notation: "Boy indentured as provided by law."[27]

In 1971, Robert Heizer and Alan Almquist published the findings of their review of 114 indentures dated from 1860 to 1863, located in old county court files in Eureka, California. In addition to publishing the name, probable age, period of indenture and/or age indentured to, Heizer and Almquist summarize the data:

> Ages of 110 persons indentured range from two to fifty, with a concentration of 49 persons between the ages of seven and twelve. Seven are listed as "taken in war" or prisoners of war"—this notation refers to children five, seven, nine, ten, and twelve years of age. Four children of ages eight, nine ten, and eleven are listed as "bought" or "given." Ten married couples were indentured, some of them with children. Three individuals seem almost too young to have been so treated—Perry, indentured in September 1860 at the age of three; George, indentured in January 1861 at the age of four; and Kitty (November 1861), also four years of age.[28]

Some of the indentures cited by Heizer and Almquist were made after the 1863 amendment that repealed Section 3 of the 1850 Act.[29]

Appendix 4 of this report is a copy of an article of indenture, located in the records of Humboldt County, published in the *Sacramento Daily Union* on February 4, 1861.

Accounts of Kidnapping and Selling of Indians

The following are accounts published in California newspapers as legal notices and articles from 1855 to 1864. These articles document incidents of kidnapping and selling of California Indian children.

> *Alta California* - 1855
>
> One of the most infamous practices known to modern times has been carried on for several months past against the aborigines of California. It has been the custom of certain disreputable persons to steal away young Indian boys and girls, and carry them off and sell them to white folks for whatever they could get. In order to do this, they are obliged in many cases to kill the parents, for low as they are on the scale of humanity, they [the Indians] have that instinctive love of their offspring which prompts them to defend them at the sacrifice of their lives.[30]

San Francisco Herald - 1856

In the Fourth District Court yesterday…for the hearing of the return to the writ of *habeas corpus* issued to produce the body of Shasta, the Indian girl claimed by Dr. Wozencraft, Charlotte Sophie Gomez appeared…and made the following return as to the cause of her inability to produce Shasta:

"That an Indian child by the name of Isabella, not about eight years of age, has lived in her family since the month of June, 1852, at her residence in the city of San Francisco. That during the last three years, or thereabouts, the said child has attended the public day school in said city. That…Isabella has resided with…Gomez until last Monday. On that day, about five o'clock in the afternoon, a person presented himself at her residence and told her that said Indian child belonged to him, and wanted to take her away. Of this fact she was told by a member of her family…Gomez says she has no knowledge of the person who took the child from her house, nor does she know where she now is, or has been, since taken away therefrom..."

…It is the belief of Dr. Wozencraft that the girl, Isabella…is the one that has been stolen from him. He is most anxious to recover Shasta and will use every legal means to recover possession of her.[31]

Alta California - 1862

The *Ukiah Herald*, published in Mendocino county, has a long article upon the practice of Indian stealing so extensively carried on in that section of the country, and says that one woodman has been caught with sixteen young Indians in his possession, being about to take them out of the county for sale. The *Herald* says:

"Here is well known there are a number of men in this county, who have for years made it their profession to capture and sell Indians, the price ranging from $30 to $150, according to quality. Some hard stories are told of those engaged in the trade, in regard to the manner of the capture of the children. It is even asserted that there are men engaged in it who do not hesitate, when they find a rancheria well stocked with young Indians, to murder in cold blood all the old ones, in order that they may safely possess themselves of all the offspring."[32]

The *Alta California* comments at the end of the 1862 article that the *Ukiah Herald* account "affords a key to the history of border Indian troubles."

The next account is found in the journal of William H. Brewer, one of the members of the original California Geological Survey mandated by the California Legislature in 1860.[33] Brewer traveled throughout California from 1860 to 1864, providing official reports under the survey.

The Indian wars now going on, and those which have been for the last three years in the counties of Klamath, Humboldt, and Mendocino, have most of their origin in this. It has for years been a regular business to steal Indian children and bring them down to the civilized parts of the state, even to San Francisco, and sell them – not as slaves, but as servants to be kept as long as possible. Mendocino County has been the scene of many of these stealings, and it is said that some of the kidnappers would often get the consent of the parents by shooting them to prevent opposition.[34]

Early California Apprenticeship and Vagrancy Laws

Apprenticeship and vagrancy laws and policies related to the general population existed in California during the first two decades of statehood. However, they were enacted after the 1850 Act related to California Indians, and the penalties under these laws were less severe when applied to the non-Indian population.

An 1853 California legal treatise entitled *A Treatise on the Practice of the Courts of the State of California, Carefully Adapted to Existing Law*, first mentions apprenticeship and minors when describing exceptions to the general rule that minors could not make a contract:

> [T]here are two exceptions to the general rule that minors cannot contract. The one case is contracts for apprenticeship. Minors can bind themselves as apprentices for seven years by deed, if the seven years are within their maturity. The other case is in contracts for necessaries. What are necessaries is frequently a question hard to resolve. What would be necessaries for one, would not be for another. Necessary boarding, clothing, and lodging, and medical attendance in sickness, tuition of necessary teachers – these are necessaries. The age and sex of the minor, the real station in society, property and business or vocation selected for life, all these things are necessarily involved in the question.[35]

1858 - An Act to Provide for Binding Minors as Apprentices, Clerks and Servants

The first apprenticeship law in California related to non-Indians, *An Act to provide for Binding Minors as Apprentices, Clerks and Servants*, was enacted in 1858, almost a decade after the 1850 Act. There were significant differences between the two laws. The 1858 Act excluded Indians (1/4 blood) from its provisions.[36] The 1858 Act mandated that

- the indenture state every sum of money paid or agreed for in relation to the apprenticeship.[37]
- the person to whom a child was bound send the child to school three months of each year of the period of the indenture to learn to read, write and the general rules of arithmetic.[38]

The 1858 Act also provided that an indenture of apprenticeship could be annulled and voided in the event that a county court found

- fraud in the contract of indenture.
- the contract was not made or signed pursuant to the law.
- willful nonfulfillment of the indenture provisions by the master.

- cruelty or maltreatment of the apprentice by the master, without cause or provocation.[39]

In 1865, Congress ratified the 13th Amendment of the U.S. Constitution. The states had to comply with the newly ratified amendment abolishing slavery and involuntary servitude:

> Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

1855 – An Act to Punish Vagrants, Vagabonds, and Dangerous and Suspicious Persons

The first vagrancy law of California that applied to others was passed April 30, 1855. The penalties under the law were less severe than the penalties imposed against Indians under the 1850 Act. The 1855 Act provided that

> All persons except Digger Indians, who have no visible means of living, who in ten days do not seek employment, nor labor when employment is offered to them, all healthy beggars, who travel with written statements of their misfortunes, all persons who roam about from place to place without any lawful business, all lewd and dissolute persons who live in and about houses of Ill-Fame; all common prostitutes and common drunkards may be committed to jail and sentenced to hard labor for such time as the Court, before whom they are convicted shall think proper, not exceeding ninety days.[40]

The law did not define "Digger Indians." The Justice of the Peace enforced the vagrancy laws, and the county Board of Supervisors determined the type of labor the convicted person was to perform.[41]

In 1863, the California Legislature amended the law to exempt California Indians from the provisions of the 1855 Act.[42] The vagrancy provisions contained in the 1850 Act relating to the California Indians (previously described) were not repealed until 1937.

1850 - 1859: California Militia and "Expeditions Against the Indians"

> That a war of extermination will continue to be waged between the races, until the Indian race becomes extinct, must be expected. While we cannot anticipate this result but with painful regret, the inevitable destiny of the race is beyond the power or wisdom of man to avert.
>
> Governor Peter H. Burnett, January 7, 1851[43]

THE GOVERNORS AND THE MILITIA

Article VII of the first California Constitution gave the Governor the power "to call for the militia, to execute the laws of the State, to suppress insurrections, and repel invasions."[44] In his annual address to the California Legislature on January 7, 1851, Governor Burnett highlighted significant events that transpired during 1850, including "repeated calls…upon the Executive for the aid of the militia to resist and punish the attacks of the Indians upon the frontier."[45] During 1850, Governor Burnett called out the militia two times. The first order was prompted by incidents at the confluence of the Gila and Colorado rivers on April 23, 1850; in response, the Governor ordered the sheriffs of San Diego and Los Angeles to organize a total of 100 men to "pursue such energetic measures to punish the Indians, bring them to terms, and protect the emigrants on their way to California."[46] The second instance occurred in October 1850, when Governor Burnett ordered the sheriff of El Dorado County to muster 200 men. The commanders were instructed to "proceed to punish the Indians engaged in the late attacks in the vicinity of Ringgold, and along the emigrant trail leading from Salt Lake to California."[47]

Governor Burnett explained calling out the militia as follows:

> In these cases the [Indian] attacks were far more formidable, and made at point where the two great emigrant trails enter the State…occurred at a period when the emigrants were arriving across the plains with their jaded and broken down animals, and them destitute of provisions. Under these circumstances, I deemed it due to humanity, and to our brethren arriving among us in a condition so helpless, to afford them all the protection within the power of the State…
>
> Had it been once known to our fellow citizens east of the Rocky Mountains, that the Indians were most hostile and formidable on the latter and more difficult portion of the route…and that the State of California would render no assistance to parties so destitute, the emigration of families to the State across the plains would have been greatly interrupted and retarded.[48]

From 1997 to 1999, the Sacramento Genealogical Society researched and compiled an extensive index of the State Militia Muster Rolls located in the California State

Archives.[49] The California State Archives contain Muster Rolls or organizational documents for 303 units located in most California counties.* Seventy-one of the militias were located in San Francisco.[50] After exhaustive review and crosschecking of 70,000 registered names, the researchers determined that approximately 35,000 men were listed on the Muster Rolls (attendance records).[51]

From the state archival record, it is impossible to determine exactly the total number of units and men engaged in attacks against the California Indians. However, during the period of 1850 to 1859, the official record does verify that the governors of California called out the militia on "Expeditions against the Indians" on a number of occasions, and at considerable expense, as Tables 1 and 2 indicate.

Table 1

"General Recapitulation of the
Expenditures incurred by the State of California
For the Subsistence and Pay of the Troops, composing of the different Military Expeditions,
ordered out by the Governor, during the Years 1850, 1851 and 1852,
For the Protection of the Lives and Property of her Citizens, and for the
Suppression of Indian Hostilities within her Borders."

Expeditions Against the Indians	**Amount**
Mariposa and Monterey	$259, 372.31
First El Dorado	101,861.65
Second El Dorado	199,784.59
Los Angeles and Utah	96,184.60
Trinity, Klamath and Clear Lake	34,320.08
San Diego "Fitzgerald Volunteers"	22,581.00
Siskiyou "Volunteer Rangers"	14, 987.00
Gila "Colorado Volunteers"	113,482.25
Amount paid in War Bonds by Paymasters	1,000.00
Total Amount	**$843,573.48**

Source: Comptroller of the State of California, *Expenditures for Military Expeditions Against Indians, 1851-1859*, (Sacramento: The Comptroller), Secretary of State, California State Archives, Located at "Roster" Comptroller No. 574, Vault, Bin 393.

* Muster Rolls may exist in other county or local archival repositories. The California State Archives does not have Muster Rolls for Colusa, Fresno, Glenn, Imperial, Inyo, Kern, Kings, Lake, Madera, Mendocino, Merced, Modoc, Riverside, San Benito, and Ventura counties for the period 1851 to 1866.

THE CALIFORNIA LEGISLATURE AND THE MILITIA

In April 1850, the California Legislature enacted two laws: *An Act concerning Volunteer or Independent Companies*,[52] and *An Act concerning the organization of the Militia*.[53] The Volunteer Act provided that citizens of any one county could:

- organize into a volunteer or independent company;
- arm and equip themselves in the same manner as the army of the United States;
- prepare muster rolls (attendance records) twice a year; and
- render prompt assistance and full obedience when summoned or commanded under the law.[54]

The lengthy Militia Act established in great detail the organization, ranks, rules, duties and commutation fees (fees in lieu of service) that governed state military service. All "free, white, able-bodied male citizens, between the ages of eighteen and forty-five years, residing in [the] State" were subject to state-mandated military duty.[55] Important provisions relating to the delegation of authority to command and call out troops provided that:

- the Governor was the commander in chief of all the forces in the state;
- the Legislature elected four Major Generals, eight Brigadier Generals, one Adjutant General and Quarter Master General (with Brigadier General rank);
- the Governor commissioned all of the officers under the Act, who then took the oath of office prescribed by the California Constitution;
- the State Treasurer initially was the *ex officio* Pay Master; and
- upon the Governor's orders, the Sheriffs of each county were responsible to call the enrolled militia.[56]

In 1851, two laws set the rates of pay for the troops.[57] As shown in Table 2, Federal authorities considered the rates exorbitant in comparison to compensation to federal troops.*

* The 1850 Volunteer Act and Militia Act were repealed and replaced in 1855, and amended in 1856 and 1857. The National Guard replaced the California Militia in 1866. 1855 Cal. Stat. ch. 115; 1856 Cal. Stat. ch. 87; 1857 Cal. Stat. 344; 1866 Cal. Stat. ch. 541; Sacramento Geneaological Society, *California State Militia*, ii.

Table 2 details the State's expenditures for expeditions from 1854 to 1859.

Table 2

Expeditions Named in the Act of Appropriations by Congress made March 2, 1861				
Expedition	Year	Amount Allowed by California*	Amount Allowed by United States**	Amount Disallowed by United States
Shasta Expedition	1854	4,068.64	1,261.38	2,807.26
Siskiyou Expedition	1855	14, 036.36	6,146.60	7,889.76
Klamath & Humboldt Expedition	1855	99,096.65	61,537.48	37,559.17
San Bernardino Expedition	1855	817.03	419.99	397.04
Klamath Expedition	1856	6,190.07	2953.77	3,237.30
Modoc Expedition	1856	188,324.22	80,436.72	107,887.50
Tulare Expedition	1856	12,732.23	3,647.25	9,084.98
Klamath & Humboldt Expedition	1858 & 1859	52,184.45	31,823.94	20,360.51
Pitt River Expedition	1859	72,156.09	41,761.54	30,394.55
	Total	**$449,605.74**	**$229,987.67**	**$219,618.07**
Source: Comptroller of the State of California, *Expenditures for Military Expeditions Against Indians, 1851-1859*, (Sacramento: The Comptroller), Secretary of State, California State Archives, Located at "Roster" Comptroller No. 574, Vault, Bin 393.				

***** Amount submitted to the United States for reimbursement.

****** Amount actually paid by the United States.

Table 3 sets forth the twenty-seven California laws that the State Comptroller relied upon in determining the total expenditures recapitulated in the official report. The total amount of claims submitted to State of California Comptroller for Expeditions against the Indians was $1,293,179.20.

Table 3

Laws and Joint Resolutions Passed Relative to the Indian Wars in the State of California 1851-1859			
Legislation	**Date**	**Page**	**Description of Act or Joint Resolution**
Statute	1851	489	Creating William Foster & William Rogers Pay Masters
Statute	1851	402	Creating James Burney Pay Master to pay Troops
Statute	1851	520	To negotiate a loan for the War Fund $500,000
Joint Resolution	1851	530	To Establish Forts on our Borders
Joint Resolution	1851	532	Directing Adjutant General to enter names on Muster Roll
Joint Resolution	1851	534	Reference to the payment of claims and informal transfers in writing
Joint Resolution	1851	535	Reference to the payment of certain claims in the Gila Expedition
Joint Resolution	1851	538	Authorizing the Pay Master of the Gila Expedition to pay claims
Joint Resolution	1851	539	For the Benefit of the Citizens of Los Angeles County
Statute	1852	59	Authorizing the Treasurer to issue Bonds for $600,000
Statute	1852	61	Authorizing and requiring Board of Examiners to settle with William Rogers
Statute	1852	250	For the relief of James S. Bolen
Statute	1852	261	For the relief of Jacob C. Kore
Statute	1852	262	For the relief of John G. Warrin
Statute	1853	79	For the relief of Thomas A. Wilton, M.D.
Statute	1853	95	To pay troops under Captain Wright S. McDermott $23,000
Statute	1853	97	For the relief of Beverly C. Sanders
Statute	1853	130	For the relief of John C. Johnson
Statute	1853	134	Additional War Fund $23,000
Statute	1853	154	For the relief of A.D. Blanchard and Samuel Stephens
Statute	1853	177	Secretary of State constituted one of the Board of Examiners
Statute	1853	177	Providing for the pay and compensation of Major James Burney
Statute	1853	200	For the relief of John Brown $1,150
Statute	1853	225	Payment of the Fitzgerald Volunteers
Statute	1853	268	For the relief of John W. Jackson
Joint Resolution	1853	310	General Statement of War Debt to be made out
Statute	1854	171	For the relief of Powell Weaver

Source: Comptroller of the State of California, *Expenditures for Military Expeditions Against Indians, 1851-1859*, (Sacramento: The Comptroller), Secretary of State, Califomia State Archives, Located at "Roster" Comptroller No. 574, Vault, Bin 393.

1860: THE LEGISLATURE'S MAJORITY AND MINORITY REPORTS ON THE MENDOCINO WAR

In 1860, the California Legislature created a Joint Special Committee on the Mendocino Indian War to investigate incidents of Indian stealing and killing of settlers' stock, and alleged atrocities committed by whites against the Indians.*

The Joint Special Committee traveled throughout Mendocino County and adjacent locations taking depositions and testimony of prominent settlers in the region. This testimony is part of the official public record, along with the committee's majority and minority reports about the events.

The Majority Report of the Joint Special Committee

O'Farrell, Dickinson, Maxon and Phelps were authors of the Majority Report. The following are excerpts of the majority's findings, conclusions, and recommendations.

> In Mendocino County…the Indians have committed extensive depredations on the stock of the settlers…The result has been that the citizens, for the purpose of protection to their property, have pursued the tribes supposed to be guilty to their mountain retreats, and in most cases have punished them severely. Repeated stealing and killing of stock, and an occasional murder of a white man, has caused a repetition of the attacks upon the offenders with the same results. The conflict still exists; Indians continue to kill cattle as a means of subsistence, and the settlers in retaliation punish with death. Many of the most respectable citizens of Mendocino County have testified before your committee that they kill Indians, found in what they consider the hostile districts, whenever they lose cattle or horses; nor do they attempt to conceal or deny this fact. Those citizens do not admit, nor does it appear by the evidence, that it is or has been their practice or intention to kill women or children, although some have fallen in the indiscriminate attacks of the Indian rancherias. The testimony shows that in the recent authorized expedition against the Indians in said county, the women and children were taken to the reservations, and also establishes the fact that in the private expeditions this rule was not observed, but that in one instance, an expedition was marked by the most horrid atrocity; but in justice to the citizens of Mendocino County, your committee say that the mass of the settlers look upon such act with the utmost abhorrence…

---

* The Joint Special Committee was comprised of Jasper O'Farrell (Sonoma, Marin, Mendocino), and W.B. Dickinson (El Dorado), as the Senate Committee. Joseph B. Lamar (Mendocino, Sonoma), William B. Maxon (San Mateo) and Abner Phelps (San Francisco) comprised the House Committee. Don A. Allen, *Legislative Sourcebook: The California Legislature and Reapportionment, 1849-1965*, (Sacramento: Assembly of the State of California, 1965), 364, 374, 450, 456.

> Accounts are daily coming in from the counties on the Coast Range, of sickening atrocities and wholesale slaughters of great numbers of defenseless Indians in that region of country. Within the last four months, more Indians have been killed by our people than during the century of Spanish and Mexican domination. For an evil of this magnitude, some one is responsible. Either our government, or our citizens, or both, are to blame…
>
> The pre-existing laws and policy of Mexico, as to the *status* of the Indian, need not have interfered with the views to be taken by our government. Mexico protected the Indian, in her own way, much more effectually than we have done. The very land upon which the aborigines of this State have dwelt, as far back as traditions reach, has been allowed by our government to be occupied by settlers, who thus have the authority of law for a forced occupation of the Indian country. A natural, humane, and proper policy would have protected the Indian in his undeniable rights to the hunting grounds of his forefathers, and would have prevented our border men from entering into a conflict which has cost both lives and property…
>
> Your committee do [sic] not think that the wrongs committed upon the Indians of California are chargeable alone to the Federal Government. The evidence appended to this report, disclose facts, from the contemplation of which the mind of peaceful citizens recoil with horror, and prompts the inquiry, if such outrages upon the defenseless are permitted by the proper authorities to go unpunished?
>
> No provocation has been shown, if any could be, to justify such acts. We must admit that the wrong has been the portion of the Indian—the blame with his white brother.
>
> The question resolves itself to this: Shall the Indians be exterminated, or shall they be protected? If the latter, that protection must come from the Federal Government, in the form of adequate appropriations of money and land; and secondly, from this State, by strictly enforcing penal statutes for any infringement upon the rights of Indians.
>
> In relation to the recent difficulty between the whites and Indians in Mendocino County, your committee desire to say that no war, or a necessity for a war, has existed, or at the present time does exist. We are unwilling to attempt to dignify, by the term "war" as slaughter of beings, who at least possess human form, and who make no resistance, and make no attacks, either on the person or residence of the citizen.[58]

The authors of the Majority Report recommended that the California Legislature pass "a law for the better protection of the Indians of California."[59]

The Minority Report of the Special Joint Committee

Lamar authored the Minority Report and dissented fundamentally from the majority's view of the events, and their recommendations. Lamar stated, "the testimony will disclose the guilty parties, and from the just indignation of outraged humanity I have no desire to screen them; but for the mass of citizens engaged in this Indian warfare, I claim that they have acted from the strongest motives that govern human action—the defense of life and property."[60]

Lamar further stated that certain tribes living outside of reservations in the region were "domesticated Indians," a great number of whom were employed by settlers, receiving "liberal compensation for their labor."[61] Lamar proposed the following general Indian policy that the State should pursue.

> The General Government should first cede to the State of California the entire jurisdiction over Indians and Indian affairs within our borders, and make such donations of land and other property and appropriations of money as would be adequate to make proper provision for the necessities of a proper management.
>
> The State should, then, adopt a general system of peonage or apprenticeship, for the proper disposition and distribution of the Indians by families among responsible citizens. General laws should be passed regulating the relations between the master and servant, and providing for the punishment of any meddlesome interference on the part of third parties. In this manner the whites might be provided with profitable and convenient servants, and the Indians with the best protection and all the necessaries of life in permanent and comfortable homes.[62]

The Mendocino War Reports and the 1860 Amendment to "An Act for the Government and Protection of Indians"

On January 19, 1860, the first version of Assembly Bill No. 65, entitled "*An Act amendatory of an Act for the Government and Protection of Indians*" was introduced in the California Legislature.[63] Assembly Bill No. 65 proposed broader apprenticeship laws than those contained in the 1850 Act. Various amendments and substitute versions of the bill found in the California State Archives Original Bill File appear to reflect the degree of debate surrounding Indian prisoners of war from expeditions, Lamar's proposed Indian policies, and more expansive Indian apprenticeship laws. Transcriptions of the proposed versions of the bill, and the original enrolled version are contained in Appendix 2 of this report.

1851-1852: California's Response to Federal Treaties Negotiated with the Indians

> Among the more immediate causes that have precipitated this state of [frontier hostilities], may be mentioned the neglect of the General Government to make treaties with [the Indians] for their lands. We have suddenly spread ourselves over the country in every direction, and appropriated whatever portion of it we pleased to ourselves, without their consent, and without compensation.
>
> Governor Peter H. Burnett, January 7, 1851[64]

From 1851 through early 1852, the U.S. Indian Commissioners, acting on behalf of the United States, negotiated 18 treaties with California Indian tribes. A number of aspects surrounding the negotiations were fraught with problems and controversy, in large part due to the ambiguous scope of authority delegated to the Commissioners by the federal government, and inadequate appropriations provided to carry out their job.[65] The treaties negotiated by the Indian Commissioners reserved to the Indians approximately 11,700 square miles, or about 7.5 million acres of land. The total amount represented seven and a half percent of the State of California.[66]

At the beginning of the 1852 California legislative session, the Legislature recognized the value of the land represented in the treaties and appointed committees to prepare joint resolutions and committee reports to recommend how California's U.S. Senators should proceed regarding the ratification of the treaties.[67] The Special Committee on the Disposal of Public Land summed up the views opposing ratification of the treaties in its report on the public domain:

> Your memorialists feel assured, from all the facts which are daily transpiring, and the state of public feeling throughout the mines, that if those treaties are ratified, without any sufficient amendments to alter their permanent disposition of the public domain, it will be utterly impossible to prevent the continued collisions between the miners and the Indians. It will not be owing to any objection of the former to the mining of the Indians in the placers; but it will be caused by the exclusive privileges attempted to be secured for Indians, to the mines always heretofore open to the labors of the white man.[68]

Instead of the treaty provisions, the Special Committee proposed a system of missions for the Indians that included

> [A]nnuities to be paid in provisions and clothing…a parcel of land to be assigned…sufficient for them to cultivate, and with every laudable means to be used to induce them to do so. Their stock of every description should be protected by law, and have the same privileges of grazing with that of our own. To the Indians, should not be denied the right of hunting,

> nor that of digging peaceably in the mines, under the same regulations which we observe.
>
> The Indians who are now residing on private lands, with the consent of the owners, or engaged in cultivating their soil, should not be disturbed in their position.. They are already in the best school of civilization…The adoption of this plan would obviate the contemplated permanent disposal of a large portion of our mineral and arable land [to the Indians].[69]

In mid-March 1852, the California Assembly (35 to 6) and Senate (19 to 4) voted to submit resolutions opposing the ratification of the treaties to California's U.S. Senators.[70]

The President submitted the treaties to the U.S. Senate on June 1, 1852. On June 7, the Senate read the President's message, and referred the treaties to the Committee on Indian Affairs. The treaties were then considered and rejected by the U.S. Senate in secret session. The treaties did not reappear in the public record until January 18, 1905, after an injunction of secrecy was removed.[71]

Early and Current Fish Protection Laws and California Indians

In 1852, the California Legislature enacted *An Act to prohibit the erection of Weirs, or other obstructions, to the run of Salmon*. The Act prohibited any weir, dam, fence, set or stop net or obstruction to the run of salmon in any river or stream in the State. The Act also provided an important exception for California Indian tribes:

> This Act shall not apply to any of the Indian tribes, so as in any manner to preclude them **from fishing in accordance with the custom heretofore practiced** by them.[72] [emphasis added]

The original bill, Senate Bill No. 80 was introduced by Senator Hubbs on March 13, read a first and second time and referred to the Committee on Commerce and Navigation.[73] The first version of the original bill made no reference to Indian tribes. However, the Committee recommended the amendment related to Indian tribes that became law.[74]

The following Table 4 lists some examples of California laws related to fish that have accommodated Indian tribes' practices in the past and today.

Table 4

California Laws Related to Fish and California Indians		
Date	Law	Title
1852	1852 Cal. Stat. ch. 62	*An act to prohibit the erection of Weirs, or other obstructions, to the run of Salmon*
1854	1854 Cal. Stat. ch. 70	*Amendment to An act to prohibit the erection of Weirs, or other obstructions, to the run of Salmon*
1866	1866 Cal. Stat. ch. 404	*An Act for the preservation of trout in the Counties of San Mateo and Santa Clara*
1951	1951 Cal. Stat. ch. 1486	*An act to add Section 429.8 to the Fish and Game Code, relating to the taking of fish by members of the Yurok Indian Tribe*
1955	1955 Cal. Stat. ch. 389	*An act to add Section 1418 to the Fish and Game Code, relating to hunting and fishing rights of California Indians*
1961	1961 Cal. Stat. ch. 963	*An act to amend Section 12300 of the Fish and Game Code, relating to Indians*
2002	CAL FISH & GAME CODE §7155 (1994)	*Right of members of Yurok Indian tribe to take fish from Klamath River*
2002	CAL FISH & GAME CODE §123000 (1994)	*Application of code to California Indians*

California Fish & Game Code §123000 currently provides that:

> Irrespective of any other provision of law, the provisions of this code are not applicable to California Indians whose names are inscribed upon the tribal rolls, while on the reservation of such tribe and under those circumstances in this State where the code was not applicable to them immediately prior to the effective date of Public Law 280, Chapter 505, First Session, 1953, 83d of Congress of the United States. No such Indian shall be prosecuted for the violation of any provision of this code occurring in the places and under the circumstances hereinabove referred to. Nothing in this section, however, prohibits or restricts the prosecution of any Indian for the violation of any provision of this code prohibiting the sale of any bird, mammal, fish, or amphibia.

Appendix 1 – Original Bill Material Pertaining to California Statutes, 1850 Chapter 133

This Appendix is based on a review of the enacted laws published in the *Statutes of California, First Session of the Legislature, 1849-1850*, and the Original Bill File, Chapter 133, 1850, California Secretary of State, State Archives, Location E6553, Box 1. Copies of the original documents and the transcript of the contents of Original Bill File are on file with the California Research Bureau.

The following is a combined comparison of the provisions contained in California Statutes, Chapter 133, Entitled "An Act for the Government and Protection of Indians" and the proposed bills contained in the Original Bill File. The notable differences in enacted law and proposed bill language is described in the annotated footnotes.

- Section 1. Justices of the Peace had jurisdiction in all cases of complaints "by, for, or against Indians."[*]

- Section 2. Persons or proprietors of lands where Indians resided were to permit the Indians to peaceably and unmolested live "in the pursuit of their usual avocations for the maintenance of themselves and families." Provided:

    - White persons or proprietors could apply to the Justice of the Peace to "set off to such Indians a certain amount of land…a sufficient amount…for the necessary wants of such Indians, including the site of their village or residence, if they [the Indians] so prefer[red] it."
    - In no case was "such selection [of land to] be made to the prejudice of such Indians," nor were the Indians to "be forced to abandon their homes or villages where they…resided for a number of years."[†]

[*] Senate Bill No. 54 introduced by Senator Chamberlin, at the request of Senator Bidwell, provided for Justices of the Peace for Indians. These Justices of the Peace were to be elected by the Indians directly, at the order and direction of the Court of Sessions. Pursuant to the language in the bill, the Court of Sessions provided Inspectors of Elections to discharge the same duties as county election inspectors. The bill also provided that the inspectors "procure one or more interpreters to be at the polls during the election who shall ask every Indian who is entitled to vote, whom he prefers for Justice for the Indians the ensuing year, and his vote shall be recorded for the person he prefers." This language was not contained in the bill proposed by the Assembly, nor the final law enacted in 1850.

[†] Sections 5 through 7 of Senate Bill 54 contained similar language but gave the issues in this section more comprehensive treatment than what appears in the enacted law. Bill No. 54: 1) permitted Indians "*and their descendents"* to reside on such lands; 2) defined "usual avocations" as "hunting, fishing, gathering seeds and acorns for the maintainance [sic] of themselves and families;" and 3) stated that "in no case shall [I]ndians be forced to abandon their village sites where they have lived *from time immemorial*." Emphasis added.

- Either party feeling aggrieved could appeal the Justice of the Peace's decision to the County Court.

- Section 3. "Any person having or hereafter obtaining a minor Indian, male or female, from the parents or relations of such Indian minor, and wishing to keep it…**shall go before a Justice of the Peace** in his Township, with the parents or friends of the child, and if **the Justice of the Peace becomes satisfied** that no compulsory means have been used to obtain the child from its parents or friends, **shall enter on record, in a book kept for that purpose**, the sex and probable age of the child, **and shall give to such person a certificate, authorizing** him or her to have **the care, custody, control and earnings of such minor**, until he or she obtain the age of majority. Every male Indian shall be deemed to have attained his majority at eighteen, and the female at fifteen years.[*] (Original text with emphasis added)

- Section 4. A person that neglected to "clothe or suitably feed…or inhumanly" treated a minor Indian in his care, could be fined not less than ten dollars, if convicted. The Justice of the Peace could place the minor Indian "in the care of some other person, giving him the same rights and liabilities that the former master…was entitled and subject to."[†]

- Section 5. "Any person wishing to hire an Indian [had to] go before the Justice of the Peace with the Indian and make such contract as the Justice may approve." The Justice filed the written contract in his office. The contract was binding between the parties; "but no contract between a white man and an Indian, for labor [was] otherwise…obligatory on the part of the Indian."[‡]

- Section 6. Indians or white persons could make complaints before a Justice of the Peace. However, "in no case [could] a white man be convicted of any offen[s]e upon the testimony of an Indian, or Indians."

- Section 7. Any person convicted of forcibly "conveying" an Indian from his home or compelling an Indian to work against his will, would be fined at least fifty dollars.

---

[*] The original Assembly Bill 129 defined the age of majority for a male Indian at twenty years, and for a female at seventeen years, but was lined out and changed to the ages contained in Section 9 of Senate Bill 54. Also, Section 8 of Senate Bill 54 mandated that the "name (if any) given by the person taking the child" was also to be included in the Justice of the Peace's record book. This language is absent from any version of the Assembly bill or the law.

[†] Section 12 of Senate Bill 54 made the fine to be not less than 50 nor more than 200 hundred dollars. This section also provided that the minor Indian could "return to his or her parents or relatives," language absent from the enacted law.

[‡] This section is absent from Senate Bill 54.

- Sections 8 and 18. Justices of the Peace were required every six months to report all moneys and fines collected to the county Court of Sessions and pay them over to the Treasurer, who was to keep the monies in an "Indian fund."

- Sections 9. Justices of the Peace were to "instruct the Indians in their neighborhood in the laws which related to them." Any tribes or villages refusing or neglecting to obey the laws could be reasonably chastised.

- Section 10. Any person was subject to fine or punishment if they set the prairie on fire, or refused "to use proper exertions to extinguish the fire."*

- Sections 11 – 13. If an Indian committed "an unlawful offen[s]e against a white person," the person offended was not allowed to mete out the punishment. However, the offended white person could, without process, bring the Indian before the Justice of the Peace, and on conviction the Indian was punished according to provisions in the Act. Justices could require "chiefs and influential men of any village to apprehend and bring before them any Indian charged or suspected of an offen[s]e."

- Section 14. If a convicted Indian was punished by paying a fine, any white person, with the consent of the Justice, could give bond for the Indian's fine and costs. In return, the Indian was "compelled to work until his fine was discharged or cancelled. The person bailing was supposed to "treat the Indian humanely, and clothe and feed him properly." The Court decided "the allowance given for such labor."

- Section 15. Anyone convicted of providing intoxicating liquors to an Indian was fined not less than 20 dollars.

- Sections 16-17. An Indian convicted of stealing horse, mules, cattle or "any valuable thing," could receive 25 lashes with a whip or be fined up to 200 dollars. The punishment was at the discretion of the Court or a jury. The Justice could appoint a white man or an Indian to whip the Indian, but was not to permit "unnecessary cruelty" in executing the sentence.

- Section 19. If a white person made an application to a Justice of the Peace for confirmation of a "contract with or in relation to an Indian," had to pay two dollars per each contract determination.

* The original language of this section was changed from "Indian" to "any person" in the final version of AB 129.

- Section 20. Any Indian able to work and support himself in some honest calling, not having wherewithal to maintain himself, who shall be found loitering and strolling about, or frequenting public places where liquors are sold, begging, or leading an immoral or profligate course of life, shall be liable to be arrested on the complaint of any resident citizen of the county, and brought before any Justice of the Peace of the proper county, Mayor or Recorder of any incorporated town or city, who shall examine said accused Indian, and hear the testimony in relation thereto, and if said Justice, Mayor, or Recorder shall be satisfied that he is a vagrant…he shall make out a warrant under his hand and seal, authorizing and requiring the officer having him in charge or custody, to hire out such vagrant within twenty-four hours to the best bidder, by public notice given as he shall direct, for the highest price that can be had, for any term not exceeding four months; and such vagrant shall be subject to and governed by the provisions of this Act, regulating guardians and minors, during the time which he has been so hired. The money received for his hire, shall, after deducting the costs, and the necessary expense for clothing for said Indian, which may have been purchased by his employer, be, if he be without a family, paid into the County Treasury, to the credit of the Indian fund. But if he have a family, the same shall be appropriated for their use and benefit: *Provided*, that any such vagrant, when arrested, and before judgment, may relieve himself by giving to such Justice, May, or Recorder, a bond, with good security, conditioned that he will, for the next twelve months, conduct himself with good behavior, and betake to some honest employment for support.

Appendix 2 - Original Bill Material Pertaining to California Statutes 1860, Chapter 231

This Appendix contains a verbatim transcription of the Original Bill Materials, located in the California State Archives, that are related to the 1860 amendment of the Act for the Government and Protection of Indians passed April 22, 1850. The first document is the initial Assembly Bill No. 65 introduced for consideration on January 19, 1860. The second document is a "substitute" Assembly Bill No. 65, introduced for consideration on February 17, 1860. The third document is the engrossed bill that was enrolled on April 6, 1860.

The first page of each transcribed document in this Appendix contains the legislative history of the bill. This information is handwritten and originally signed by each legislative officer on the front page of the original documents. The language originally contained in the proposed bills, but subsequently deleted from the text during the course of the legislative process is noted in brackets.

[First Document Transcription Begins Here]

Assembly Bill No. 65

An act amendatory of an act entitled an act for the Government and Protection of Indians passed April 22, 1850

In Assembly January 19, 1860
Read first & second time
Referred to Com. on Indian Affairs

Weston
Asst Clerk

February 11, 1860, Reported with amendt & passage
Recommended as amended

Weston
Asst Clk

Feb. 13, 1860
Taken from file
& referred to Jud[iciary] Com[mittee]

Weston
Asst Clk

Feb 17, 1860, Substitute reported & recommended

Weston
Asst Clk

Feb 27, 1860: Substituted adopted & ordered printed

Weston
Ass't Clk

An Act amendatory of an act entitled An Act for the Government and Protection of Indians passed April 22, 1850

The People of the State of California represented in Senate and Assembly do enact as follows:

Section 1st , Section third of said Act is hereby amended so as to read as follows

Section 3d Any person having or hereafter obtaining any Indian child or children male or female from the parents or relations of such child or children [stricken from text: with their] and wishing to domesticate said child or children and any person desiring to obtain any Indian or Indians either children or grown persons that may have been taken prisoner or prisoners [stricken from text: and wishing to domesticate either children or grown persons in any expedit] of war [stricken from text: in any] and wishing to domesticate said Indians, such person shall go before a Justice of the Peace of the County in which such Indians may [stricken from text: be] reside at the time and if the Justice of the Peace becomes satisfied that no compulsory means have been used to obtain the said child or children from its parents or friends or that the said child or children or other Indian or indians of either sex have been taken and are held as a prisoner or prisoners of war, he shall enter on record, in a book kept for that purpose the sex and probable age of the child or children or other indians, and shall give to such person a certificate authorizing him or her to have the care custody control and earnings of such child or children or other Indians, for and during the following term of years, such children as are under twelve years of age, until they attain the age of twenty five years, such children as are over twelve and under eighteen years of age until they attain the age of thirty years, and such indians as may be over the age of eighteen years, for and during the term of ten years then next following the date of said certificate, any person or persons [stricken: being] having any indian or indians in his or their possession as such prisoners shall have the preference to domesticate as many of such indians as he or they may desire for their own use, every indian either male or female in the possession or under the control of any person under the provisions of this act shall be taken and deemed to be a minor Indian, [stricken from text: for such]

Sec. 2nd Section seventh of said act is hereby amended so as to read as follows,

Sec 7. If any person shall forcibly convey any Indian from any place without this State to any place within this State, or from his or her home within this State, or compel him, or her, to work or perform any services against his or her will,

Except as provided in this act, he or they may be upon conviction fined in any sum not less than fifty dollars, nor more than five hundred dollars, at the discretion of the Court

[First Document Transcription Ends Here]

[Second Document Transcription Begins Here]

Substitute for Assembly Bill No. 65

An act amendatory of an act entitled An Act for the Government & Protection of Indians passed April 22, 1850

Feb 17, 1860. Reported as substitute for Assembly Bill No. 65 & passage recommended

Weston
Ass't Clk

Feb. 27, 1860, adopted & ordered printed.

Weston
Ass't Clk

Mch 10, 1860, amended, ___ suspended, considered engrossed read third time and passed

Weston
Asst Clk

Judiciary Committee

An Act amendatory of An Act Entitled "An Act for the Government and Protection of Indians passed April 22 1850

The People of the State of California represented in Senate and Assembly, do enact as follows:

Section 1st Section third of said Act is hereby amended so as to read as follows:

> Section 3: County and District Judges in the respective counties of this State shall by virtue of this Act have full power and authority, at the instance and request of any person having or hereafter obtaining any Indian child or children male or female under the age of fifteen years from the parents or person or persons having the care or charge of such child or children with the consent of such parents or person or persons having the care or charge of any such child or children, or at the instance and request of any person desirous of obtaining any indian or Indians whether children or grown persons that may be held as prisoners of war, or at the instance and request of any person desirous of obtaining any vagrant Indian or Indians as have no settled habitation or means of livelihood and have not placed themselves under the protection of any white person, to bind and put out such Indians as apprentices to trades --- husbandry or other employments as shall to them appear proper, and for this purpose shall execute duplicate Articles of Indenture of Apprenticeship on behalf of such Indians, which Indentures shall also be executed by the person to whom such Indian or Indians are to be indentured: one copy of which shall be filed by the County Judge [stricken from text: with the] in the Recorders Office of the County and one copy retained by the person to whom such Indian or Indians may be indentured; such Indenture shall authorise [sic] such person to have the care custody control and earnings of such Indian or Indians and shall require such person to clothe and suitably provide the necessaries of life, for such Indian or Indians for and during the term for which such Indian or Indians shall be apprenticed, and shall contain the sex name and probable age of such Indian or Indians, Such Indentures may be for the following terms of years, such children as are under fourteen years of age, if males until they attain the age of twenty five years; if females until they attain the age of twenty one years; such as are over fourteen and under twenty years of age if males until they attain the age of thirty years; if females until they attain the age of twenty five years; and such Indians as may be over the age of twenty years for and during the term of ten years then next following the date of such Indenture at the discretion of such Judge. Such Indians as may be indentured under the provisions of this section shall be deemed within such provisions of this act as are applicable to minor Indians

Section 2d Section seventh of said act is hereby amended so as to read as follows,

Section 7 If any person shall forcibly convey any Indian from any place without this State to any place within this State or from his or her home within this State, or compel him or her to work or perform any service against his or her will except as provided in

this Act he or they shall upon conviction thereof be fined in any sum not less than one hundred dollars nor more than five hundred dollars before any court having jurisdiction at the discretion of the Court, and the collection of such fine shall be enforced as provided by law in other criminal cases, one half to be paid to the prosecutor and one have [sic] to the County in which such conviction is had

[Second Document Transcription Ends Here]

[Third Document Transcription Begins Here]

Substitute for Assembly Bill No. 65

An act amendatory of an act entitled an act for the government & protection of Indians passed April 22, 1850

Feb 17, 1860 reported as substitute for assembly Bill No. 65 & passage recommended

Weston
Asst Clk

Feb 27, 1860, adopted and ordered printed

Weston
Asst. Clk

March 10, 1860 Amended rules suspended, considered
Engrossed read third time and passed

Weston
Asst Clk

E.W. Casey Engrossing Clerk
231 [in pencil]

Judiciary Committee

March 13th 1860
Read first and second times and refd to the Committee on Federal Relations

Williamson
Asst Secty

March 23rd 1860

Reported back and passage recommended & placed on file April 6th
Taken up read a third time & passed

Enrolled April 6th 1860
H.C. Kibbe
Enrolling Clerk

Chap 231 [in pencil]

An Act amendatory of an act Entitled "An Act for the Government and Protection of Indians passed April 22d 1850.

The People of the State of California represented in Senate and Assembly do enact as follows.

Section 1. Section third of said Act, is hereby amended so as to read as follows;

> Section 3d. County and District Judges in the respective Counties of the State shall by virtue of this act have full power and authority, at the instance and request of any person having or hereafter obtaining any Indian child or children male or female under the age of fifteen years, from the parents or person or persons having the care or charge of such child or children with the consent of such parents or person or persons having the care or charge of any such child or children, or at the instance and request of any person desirous of obtaining any Indian or Indians, whether children or grown persons that may be held as prisoners of war, or at the instance and request of any person desirous of obtaining any vagrant Indian or Indians as have no settled habitation or means of livelihood, and have not placed themselves under the protection of any white person, to bind and put out such Indians as apprentices to trades husbandry or other employments as shall to them appear proper, and for this purpose shall execute duplicate Articles of Indenture of Apprenticeship on behalf of such Indians, which Indentures shall also be executed by the person to whom such Indian or Indians are to be Indentured; one copy of which shall be filed by the County Judge, in the Recorders office of the County, and one copy retained by the person to whom such Indian or Indians may be Indentured, such Indentures shall authorize such person to have the care custody control and earnings of such Indian or Indians and shall require such person to clothe and suitably provide the necessaries of life for such Indian or Indians, for and during the term for which such Indian or Indians shall be apprenticed, and shall contain the sex name and probable age of such Indian or Indians, such indentures may be for the following terms of years; such children as are under fourteen years of age, if males until they attain the age of twenty five years; if females until they attain the age of twenty one years; such as are over fourteen and under twenty years of age, if males until they attain the age of thirty years; if females until they attain the age of twenty five years, and such Indians as may be over the age of twenty years for and during the term of ten years thru next following the date of such indenture at the discretion of such Judge, such Indians as may be indentured under the provisions of this Section, shall be deemed within such provisions of this Act, as are applicable to minor Indians

Section 2. Section Seventh of said act is hereby amended so as to read as follows:

> Section 7. If any person shall forcibly convey any Indian from any place without this State, to any place within this State, or from his or her home within this State, or compel him or her to work or perform any service against his or her will except as provided in this act, he or they shall upon conviction thereof, be fined in any sum, not less than one hundred dollars nor more than five hundred dollars, before any Court having jurisdiction at the discretion of the Court, and the collection of such fine shall be enforced as provided by law in other criminal cases, on half to be paid to the prosecutor, and one half to the County in which such conviction is had.

[Third Document Transcription Ends Here]

California Secretary of State, California State Archives
Original Bill File AB 65 1860
Location: E6562 Box 1

Transcribed July 29, 2002 by Kimberly Johnston Dodds, California Research Bureau

Appendix 3 - Court of Sessions

The Courts of Sessions were the earliest county-level courts of record* that adjudicated criminal offenses. The first Courts of Sessions in California were authorized by the state Constitution:

> There shall be elected in each of the organized counties of this State, one County Judge, who shall hold his office for four years…The County Judge, with two Justices of the Peace, to be designated according to law, shall hold Courts of Sessions with such criminal jurisdiction as the Legislature shall prescribe, and he shall perform such other duties as shall be required by law.[75]

The two Justices of the Peace (Associate Justices of the Courts of Sessions) were chosen by all of the Justices of the Peace from within the county.[76]

The Legislature conferred upon the Courts of Sessions jurisdiction over "all cases of assault, assault and battery, breach of the peace, riot, affray, and petit larceny, and over all misdemeanors punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding three months, or both such fine and imprisonment."[77] The jurisdiction of the Courts of Sessions also extended to grand jury investigations of public offenses committed or triable in the their respective counties, except murder, manslaughter, arson and other crimes that were punished by death. These courts also heard and decided appeals from lower courts that were not courts of record -- the justices', recorders', and mayors' courts. The Courts of Sessions did not have jurisdiction to try indictments against justices of the peace.[78]

In counties that did not have a board of supervisors, the Courts of Sessions also had the following powers to:

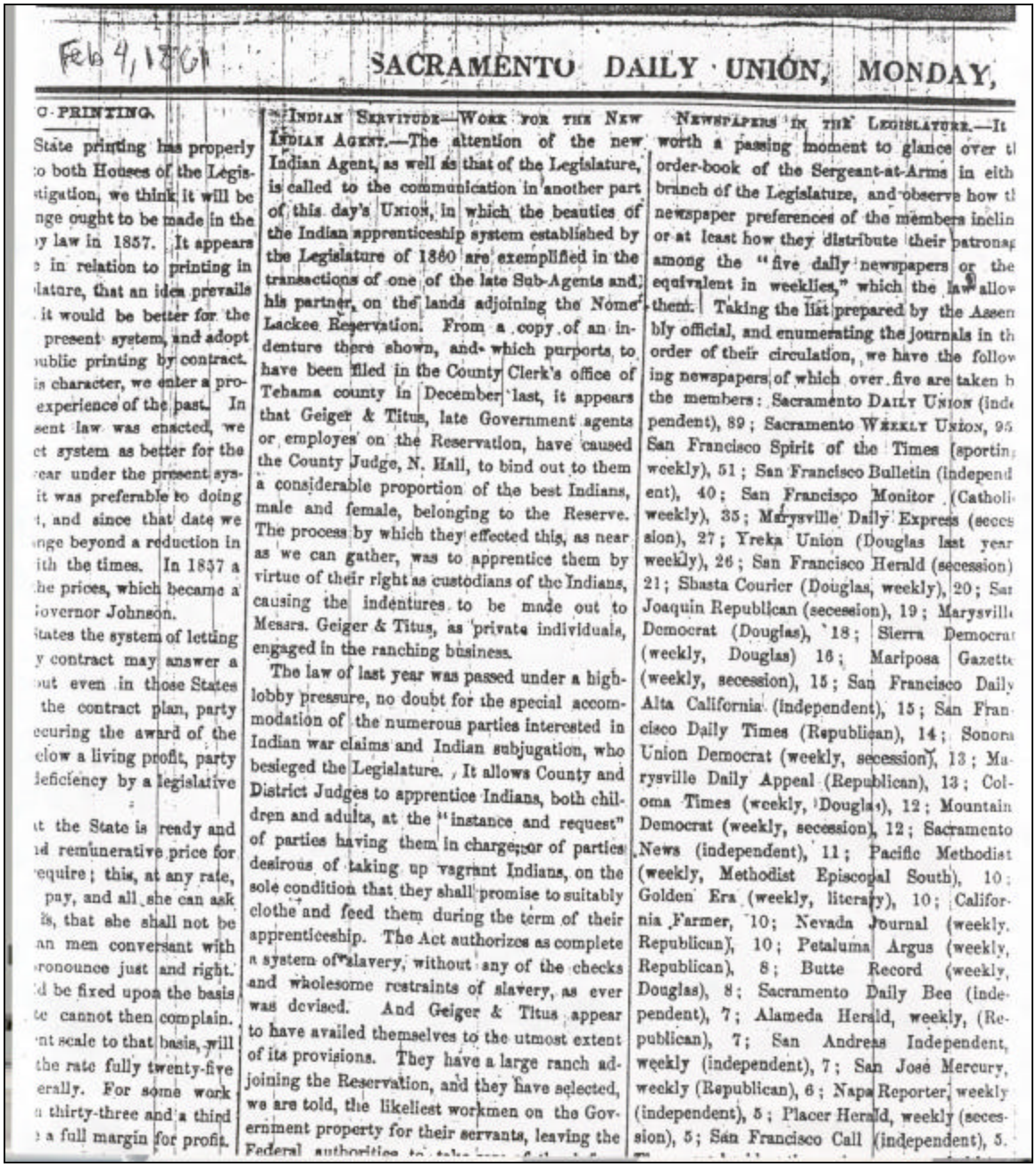
- Make orders and decisions respecting county property, including care and preservation;
- Examine, settle and allow all accounts legally chargeable against the county;
- Direct assessing the value of real and personal property taxes;
- Examine and audit accounts of all county officers;
- Control and manage public roads, turnpikes, ferries, canals, and bridges within the county;

* A court of record is a court whose proceedings are recorded in some manner of permanence at the same time that the proceedings take place. See *Cal Jur* vol. 16, part 1 3d ed. (San Francisco: Bancroft-Whitney Co. 1983, 2002 supp.) 300-301.

- Divide the county into townships, including changing township boundaries when required; and
- Establish and change election precincts.[79]

In 1863, the Legislature abolished the Courts of Sessions. The County Courts then maintained similar jurisdiction as the Courts of Sessions.[80]

Appendix 4 – 1861 Indian Article of Indenture



Feb 4, 1861

SACRAMENTO DAILY UNION, MONDAY,

G PRINTING.

State printing has properly
:o both Houses of the Legis-
stigation, we think it will be
nge ought to be made in the
y law in 1857. It appears
in relation to printing in
lature, that an idea prevails
it would be better for the
present system, and adopt
ublic printing by contract.
is character, we enter a pro-
experience of the past. In
sent law was enacted, we
ct system as better for the
ear under the present sys-
it was preferable to doing
, and since that date we
nge beyond a reduction in
ith the times. In 1857 a
he prices, which became a
Governor Johnson.
States the system of letting
y contract may answer a
ut even in those States
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ecuring the award of the
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t the State is ready and
id remunerative price for
equire; this, at any rate,
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is, that she shall not be
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pronounce just and right.
d be fixed upon the basis
te cannot then complain.
nt scale to that basis, will
the rate fully twenty-five
erally. For some work
thirty-three and a third
a full margin for profit.

INDIAN SERVITUDE—WORK FOR THE NEW INDIAN AGENT.—The attention of the new Indian Agent, as well as that of the Legislature, is called to the communication in another part of this day's UNION, in which the beauties of the Indian apprenticeship system established by the Legislature of 1860 are exemplified in the transactions of one of the late Sub-Agents and his partner, on the lands adjoining the Nome Lackee Reservation. From a copy of an indenture there shown, and which purports to have been filed in the County Clerk's office of Tehama county in December last, it appears that Geiger & Titus, late Government agents or employes on the Reservation, have caused the County Judge, N. Hall, to bind out to them a considerable proportion of the best Indians, male and female, belonging to the Reserve. The process by which they effected this, as near as we can gather, was to apprentice them by virtue of their right as custodians of the Indians, causing the indentures to be made out to Messrs. Geiger & Titus, as private individuals, engaged in the ranching business.

The law of last year was passed under a high-lobby pressure, no doubt for the special accommodation of the numerous parties interested in Indian war claims and Indian subjugation, who besieged the Legislature. It allows County and District Judges to apprentice Indians, both children and adults, at the "instance and request" of parties having them in charge, or of parties desirous of taking up vagrant Indians, on the sole condition that they shall promise to suitably clothe and feed them during the term of their apprenticeship. The Act authorizes as complete a system of slavery, without any of the checks and wholesome restraints of slavery, as ever was devised. And Geiger & Titus appear to have availed themselves to the utmost extent of its provisions. They have a large ranch adjoining the Reservation, and they have selected, we are told, the likeliest workmen on the Government property for their servants, leaving the Federal authorities to

NEWSPAPERS IN THE LEGISLATURE.—It worth a passing moment to glance over t order-book of the Sergeant-at-Arms in eith branch of the Legislature, and observe how t newspaper preferences of the members inclin or at least how they distribute their patronag among the "five daily newspapers or the equivalent in weeklies," which the law allow them. Taking the list prepared by the Assen bly official, and enumerating the journals in th order of their circulation, we have the follow ing newspapers of which over five are taken b the members: Sacramento DAILY UNION (inde pendent), 89; Sacramento WEEKLY UNION, 95 San Francisco Spirit of the Times (sportin weekly), 51; San Francisco Bulletin (independ ent), 40; San Francisco Monitor (Catholi weekly), 35; Marysville Daily Express (secess sion), 27; Yreka Union (Douglas last year weekly), 26; San Francisco Herald (secession) 21; Shasta Courier (Douglas, weekly), 20; San Joaquin Republican (secession), 19; Marysville Democrat (Douglas), 18; Sierra Democrat (weekly, Douglas) 16; Mariposa Gazette (weekly, secession), 15; San Francisco Daily Alta California (independent), 15; San Francisco Daily Times (Republican), 14; Sonora Union Democrat (weekly, secession), 13; Marysville Daily Appeal (Republican), 13; Coloma Times (weekly, Douglas), 12; Mountain Democrat (weekly, secession), 12; Sacramento News (independent), 11; Pacific Methodist (weekly, Methodist Episcopal South), 10; Golden Era (weekly, literary), 10; California Farmer, 10; Nevada Journal (weekly, Republican), 10; Petaluma Argus (weekly, Republican), 8; Butte Record (weekly, Douglas), 8; Sacramento Daily Bee (independent), 7; Alameda Herald, weekly, (Republican), 7; San Andreas Independent, weekly (independent), 7; San José Mercury, weekly (Republican), 6; Napa Reporter, weekly (independent), 5; Placer Herald, weekly (secession), 5; San Francisco Call (independent), 5.

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Governor Johnson.
States the system of letting
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but even in those States
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elow a living profit, party
deficiency by a legislative

at the State is ready and
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require; this, at any rate,
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is, that she shall not be
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per 1,000 ems	$2 50
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1,000 ems	4 00
240 sheets	2 75

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per 1,000 ems	$1 50
per 1,000 ems	2 00
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The times are propitious for a change in this misnamed law "for the government and protection of Indians"—a change which shall deprive the parties in the above transaction, and others who have sought to obtain control of the persons of Indians under similar circumstances, of the unlimited power they hold under the Act of last year. The new Agent is now in his place, and the Legislature of 1861 differs materially in its composition from the one of the year preceding. At all events, let us have an investigation of the matter brought to notice in another column, and a little light, if light can be obtained, on the general operation of the law under which parties are seeking to establish a system of domestic servitude in our midst.

A Selfish Move.—A day or two since

weekly), 26; San Francisco Herald (secession) 21; Shasta Courier (Douglas, weekly), 20; San Joaquin Republican (secession), 19; Marysville Democrat (Douglas), 18; Sierra Democrat (weekly, Douglas) 16; Mariposa Gazette (weekly, secession), 15; San Francisco Daily Alta California (Independent), 15; San Francisco Daily Times (Republican), 14; Sonora Union Democrat (weekly, secession), 13; Marysville Daily Appeal (Republican), 13; Coloma Times (weekly, Douglas), 12; Mountain Democrat (weekly, secession), 12; Sacramento News (independent), 11; Pacific Methodist (weekly, Methodist Episcopal South), 10; Golden Era (weekly, literary), 10; California Farmer, 10; Nevada Journal (weekly, Republican), 10; Petaluma Argus (weekly, Republican), 8; Butte Record (weekly, Douglas), 8; Sacramento Daily Bee (independent), 7; Alameda Herald, weekly, (Republican), 7; San Andreas Independent, weekly (independent), 7; San José Mercury, weekly (Republican), 6; Napa Reporter, weekly (independent), 5; Placer Herald, weekly (secession), 5; San Francisco Call (independent), 5. There are besides these the names of thirty-seven other papers which are ordered to the address of members singly, or which have only three or four subscribers on the Sergeant's roll. We have classed as secession papers those journals which either declare the right of a State to secede or else oppose coercion on the part of the Federal power. The times do not admit of hair-drawn distinctions in political newspaper nomenclature any more than in partisan professions.

In the Senate the newspapers of which over five are ordered, classified according to the above arrangement, are as follows: Sacramento Daily Union, 38; Weekly Union, 22; San Francisco Daily Herald, 22; Spirit of the Times, 22; Alta California, 16; San Francisco Bulletin, 16; Marysville Express, 14; San Francisco Monitor, 13; Pacific Methodist, 9; Butte Record, 6; Yreka Union, 6; National Democrat, 6; Democratic Signal (Douglas Democrat), 6; Mountain Democrat, 6; San Francisco Times, 5.

Speech of Z. Montgomery.—The Marysville *Express* publishes the speech of Z. Montgomery, made recently in the Assembly on the subject of the Broderick expunging resolutions, and from the notes of the Union reporter [illegible]

SACRAMENTO DAILY UNION, MONDAY, FEBRUARY 4, 1861.

INDENTURING INDIANS—A NICE SYSTEM OF SLAVERY.

RED BLUFF, January 30, 1861.

EDITORS UNION: As the meaning and much as well as the constitutionality of the Act passed last Winter in regard to indenturing Indians without their consent, or even apprising them of the fact, but by simply calling on the County or District Judge, with a list, and having him sign it officially—has been doubted by many, I send you a copy of an indenture, now on file in the Clerk's office in Tehama county. The Indians named therein are not prisoners of war, or vagrant Indians, but belong to the Nome Lackee tribe, that have been taught to work, at a cost to Government of about three hundred thousand dollars. And the persons to whom they are indentured have been receiving as salaries from Government, four hundred and seventy-five dollars per month, for nearly four years past.

It may be true that they were in their possession at that date, as they claimed to be in possession of the Reserve. They were most of them on the Reservation, and not ten per cent. of them have ever seen their humane (?) guardian that, "at the instance and request" of Titus and Geiger, made them slaves, without the semblance of a bond to clothe, feed and protect them.

I hope our representatives from this county will attend to this law, and have it either explained or repealed. W.

"This indenture, made this 29th day of December, 1860, witnesseth: that I, Newel Hall, Judge of the county of Tehama, State of California, under and by virtue of the provisions of the laws of the State of California conferring such power, have this day, on application of F. J. Titus and V. E. Geiger, partners in in ranching in the county and State aforesaid, and who now have charge of and who are in possession of certain Indians hereinafter named, and at their request and instance do hereby, by virtue of the authority in me vested as said County Judge, bind and apprentice to them the following named and described Indians, to wit:

Name.	Age.	Till When Bound.
Simon	17	30 years of age.
Big Jack	20	30 do do
Jackass	20	30 do do
Jack White	18	30 do do
Joe	15	30 do do
Elijah	18	30 do do
Judas	18	30 do do
Ben	17	30 do do
Tebalth	19	30 do do
Doc	18	30 do do
Peter	19	30 do do
Big Sam	18	30 do do
Number Two	17	30 do do
Big Abe	19	30 do do
Darly	18	30 do do
Tony	18	30 do do
Ambrose	18	30 do do
Bob	18	30 do do
Bony	16	30 do do
Henry	17	30 do do
Jordan	18	30 do do
Prince	18	30 do do
Yolo Bailey	15	30 do do
Little Sam	12	25 do do
Job	12	25 do do
Billy	12	25 do do
Nancy—(she)	15	30 do do
Susan	15	30 do do
Mary	18	30 do do
Laura	10	25 do do
Betsey	15	30 do do
Julia	17	30 do do

DANIEL WEBSTER'S FIRST CASE.

Webster, father of Daniel, was a farmer. The vegetables in his garden suffered considerably from the depredations of a woodchuck, whose hole and habitation was near the premises. Daniel, some ten or twelve years old, and his brother Ezekiel, had set a steel trap, and at last succeeded in capturing the transgressor. Ezekiel proposed to kill the animal and end all further trouble with him; but Daniel looked with compassion upon the meek, dumb captive, and offered to let him go. The boys could not agree, and each appealed to their father to decide the case.

"Well, my boys," said the old gentleman, "I will be judge. There is the prisoner," pointing to the woodchuck; "and you shall be the counsel, and plead the case for and against his life and liberty."

Ezekiel opened the case with a strong argument, urging the mischievious nature of the animal, the great harm he had already done—said that much time and labor had been spent in his capture, and now, if he was suffered to live and go at large he would renew his depredations, and be cunning enough not to suffer himself to be caught again, and that he ought now to be put to death; that his skin was of some value, and that, make the most of him they could, it would not repay half the damage he had already done. His argument was ready, practical, and to the point, and of much greater length than our limits will allow us to occupy in relating the story.

"Now, Daniel, it's your turn; I'll hear what you've got to say."

It was his first case. Daniel saw that the plea of his brother had sensibly affected his father, the judge; and as his large, brilliant black eyes looked upon the soft, timid expression of the animal, and as he saw it tremble with fear in its narrow prison house, his heart swelled with pity, and he appealed with eloquent words that the captive might again go free. God, he said, had made the woodchuck; he made him to live, to enjoy the brilliant sunshine, the pure air, the free fields and woods. God has not made him for anything in vain; the woodchuck has as much right as any other living thing; he was not a destructive animal, as the fox or wolf was; he simply ate a few common vegetables, of which they had plenty, and could well spare a part; he destroyed nothing, except the little food he needed to sustain his humble life; and that little food was as sweet to him, and as necessary to his existence, as was to them the food on their mother's table. God furnished their own food; he gave them all they possessed; and would they not spare a little for the dumb creature, who really had as much right to his small share of God's bounty as they themselves had to their portion? Yes, more, the animal had never violated the laws of his nature or the laws of God, as man often did, but strictly followed the simple instincts he had received from the hands of the Creator of all things. Created by God's hands, he had a right from God to life, to food, to liberty; and they had no right to deprive him of either. He alluded to the mute but earnest pleadings of the animal for that life, as sweet, as dear to him as their

PRAYER MEETING IN A STO

BY BAYARD TAYLOR.

"Twas Pres[illegible] the sou'-sou'-west,
A gale came up fr[illegible] rather;
'Twas fierce November [illegible] ...ors,
But the ship had fell weath a storm,
And the planks still held together,
And thus, though the hot wing tempest showe
No signs of diminution,
The passengers said, "We'll trust our ship,
The stanneh old Constitution."

The captain stood on the quarter deck—
"The sea," he said, "they batter us;
'Twas my watch below in the former gale—
I doubt if we'll weather Hatteras.
The wind on the one side blows me off,
The current sets me shoreward;
I'll just lay to between them both,
And seem to be going forward."

"Breakers ahead," cried the watch on the bo
"Hard up!" was the first mate's order;
"She feels the ground swell," the passengers
"And the seas already board her!"
The foresail split in the angry gust;
In the hold the ballast shifted;
And an old tar said, "If Jackson steered
We shouldn't thus have drifted!"

But the captain cried, "Let go your helm!"
And then he called to the bo'swain:
"Pipe all hands to the quarter deck,
And we'll save her by Devotion!"
The first mate hurled his trumpet down—
The old tars cursed together,
To see the good ship helpless roll
At the sport of wave and weather,

The tattered sails are all shack,
Yards crack, and masts are started;
And the captain weeps and says his prayers,
Till the hull be 'mid-ships parted;
But God's on the steersman's side—
The crew are in revolution;
The wave that washes the captain off
Will save the Constitution!

NEW YORK, Dec. 18, 1860.

A WARM BATH WANTED—THE QUESTION ENDURANCE TESTED.—Smith was a man never permitted himself to be outdone—he co do whatever anybody else could. Smith Brown in a bath room, and Brown, knowing other's peculiar conceit, said that he (Bro could endure a hotter bath than any living m Thereat Smith fired up, and a bet was ma Two bathing tubs were prepared with six inc of cold water in each. The fellows stripp and separated by a cloth partition, each got and let on the hot water at the word—the wa being who should stay in the longest with hot water running. Smith drew up his feet far as possible from the boiling stream, wh Brown pulled out the plug in the bottom of tub. After about half a minute quoth Smit

"How is it, Brown—pretty warm?"

"Yes," says the other, "its getting almigh hot, but I guess I can hold out a minute, yet."

"So can I," answered Smith. "Scis-s-s! squash!—lightning!—it's awful!"

Fifteen seconds, equal to half an hour Smith's imaginary watch.

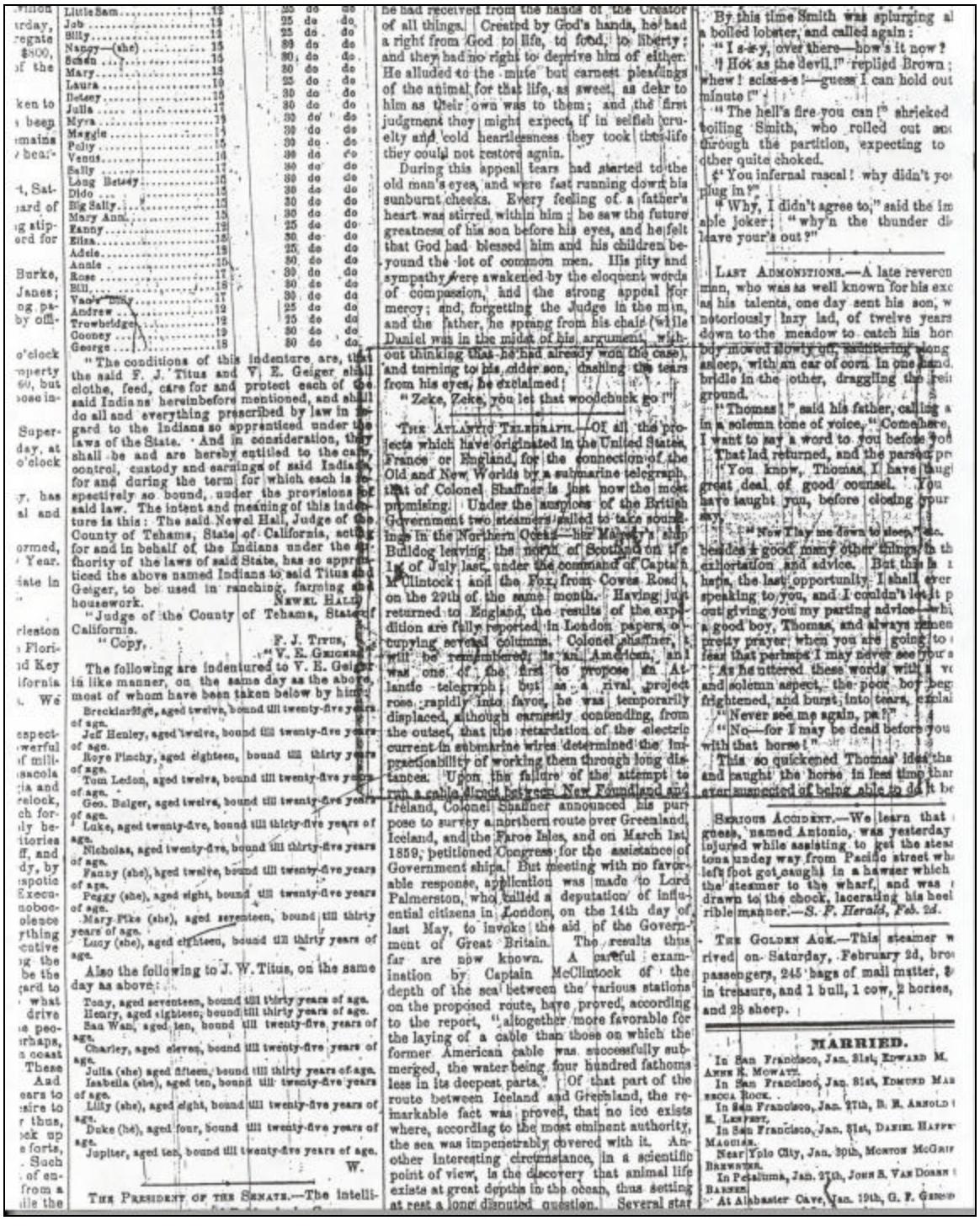
"I say, over there—how is it now?"

"O! it's nearly up to the bilin' pint—O Christopher!" answered the diabolical villai who was lying in the empty tub, while the h water passed out of the escape pipe.

By this time Smith was splurging about lik a boiled lobster, and called again:

"I s-a-y, over there—how's it now?

"Hot as the devil!" replied Brown; "but—whew! scis-s-s!—guess I can hold out anothe minute!"



Little Sam	13		25	do do
Jab	13		25	do do
Billy	12		30	do do
Nancy—(she)	15		30	do do
Schen	15		30	do do
Mary	13		25	do do
Laura	10		25	do do
Betsey	15		30	do do
Julia	17		30	do do
Myra	13		30	do do
Maggie	14		30	do do
Polly	15		30	do do
Venus	14		30	do do
Sally	17		30	do do
Long Betsey	16		30	do do
Dido	15		30	do do
Big Sally	15		30	do do
Mary Ann	15		30	do do
Fanny	12		25	do do
Eliza	15		30	do do
Adele	13		25	do do
Annie	10		30	do do
Rose	17		30	do do
Bill	18		30	do do
Vacy Billy	17		30	do do
Andrew	12		25	do do
Trowbridge	12		25	do do
Cooney	12		30	do do
George	13		30	do do

"The conditions of this indenture are, that the said F. J. Titus and V. E. Geiger shall clothe, feed, care for and protect each of the said Indians hereinbefore mentioned, and shall do all and everything prescribed by law in regard to the Indians so apprenticed under the laws of the State. And in consideration, they shall be and are hereby entitled to the care, control, custody and earnings of said Indians, for and during the term for which each is respectively so bound, under the provisions of said law. The intent and meaning of this indenture is this: The said Newel Hall, Judge of the County of Tehama, State of California, acting for and in behalf of the Indians under the authority of the laws of said State, has so apprenticed the above named Indians to said Titus and Geiger, to be used in ranching, farming and housework.

NEWEL HALL,
"Judge of the County of Tehama, State of California.

"Copy, F. J. TITUS,
"V. E. GEIGER."

The following are indentured to V. E. Geiger in like manner, on the same day as the above, most of whom have been taken below by him:

Breckinridge, aged twelve, bound till twenty-five years of age.
Jeff Henley, aged twelve, bound till twenty-five years of age.
Roye Pinchy, aged eighteen, bound till thirty years of age.
Tom Ledon, aged twelve, bound till twenty-five years of age.
Geo. Bulger, aged twelve, bound till twenty-five years of age.
Luke, aged twenty-five, bound till thirty-five years of age.
Nicholas, aged twenty-five, bound till thirty-five years of age.
Fanny (she), aged twelve, bound till twenty-five years of age.
Peggy (she), aged eight, bound till twenty-five years of age.
Mary Pike (she), aged seventeen, bound till thirty years of age.
Lucy (she), aged eighteen, bound till thirty years of age.

Also the following to J. W. Titus, on the same day as above:

Tony, aged seventeen, bound till thirty years of age.
Henry, aged eighteen, bound till thirty years of age.
San Wan, aged ten, bound till twenty-five years of age.
Charley, aged eleven, bound till twenty-five years of age.
Julia (she) aged fifteen, bound till thirty years of age.
Isabella (she), aged ten, bound till twenty-five years of age.
Lilly (she), aged eight, bound till twenty-five years of age.
Duke (he), aged four, bound till twenty-five years of age.
Jupiter, aged ten, bound till twenty-five years of age.

W.

THE PRESIDENT OF THE SENATE.—The intelligence he had received from the hands of the Creator of all things. Created by God's hands, he had a right from God to life, to food, to liberty; and they had no right to deprive him of either. He alluded to the mute but earnest pleadings of the animal for that life, as sweet as dear to him as their own was to them; and the first judgment they might expect, if in selfish cruelty and cold heartlessness they took this life they could not restore again.

During this appeal tears had started to the old man's eyes, and were fast running down his sunburnt cheeks. Every feeling of a father's heart was stirred within him; he saw the future greatness of his son before his eyes, and he felt that God had blessed him and his children beyound the lot of common men. His pity and sympathy were awakened by the eloquent words of compassion, and the strong appeal for mercy; and, forgetting the Judge in the man, and the father, he sprang from his chair (while Daniel was in the midst of his argument, without thinking that he had already won the case), and turning to his older son, dashing the tears from his eyes, he exclaimed:

"Zeke, Zeke, you let that woodchuck go!"

THE ATLANTIC TELEGRAPH.—Of all the projects which have originated in the United States, France or England, for the connection of the Old and New Worlds by a submarine telegraph, that of Colonel Shaffner is just now the most promising. Under the auspices of the British Government two steamers sailed to take soundings in the Northern Ocean—her Majesty's ship Bulldog leaving the north of Scotland on the 1st of July last, under the command of Captain McClintock; and the Fox, from Cowes Road, on the 29th of the same month. Having just returned to England, the results of the expedition are fully reported in London papers, occupying several columns. Colonel Shaffner, it will be remembered, is an American, and was one of the first to propose an Atlantic telegraph; but as a rival project rose rapidly into favor, he was temporarily displaced, although earnestly contending, from the outset, that the retardation of the electric current in submarine wires determined the impracticability of working them through long distances. Upon the failure of the attempt to run a cable direct between Newfoundland and Ireland, Colonel Shaffner announced his purpose to survey a northern route over Greenland, Iceland, and the Faroe Isles, and on March 1st, 1859, petitioned Congress for the assistance of Government ships. But meeting with no favorable response, application was made to Lord Palmerston, who called a deputation of influential citizens in London, on the 14th day of last May, to invoke the aid of the Government of Great Britain. The results thus far are now known. A careful examination by Captain McClintock of the depth of the sea between the various stations on the proposed route, have proved, according to the report, "altogether more favorable for the laying of a cable than those on which the former American cable was successfully submerged, the water being four hundred fathoms less in its deepest parts." Of that part of the route between Iceland and Greenland, the remarkable fact was proved, that no ice exists where, according to the most eminent authority, the sea was impenetrably covered with it. Another interesting circumstance, in a scientific point of view, is the discovery that animal life exists at great depths in the ocean, thus setting at rest a long disputed question. Several star

By this time Smith was splurging a boiled lobster, and called again:

"I s-a-y, over there—how's it now?

"Hot as the devil!" replied Brown; whew! scis-s-s!—guess I can hold out minute!"

"The hell's fire you can!" shrieked boiling Smith, who rolled out and through the partition, expecting to other quite choked.

"You infernal rascal! why didn't yo plug in?"

"Why, I didn't agree to," said the im able joker; "why'n the thunder di leave your's out?"

LAST ADMONITIONS.—A late reveren man, who was as well known for his exc as his talents, one day sent his son, w notoriously lazy lad, of twelve years down to the meadow to catch his hor boy moved slowly off, muttering along asleep, with an ear of corn in one hand bridle in the other, draggling the rei ground.

"Thomas!" said his father, calling a in a solemn tone of voice, "Come here, I want to say a word to you before you That lad returned, and the parson pr

"You know, Thomas, I have taug great deal of good counsel. You have taught you, before closing your say,

"'Now I lay me down to sleep,' &c. besides a good many other things, in th exhortation and advice. But this is hapa, the last opportunity I shall ever speaking to you, and I couldn't let it p out giving you my parting advice—whi a good boy, Thomas, and always remem pretty prayer when you are going to fear that perhaps I may never see your a

As he uttered these words with a v and solemn aspect, the poor boy beg frightened, and burst into tears, exclai

"Never see me again, pa!"

"No—for I may be dead before you with that horse!"

This so quickened Thomas' idea tha and caught the horse in less time than ever suspected of being able to do it be

SERIOUS ACCIDENT.—We learn that guess, named Antonio, was yesterday injured while assisting to get the stea tona under way from Pacific street wh left foot got caught in a hawser which the steamer to the wharf, and was drawn to the chock, lacerating his heel rible manner.—*S. F. Herald, Feb. 2d.*

THE GOLDEN AGE.—This steamer w rived on Saturday, February 2d, bro passengers, 245 bags of mail matter, $ in treasure, and 1 bull, 1 cow, 2 horses, and 28 sheep.

MARRIED.

In San Francisco, Jan. 31st, EDWARD M. ANNE E. MCWATT.
In San Francisco, Jan. 31st, EDMUND MA REBECCA ROCK.
In San Francisco, Jan. 27th, B. R. ARNOLD LEPERT.
In San Francisco, Jan. 31st, DANIEL HAPP MAGUIRE.
Near Yolo City, Jan. 30th, MORTON MCGAR BREWSTER.
In Petaluma, Jan. 27th, JOHN S. VAN DORN BARNES.
At Alabaster Cave, Jan. 19th, G. F. GRIGG

Endnotes

[1] To my knowledge, either scholars, or the State of California, have never published an exhaustive and complete review of primary sources or thorough compilation related to this subject.

[2] Given the scope of the research, a review of secondary historical sources was first conducted. Based upon this research, a number of primary and original State of California legislative and executive documents were analyzed, mainly from the period of 1850 to 1865. I also examined certain primary sources of federal documents related to California Indian Affairs during the same time period and contained in the same collections. The primary documents and sources reviewed for this report are located at the California State Archives, California State Library, Sacramento Archives and Museum Collection Center, and the Bancroft Library at the University of California, Berkeley. The secondary sources are located in the California State Library and University of California library collections.

[3] J. Ross Browne, *Report of the Debates in the Convention of California on the Formation of the State Constitution*, (Washington: John T. Tower, 1850), 70, 64-65.

[4] CAL. CONST. of 1850, Art. II, § 1.

[5] 43 U.S.C. 253. See generally, Felix S. Cohen's, *Handbook of Federal Indian Law*, (Albuquerque: University of New Mexico Press, 1971, reprint of the 1942 edition), 153-159; Chauncey S. Goodrich, "The Legal Status of the California Indian," *California Law Review* 14, no. 2 (January 1926) 83-84; N.D. Houghton, "The Legal Status of Indian Suffrage in the United States," *California Law Review* 19, no. 5 (July 1931), 507-520.

[6] Original Bill File, Chapter 133, 1850, California Secretary of State, State Archives, Location E6553, Box 1, (transcript of Original Bill File contents on file with the California Research Bureau); *Journal of the Senate of the State of California, at the First Session of the Legislature, 1849-1850*, (San José: J. Winchester, State Printer, 1850) 217, 224 (*Senate Journal – 1850*).

[7] Original Bill File Chapter 133, 1850.

[8] Original Assembly Bill No. 129, Original Bill File Chapter 133, 1850; *Senate Journal – 1850*, 367, 386-387.

[9] 1937 Cal. Stat. ch. 269; Cal. Welf. and Inst. Code §20,000.

[10] 1855 Cal. Stat. ch. 144; 1860 Cal. Stat. ch. 231; 1863 Cal. Stat. ch. 475; 1863 Cal. Stat. ch. 499.

[11] 1850 Cal. Stat. ch.99 § 14; 1851 Cal. Stat. ch. 5 § 394 3d.

[12] CAL. CONST. of 1850, Art. VI, § 14.

[13] 1850 Cal. Stat. ch. 73 §§ 1-3.

[14] Ibid.

[15] 1850 Cal. Stat. ch. 119, § 103.

[16] Henry J. Labatt, *The California Practice Act:…also "An Act concerning the Courts of Justice in this state, and Judicial Officers," passed May 19, 1853…*, 4th ed. (San Francisco: Kenny & Alexander, 1861), 323-326.

[17] 1853 Cal. Stat. ch. 1 § 89; 1863 Cal. Stat. ch. 260 § 48 (9); Labatt, *The California Practice Act*, 324.

[18] Original Bill File, Chapter 133, 1850.

[19] 1850 Cal. Stat. ch. 133 § 20.

[20] Ibid.

[21] 1855 Cal. Stat. ch. 144.

[22] Henry J. Labatt, *The California Practice Act*, citing ____§394.

[23] Original Bill File, Chapter 231, 1860, Secretary of State, California State Archives.

[24] 1850 Cal. Stat. ch. 133 §§ 16-17; *People v. Juan Antonio*, 27 Cal. 404 (1865).

[25] *In the Matter of The Indian Boy Frank, Petition of L. Harris for Apprenticeship*, filed January 28, 1862; *William Moorhead to Hon. Robert Robinson, Petition for Apprentice*, filed March 4, 1862, in the Sacramento Archives and Museum Collection Center, Sacramento County Archives, County Court: Indian Indentures, 80/132/20-21: 32:42. Copies of originals and related transcripts are on file with the California Research Bureau.

[26] *William Moorhead to Hon. Robert Robinson, Petition for Apprentice*, filed March 4, 1862, Sacramento County Archives, County Court: Indian Indentures, 80/132/20-21: 32:42.

[27] Ibid.

[28]Robert F. Heizer and Alan F. Almquist, *The Other Californians: Prejudice and Discrimination under Spain, Mexico and the United States to 1920* (Berkeley: University of California Press, 1971), 53.

[29] Heizer and Almquist, 51-57.

[30] "Lo, the Poor Indian," *Alta California*, April 7, 1855, 2-1.

[31] *San Francisco Herald*, December 14, 1856, 4-1.

[32] "Indian Slavery," *Alta California*, April 14, 1862, 1.

[33] 1860 Cal. Stat. ch. 254.

[34] Francis P. Farquhar, ed. *Up and Down California in 1860-1864: The Journal of William H. Brewer* (Berkeley: University of California Press, 1966), 493.

[35] Jesse B. Hart, *A Treatise on the Practice of the Courts of the State of California, Carefully Adapted to Existing Law*, (New York: Gould, Banks & Co., 1853), 108.

[36] 1858 Cal. Stat. ch. 182 § 13.

[37] 1858 Cal. Stat. ch. 182 § 8.

[38] 1858 Cal. Stat. ch. 182 § 9.

[39] 1858 Cal. Stat. ch. 182 § 14.

[40] 1855 Cal. Stat. ch 165 § 1.

[41] 1855 Cal. Stat. ch 175 §§ 3-5.

[42] 1863 Cal. Stat. ch. 525 § 1.

[43] Peter H. Burnett, "Governor's Annual Message to the Legislature, January 7, 1851," in *Journals of the Senate and Assembly of the State of California, at the Second Session of the Legislature, 1851-1852*, (San Francisco: G.K. Fitch & Co., and V.E. Geiger & Co., State Printers, 1852), 15.

[44] CAL. CONST. of 1850, Art. VII, § 3.

[45] Peter H. Burnett, "Governor's Annual Message to the Legislature, January 7, 1851," in *Journals of the Senate and Assembly of the State of California, at the Second Session of the Legislature, 1851-1852*, (San Francisco: G.K. Fitch & Co., and V.E. Geiger & Co., State Printers, 1852), 13.

[46] Ibid., 16-17.

[47] Ibid., 18.

[48] Ibid.

[49] ROOT CELLAR, Sacramento Geneaological Society, *California State Militia: Index to the Muster Rolls of 1851 to 1866* (Sacramento: The Society, 1999), ii, 1396-1465.

[50] Ibid., 1432-1446.

[51] Ibid., ii.

[52] 1850 Cal. Stat. ch. 54.

[53] 1850 Cal. Stat. ch. 76.

[54] 1850 Cal. Stat. ch. 54, §§ 1, 7, 17, 20.

[55] 1850 Cal. Stat. ch. 76, § 1.

[56] 1850 Cal. Stat. ch. 76, §§ 6, 8, 10, 45, 56, 57.

[57] 1851 Cal. Stat. ch. 91; 1851 Cal. Stat. ch. 125.

[58] "Majority Report of the Special Joint Committee on the Mendocino War," in *Appendix to Journals of the Senate, of the Eleventh Session of the Legislature of the State of California*, (Sacramento: C.T. Botts, State Printer, 1860), 4-6.

[59] Ibid., 7.

[60] "Minority Report of the Special Joint Committee on the Mendocino War," in *Appendix to Journals of the Senate, of the Eleventh Session of the Legislature of the State of California*, (Sacramento: C.T. Botts, State Printer, 1860), 10.

[61] Ibid.

[62] Ibid.

[63] *Journal of the House of Assembly of California at the Eleventh Session of the Legislature, 1860*, (Sacramento: C.T. Botts, State Printer, 1860), 196.

[64] Peter H. Burnett, "Governor's Annual Message to the Legislature, January 7, 1851," in *Journals of the Senate and Assembly of the State of California, at the Second Session of the Legislature, 1851-1852*, (San Francisco: G.K. Fitch & Co., and V.E. Geiger & Co., State Printers, 1852), 15.

[65] A comprehensive analysis of this important aspect of California history is beyond the scope of this report. For a sample of further discussion from various viewpoints, see William Henry Ellison, *The Federal Indian Policy in California, 1846-1860*, Thesis, (Berkeley: University of California, 1913); reprinted in (Saratoga: R and E Research Associates, 1974) 170- 199; James J. Rawls, *Indians of California: The Changing Image* (Norman: University of Oklahoma Press, 1984) 141-170; and H. Kelsey, "The California Indian Treaty Myth," *Southern California Quarterly*, 15 no. 3 (1973), 225-235.

[66] Ellison, 186.

[67] *Journals of the Senate and Assembly of the State of California, at the Third Session of the Legislature, 1852*, (Sacramento: State Printing Office, 1852), 44-45.

[68] "Report of the Special Committee on the Disposal of the Public Lands of the United States in California," in *Journals of the Senate and Assembly of the State of California, at the Third Session of the Legislature, 1852*, (San Francisco: G.K. Fitch & Co., and V.E. Geiger & Co., State Printers, 1852), 589.

[69] Ibid., 590-591.

[70] *Assembly Journal – 1852*, 270; *Senate Journal – 1852*, 195-198.

[71] Ellison, 193, citing *Congressional Globe*, 32 Cong., 1 Sess, Part III, 2103; and *Congressional Record*, 58 Cong., 3 Sess. Part I, 1021.

[72] 1852 Cal. Stat. ch. 62, § 7.

[73] Original Bill File, Chapter 62, 1852. California Secretary of State, State Archives, Location LP1:1502, (transcript of Original Bill File contents on file with the California Research Bureau); *Journal of the Senate of the State of California, at the Third Session of the Legislature, 1852*, (Sacramento: State Printing Office, 1852), 185-186 (*Senate Journals – 1852*).

[74] Original Bill File, Chapter 62, 1852.

[75] CAL. CONST. of 1850, Art. VI, § 8.

[76] 1850 Cal. Stats. ch. 86, § 2; 1851 Cal. Stat. ch. 1 § 64; 1853 Cal. Stat. ch. 180 § 50.

[77] 1850 Cal. Stat. ch. 86 § 5.

[78] Jesse B. Hart, *A Treatise on the Practice of the Courts of the State of California, Carefully Adapted to Existing Law*, (New York: Gould, Banks & Co., 1853) 7.

[79] Ibid.

[80] 1863 Cal. Stat. ch. 260 §§ 47-53, 89.

CALIFORNIA
TRIBAL COURT–STATE COURT
FORUM

Frequently Asked Questions: Indian Tribes and Tribal Communities in California

> *That a war of extermination will continue to be waged between the races, until the Indian race becomes extinct, must be expected. While we cannot anticipate this result but with painful regret, the inevitable destiny of the race is beyond the power or wisdom of man to avert.*
>
> —California Governor Peter H. Burnett, January 7, 1851

> *So let us work to bring this generation and the next seven generations a world of abundant hope and opportunity, where all tribes have vanquished poverty and disease and all people have the tools to achieve their greatest potential.*
>
> —U.S. President William J. Clinton, August 6, 1998

> *We also recommit to supporting tribal self-determination, security, and prosperity for all Native Americans. While we cannot erase the scourges or broken promises of our past, we will move ahead together in writing a new, brighter chapter in our joint history."*
>
> —U.S. President Barack Obama, November 13, 2013

1. How many California tribes are there?

   There are approximately 110 federally recognized Indian tribes, including several tribes with lands that cross state boundaries. There are also about 81 groups seeking federal recognition.

2. Where are the tribes located?

   California's tribes are everywhere throughout the state, including
   - Near highly populated cities like San Diego, and Sacramento
   - In rural areas
   - Close to the borders (and sometimes across the borders) of other states, such as Arizona, Oregon, and Nevada
   - In the mountains of northern and eastern California
   - In the high deserts of southern and southeastern California
   - On the coast, on the rivers, and around the lakes

3. How many Native Americans reside in California?

   California has the highest Native American population in the country. According to the 2010 U.S. Census, California represents 12 percent of the total Native American population (approximately 720,000) identified themselves as Native American. Over one-half of the state's Native American population is composed of individuals (and now their descendents) who were relocated to large urban areas as part of the federal government's termination policy.

4. How large are the California tribes?

   California's tribes are as small as five members and as large as 6,000 members.

5. Why is the Native American population so diverse?

   Like all other tribes around the country, California's tribes have a tragic and tumultuous history.

   - Before the missionary, fur trapping, and gold rush era migrations, California's Native American population was estimated at about 200,000.

   - Between 1840 and 1870, however, that population declined to 12,000 due to disease, removal, and death.

   - Between 1851 and 1852, 18 treaties were signed between the tribes and the United States. The treaties reserved 7.5 million acres for the tribes but were rejected by the U.S. Senate in secret session at the request of the State of California. The tribes, believing that the treaties were valid, relinquished the historic territories and moved to the reserved acreage. However, once they reached their new locations, they were turned away. The tribes were not officially notified of the reason for this until 1905, some 55 years later.

   - In the 1850s, California passed a series of laws pertaining to its Native American population. These laws allowed:
     - A justice of the peace to remove Indians from lands in a white person's possession
     - Any Indian to be declared vagrant (upon word of a white person), thrown in jail, and sold at auction for up to four months with no pay
     - The kidnapping, selling, and use of Indian children as slaves
     - Indentured servitude of any Indian (one report mentioned 110 servants who ranged from ages 2 to 50, 49 of whom were between 7 and 12 years old)
     - Prohibited Indians from testifying in court against a white person

   - In the 1950s, nearly 100 years later, the federal government's continued attempts to force assimilation on the entire Native American population

resulted in the termination (i.e., loss of federally recognized status) of over 109 tribes throughout the United States. In California, this came about through the Rancheria Act of 1958, which resulted in the termination of federal status of 44 Indian tribes.

- The Relocation Act of 1956 provided funding to establish relocation centers for Native Americans in urban areas like Denver, Chicago, Los Angeles, and San Francisco, and to finance the relocation of individual Native Americans and their families.
  - Funding for similar reservation-based programs was denied.
  - Those who participated in the federal relocation programs were usually required to sign agreements that they would not return to their respective reservations to live.
  - Between 60,000 and 70,000 out-of-state Native Americans settled in Los Angeles and San Francisco. To date, these cities have two of the largest urban Native American populations in the United States.

6. How are California's Indian child welfare issues impacted by this history?

   This history, combined with the treatment of Native American children that resulted in the passage of ICWA, the effects of Public Law 280, and the county-based system in place in California provide significant, but not impossible, challenges.

   - Large urban Native American populations from out-of-state tribes create a continuing issue concerning notice to and participation of out-of-state tribes.
   - Diverse governmental, cultural, social, economic, and geographic factors come into play because every tribe, regardless of its size, has its own governmental structure and process, cultural and social standards, economic issues, and specific social services needs.
   - Jurisdictional issues and questions are inevitable because given the many tribal courts in California, with more in development. To learn more about the tribal courts in California, see http://www.courts.ca.gov/14400.htm.

7. What tribal programs are in place today?

   - Many tribes have developed their own social services programs, which include child welfare departments; these programs provide training, counseling, advocacy, and other services for children and families.
   - There are no Indian Health Service (IHS) facilities in California. In urban areas, there are urban Indian health programs funded in part by federal dollars. Tribes own and operate their own health programs through contracts and compacts with IHS under the federal Indian Self-Determination and Education Assistance Act. Many of these programs provide their own counseling and treatment programs.

CALIFORNIA
TRIBAL COURT–STATE COURT
FORUM

May 2015

Jurisdictional Issues in California Regarding Indians and Indian Country

California Indian Tribes and Territory

California currently has approximately 110 federally recognized tribes,[1] with nearly 100 separate reservations or rancherias.[2] In addition there are currently 81 groups petitioning for federal recognition.[3] In the 2010 census roughly 725,000 California citizens identified as American Indian or Alaska Native either alone or in combination with other ethnicities.[4] This represents roughly 14% of the entire American Indian/Alaska Native population of the United States.

General Rules (these rules apply in California unless modified by PL 280)

Tribes are sovereign and have exclusive inherent jurisdiction over their territory and members, but **not** necessarily with jurisdiction over non-Indians even within tribal territory.

Tribes are under the exclusive and plenary jurisdiction of the federal congress, which may restrict or abolish jurisdiction and sovereignty. The federal government has exercised this power a number of times to limit tribal jurisdiction, assume federal jurisdiction over a number of areas, and delegate that jurisdiction to some states. Congress has granted limited jurisdictional authority to the federal courts (under the General Crimes Act 18 USC § 1153 and the Major Crimes Act 18 USC § 1152) and to state courts (for example under Public Law 280). Congress has imposed limits on tribal courts through the Indian Civil Rights Act (ICRA 25 USC § 1301-1303).

Public Law 280

The general jurisdictional scheme was altered in California by Public Law 280 enacted by Congress in 1953. PL 280 transferred federal criminal jurisdiction and conferred some civil jurisdiction on states and state courts in the six mandatory Public Law 280 states, which includes California. Public Law 280 is now codified in federal law as 28

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[1] See http://www.bia.gov/cs/groups/public/documents/text/idc006989.pdf
[2] Note that some tribes remain "landless" meaning they have no land in trust for their members, while other tribes may have more than one reservation or rancheria.
[3] As of November 12, 2013. See http://www.bia.gov/cs/groups/xofa/documents/text/idc1-024418.pdf
[4] See http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf

U.S.C. § 1360 regarding civil jurisdiction and 18 U.S.C. § 1162 regarding criminal jurisdiction.[5]

Per the U.S. Supreme Court in C*alifornia v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, Public Law 280 had the following effect on California's civil and criminal jurisdiction in Indian Country:

> In Pub L. 280, Congress expressly granted six States, including California, jurisdiction over specified areas of Indian country within the States and provided for the assumption of jurisdiction by other States. In § 2 [ie.18 U.S.C. § 1162], California was granted broad criminal jurisdiction over offenses committed by or against Indians within all Indian country within the State. Section 4's [ie. 28 U.S.C. § 1360] grant of civil jurisdiction was more limited. In *Bryan v. Itasca County*, 426 U.S. 373 (1976), we interpreted § 4 to grant States jurisdiction over private civil litigation involving reservation Indians in state court, but not to grant general civil regulatory authority. *Id.*, at 385, 388-390. Accordingly, when a State seeks to enforce a law within an Indian reservation under the authority of Pub. L. 280 it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court. (at pp. 207-208)

The "criminal/prohibitory" versus "civil/regulatory" distinction was set out by the Court in *Cabazon* as follows:

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Publ. L. 280 does not authorize its enforcement on an Indian reservation. (p. 209)

So, in terms of civil jurisdiction, the effect of PL 280 was merely to grant Indians access to state court forums to resolve disputes. It did not give the state jurisdiction to impose civil regulatory laws on the tribes or tribal territory. Note that the fact that there are misdemeanor criminal penalties for infraction of a law is not sufficient in and of itself to convert it from civil/regulatory into criminal/prohibitory for the purposes of Pub. L. 280. Further, PL 280 applies only to STATE laws of general application, local ordinances do not apply.

The term "Indian Country" is defined in 18 U.S.C. § 1151:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United

[5] See attached statutes.

States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

California Criminal Jurisdiction in Indian Country pursuant to Public Law 280

Offender	**Victim**	**Jurisdiction**
Non-Indian	Non-Indian	State jurisdiction is exclusive of federal and tribal jurisdiction unless certain specific federal laws apply.
Non-Indian	Indian	Generally, state has jurisdiction exclusive of federal and tribal jurisdiction. (However, under VAWA[6] can have concurrent tribal, and Federal if interstate provisions (18 U.S.C. 2261, 2261A, 2262 or 922(g)(8) or (9)) apply.) Under VAWA tribes may opt to exercise some jurisdiction over non-Indians for DV offences
Indian	Non-Indian	State has jurisdiction exclusive of federal government (unless federal government has reassumed jurisdiction under the Tribal Law and order Act) but tribe may exercise concurrent jurisdiction. Federal for certain federal offences including interstate DV.
Indian	Indian	Generally, state has jurisdiction exclusive of federal government (unless federal government has reassumed jurisdiction under Tribal Law and Order Act, or unless specific federal crimes are involved) but tribe may exercise concurrent jurisdiction.
Non-Indian	Victimless	State jurisdiction is exclusive unless federal jurisdiction has been reassumed under Tribal Law and order Act.
Indian	Victimless	There may be concurrent state, tribal, and federal jurisdiction if reassumption under Tribal Law and Order Act. There is no state regulatory jurisdiction.

[6] Violence Against Women Act

Full Faith and Credit

While tribes are recognized as sovereign, they are not "states" for the purposes of the full faith and credit requirements of Article IV of the U.S. Constitution. There is general consensus (but no Supreme Court authority on point) that tribes are not encompassed by the federal full faith and credit statute (28 U.S.C. §1738). There are, however, a number of relevant federal and state provisions that mandate full faith and credit for and between tribal courts:

- Indian Child Welfare Act (25 U.S.C. § 1911 (d))
- Violence Against Women Act (18 U.S.C. § 2265)
- Child Support Enforcement Act (28 U.S.C. 1738 B)
- Uniform Child Custody Jurisdiction and Enforcement Act (Family Code §3404)

Where there is no specific statutory mandate for full faith and credit, the general rule is that tribal court orders are entitled to comity

Effect on Dependency and Delinquency Jurisdiction

Under the jurisdictional regime of PL 280, State courts in California generally have jurisdiction over dependency and delinquency cases involving Indians and Indian children, even if the events occur in Indian country. However, this jurisdiction is affected by the requirements of the Indian Child Welfare Act (ICWA) and the fact that tribe's may also exercise jurisdiction over these matters. Pursuant to ICWA (25 U.S.C. § 1911) even in PL-280 state, tribal jurisdiction is exclusive where a child is already the ward of a tribal court. Further, ICWA recognizes presumptive tribal jurisdiction over cases involving Indian children who are not already wards of a tribal court.

Effect on Jurisdiction in DV cases and ability to enforce protective orders

If events take place in Indian country and either the victim or perpetrator or both are Indian, then tribal court may exercise concurrent jurisdiction with the state court. (Note that there may also be federal jurisdiction over some federally defined crimes). Tribal jurisdiction and remedies subject to limitations under the Indian Civil Rights Act and Major Crimes Act.

Civil state protective or restraining orders may be considered civil/regulatory and therefore be unenforceable in Indian country unless registered with the tribe/tribal court. Some county police departments take position that they have no authority to enforce protective orders in Indian country. Restraining orders issued in a criminal case should be enforced/enforceable on tribal lands.

Few California tribes have tribal courts or tribal police departments.

Laws Governing Federal Jurisdiction in Indian Country

General Crimes Act:

18 U.S.C. § 1152. Laws governing

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Major Crimes Act:

18 U.S.C. § 1153. Offenses committed within Indian country

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

Embezzlement:

18 U.S.C. § 1163. Embezzlement and theft from Indian tribal organizations

Whoever embezzles, steals, knowingly converts to his use or the use of another, willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, goods, assets, or other property belonging to any Indian tribal organization or intrusted to the custody or care of any officer, employee, or agent of an Indian tribal organization; or

Whoever, knowing any such moneys, funds, credits, goods, assets, or other property to have been so embezzled, stolen, converted, misapplied or permitted to be misapplied,

receives, conceals, or retains the same with intent to convert it to his use or the use of another--

Shall be fined under this title, or imprisoned not more than five years, or both; but if the value of such property does not exceed the sum of $1,000, he shall be fined under this title, or imprisoned not more than one year, or both.

As used in this section, the term “Indian tribal organization” means any tribe, band, or community of Indians which is subject to the laws of the United States relating to Indian affairs or any corporation, association, or group which is organized under any of such laws.

Public Law 280

Public Law 280 (Criminal Provision):

18 U.S.C. § 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
aska	l Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended
alifornia	l Indian country within the State
innesota	l Indian country within the State, except the Red Lake Reservation
ebraska	l Indian country within the State
regon	l Indian country within the State, except the Warm Springs Reservation
isconsin	l Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

(d) Notwithstanding subsection (c), at the request of an Indian tribe, and after consultation with and consent by the Attorney General--

(1) sections 1152 and 1153 shall apply in the areas of the Indian country of the Indian tribe; and

(2) jurisdiction over those areas shall be concurrent among the Federal Government, State governments, and, where applicable, tribal governments.

Public Law 280 (Civil Provisions):

28 U.S.C. § 1360. State civil jurisdiction in actions to which Indians are parties

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	*Indian country affected*
Alaska	l Indian country within the State
California	l Indian country within the State
Minnesota	l Indian country within the State, except the Red Lake Reservation
Nebraska	l Indian country within the State
Oregon	l Indian country within the State, except the Warm Springs Reservation
Wisconsin	l Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

Federal Laws Requiring Full Faith and Credit

18 U.S.C. § 2265. Full faith and credit given to protection orders

(a) Full faith and credit.--Any protection order issued that is consistent with subsection (b) of this section by the court of one State, Indian tribe, or territory (the issuing State, Indian tribe, or territory) shall be accorded full faith and credit by the court of another State, Indian tribe, or territory (the enforcing State, Indian tribe, or territory) and enforced by the court and law enforcement personnel of the other State, Indian tribal government or Territory as if it were the order of the enforcing State or tribe.

(b) Protection order.--A protection order issued by a State, tribal, or territorial court is consistent with this subsection if--

(1) such court has jurisdiction over the parties and matter under the law of such State, Indian tribe, or territory; and

(2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.

(c) Cross or counter petition.--A protection order issued by a State, tribal, or territorial court against one who has petitioned, filed a complaint, or otherwise filed a written pleading for protection against abuse by a spouse or intimate partner is not entitled to full faith and credit if--

(1) no cross or counter petition, complaint, or other written pleading was filed seeking such a protection order; or

(2) a cross or counter petition has been filed and the court did not make specific findings that each party was entitled to such an order.

(d) Notification and registration.--

(1) Notification.--A State, Indian tribe, or territory according full faith and credit to an order by a court of another State, Indian tribe, or territory shall not notify or require notification of the party against whom a protection order has been issued that the protection order has been registered or filed in that enforcing State, tribal, or territorial jurisdiction unless requested to do so by the party protected under such order.
(2) No prior registration or filing as prerequisite for enforcement.--Any protection order that is otherwise consistent with this section shall be accorded full faith and credit, notwithstanding failure to comply with any requirement that the order be registered or filed in the enforcing State, tribal, or territorial jurisdiction.

(3) Limits on Internet publication of registration information.--A State, Indian tribe, or territory shall not make available publicly on the Internet any information regarding the registration, filing of a petition for, or issuance of a protection order, restraining order or injunction, restraining order, or injunction in either the issuing or enforcing State, tribal or territorial jurisdiction, if such publication would be likely to publicly reveal the identity or location of the party protected under such order. A State, Indian tribe, or territory may share court-generated and law enforcement-generated information contained in secure, governmental registries for protection order enforcement purposes.

(e) Tribal court jurisdiction.--For purposes of this section, a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.

25 U.S.C. § 1911. Indian tribe jurisdiction over Indian child custody proceedings

(d) 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.

§ 1738B. Full faith and credit for child support orders

(a) General rule.--The appropriate authorities of each State--

(1) shall enforce according to its terms a child support order made consistently with this section by a court of another State; and
(2) shall not seek or make a modification of such an order except in accordance with subsections (e), (f), and (i).

(b) Definitions.--In this section:

“child” means--

(A) a person under 18 years of age; and

(B) a person 18 or more years of age with respect to whom a child support order has been issued pursuant to the laws of a State.

“child's State” means the State in which a child resides.

“child's home State” means the State in which a child lived with a parent or a person acting as parent for at least 6 consecutive months immediately preceding the time of filing of a petition or comparable pleading for support and, if a child is less than 6 months old, the State in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the 6-month period.

“child support” means a payment of money, continuing support, or arrearages or the provision of a benefit (including payment of health insurance, child care, and educational expenses) for the support of a child.

“child support order”--

(A) means a judgment, decree, or order of a court requiring the payment of child support in periodic amounts or in a lump sum; and

(B) includes--

(i) a permanent or temporary order; and

(ii) an initial order or a modification of an order.

“contestant” means--

(A) a person (including a parent) who--

(i) claims a right to receive child support;

(ii) is a party to a proceeding that may result in the issuance of a child support order; or
(iii) is under a child support order; and

(B) a State or political subdivision of a State to which the right to obtain child support has been assigned.

“court” means a court or administrative agency of a State that is authorized by State law to establish the amount of child support payable by a contestant or make a modification of a child support order.

“modification” means a change in a child support order that affects the amount, scope, or duration of the order and modifies, replaces, supersedes, or otherwise is made subsequent to the child support order.

“State” means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian country (as defined in section 1151 of title 18).

(c) Requirements of child support orders.--A child support order made by a court of a State is made consistently with this section if--

(1) a court that makes the order, pursuant to the laws of the State in which the court is located and subsections (e), (f), and (g)--

(A) has subject matter jurisdiction to hear the matter and enter such an order; and

(B) has personal jurisdiction over the contestants; and

(2) reasonable notice and opportunity to be heard is given to the contestants.

(d) Continuing jurisdiction.--A court of a State that has made a child support order consistently with this section has continuing, exclusive jurisdiction over the order if the State is the child's State or the residence of any individual contestant unless the court of another State, acting in accordance with subsections (e) and (f), has made a modification of the order.

(e) Authority to modify orders.--A court of a State may modify a child support order issued by a court of another State if--

(1) the court has jurisdiction to make such a child support order pursuant to subsection (i); and

(2)(A) the court of the other State no longer has continuing, exclusive jurisdiction of the child support order because that State no longer is the child's State or the residence of any individual contestant; or

(B) each individual contestant has filed written consent with the State of continuing, exclusive jurisdiction for a court of another State to modify the order and assume continuing, exclusive jurisdiction over the order.

(f) Recognition of child support orders.--If 1 or more child support orders have been issued with regard to an obligor and a child, a court shall apply the following rules in determining which order to recognize for purposes of continuing, exclusive jurisdiction and enforcement:

(1) If only 1 court has issued a child support order, the order of that court must be recognized.

(2) If 2 or more courts have issued child support orders for the same obligor and child, and only 1 of the courts would have continuing, exclusive jurisdiction under this section, the order of that court must be recognized.

(3) If 2 or more courts have issued child support orders for the same obligor and child, and more than 1 of the courts would have continuing, exclusive jurisdiction under this section, an order issued by a court in the current home State of the child must be recognized, but if an order has not been issued in the current home State of the child, the order most recently issued must be recognized.

(4) If 2 or more courts have issued child support orders for the same obligor and child, and none of the courts would have continuing, exclusive jurisdiction under this section, a court having jurisdiction over the parties shall issue a child support order, which must be recognized.

(5) The court that has issued an order recognized under this subsection is the court having continuing, exclusive jurisdiction under subsection (d).

(g) Enforcement of modified orders.--A court of a State that no longer has continuing, exclusive jurisdiction of a child support order may enforce the order with respect to nonmodifiable obligations and unsatisfied obligations that accrued before the date on which a modification of the order is made under subsections (e) and (f).

(h) Choice of law.--

(1) In general.--In a proceeding to establish, modify, or enforce a child support order, the forum State's law shall apply except as provided in paragraphs (2) and (3).

(2) Law of State of issuance of order.--In interpreting a child support order including the duration of current payments and other obligations of support, a court shall apply the law of the State of the court that issued the order.

(3) Period of limitation.--In an action to enforce arrears under a child support order, a court shall apply the statute of limitation of the forum State or the State of the court that issued the order, whichever statute provides the longer period of limitation.

(i) Registration for modification.--If there is no individual contestant or child residing in the issuing State, the party or support enforcement agency seeking to modify, or to modify and enforce, a child support order issued in another State shall register that order in a State with jurisdiction over the nonmovant for the purpose of modification.

California State Laws Concerning Recognition and Enforcement of Tribal Court Orders

Under the Uniform Child Custody Jurisdiction and Enforcement Act:

Family Code § 3404. Native American children

(a) A child custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) is not subject to this part to the extent that it is governed by the Indian Child Welfare Act.

(b) A court of this state shall treat a tribe as if it were a state of the United States for the purpose of applying this chapter and Chapter 2 (commencing with Section 3421).

(c) A child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this part must be recognized and enforced under Chapter 3 (commencing with Section 3441).

Under the Uniform Interstate Family Support Act:

Family Code § 4901

The following definitions apply to this chapter:

(s) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term "state" also includes both of the following:

(1) An Indian tribe

Under the Uniform Interstate Enforcement of Domestic Violence Protection Orders:

Family Code § 6401
In this part:

(1) "Foreign protection order" means a protection order issued by a tribunal of another state.

(2) "Issuing state" means the state whose tribunal issues a protection order.
(3) "Mutual foreign protection order" means a foreign protection order that includes provisions in favor of both the protected individual seeking enforcement of the order and the respondent.

(4) "Protected individual" means an individual protected by a protection order.

(5) “Protection order” means an injunction or other order, issued by a tribunal under the domestic violence, family violence, or antistalking laws of the issuing state, to prevent an individual from engaging in violent or threatening acts against, harassment of, contact or communication with, or physical proximity to, another individual.

(6) “Respondent” means the individual against whom enforcement of a protection order is sought.

(7) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or any branch of the United States military, that has jurisdiction to issue protection orders.

(8) “Tribunal” means a court, agency, or other entity authorized by law to issue or modify a protection order.

Under the Foreign Country Money Judgments Act:

Code of Civil Procedure § 1714. Definitions

As used in this chapter:

(a) “Foreign country” means a government other than any of the following:

(1) The United States.

(2) A state, district, commonwealth, territory, or insular possession of the United States.

(3) Any other government with regard to which the decision in this state as to whether to recognize a judgment of that government's courts is initially subject to determination under the Full Faith and Credit Clause of the United States Constitution.

(b) “Foreign-country judgment” means a judgment of a court of a foreign country. “Foreign-country judgment” includes a judgment by any Indian tribe recognized by the government of the United States.

Under the Interstate and International Depositions and Discovery Act

Code of Civil Procedure § 2029.200.

In this article:

(a) “Foreign jurisdiction” means either of the following:

(1) A state other than this state.

(2) A foreign nation.

(b) “Foreign subpoena” means a subpoena issued under authority of a court of record of a foreign jurisdiction.

(c) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(d) “State” means a state of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

(e) “Subpoena” means a document, however denominated, issued under authority of a court of record requiring a person to do any of the following:

(1) Attend and give testimony at a deposition.

(2) Produce and permit inspection, copying, testing, or sampling of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person.

(3) Permit inspection of premises under the control of the person.

Indian Civil Rights Act

25 U.S.C. § 1301. Definitions

For purposes of this subchapter, the term--

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;

(3) "Indian court" means any Indian tribal court or court of Indian offense; and

(4) "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.

25 U.S.C. § 1302. Constitutional rights

(a) In general

No Indian tribe in exercising powers of self-government shall--

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b));

(7)(A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;

(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of $5,000, or both;

(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or

(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than $5,000

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who--

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

(c) Rights of defendants

In a criminal proceeding in which an Indian tribe, in exercising powers of self-

government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall--

(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

(3) require that the judge presiding over the criminal proceeding--

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States;

(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and

(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

(d) Sentences

In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant--

(1) to serve the sentence--

(A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;
(B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c) of the Tribal Law and Order Act of 2010;

(C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or

(D) in an alternative rehabilitation center of an Indian tribe; or

(2) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

(e) Definition of offense

In this section, the term “offense” means a violation of a criminal law.

(f) Effect of section

Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.

25 U.S.C. § 1303. Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

Legislation Affecting Jurisdiction Over Domestic Violence Cases

25 U.S.C. § 1304. Tribal jurisdiction over crimes of domestic violence

(a) Definitions

In this section:

(1) Dating violence

The term "dating violence" means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

(2) Domestic violence

The term "domestic violence" means violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family- violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.

(3) Indian country

The term "Indian country" has the meaning given the term in section 1151 of Title 18.

(4) Participating tribe

The term "participating tribe" means an Indian tribe that elects to exercise special domestic violence criminal jurisdiction over the Indian country of that Indian tribe.

(5) Protection order

The term "protection order"--

(A) means any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and

(B) includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a pendent lite order in another proceeding,

if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.

(6) Special domestic violence criminal jurisdiction

The term "special domestic violence criminal jurisdiction" means the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.

(7) Spouse or intimate partner

The term "spouse or intimate partner" has the meaning given the term in section 2266 of Title 18.

(b) Nature of the criminal jurisdiction

(1) In general

Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 1301 and 1303 of this title, the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.

(2) Concurrent jurisdiction

The exercise of special domestic violence criminal jurisdiction by a participating tribe shall be concurrent with the jurisdiction of the United States, of a State, or of both.

(3) Applicability

Nothing in this section--

(A) creates or eliminates any Federal or State criminal jurisdiction over Indian country; or

(B) affects the authority of the United States or any State government that has been delegated authority by the United States to investigate and prosecute a criminal violation in Indian country.

(4) Exceptions

(A) Victim and defendant are both non-Indians

(i) In general

A participating tribe may not exercise special domestic violence criminal jurisdiction over an alleged offense if neither the defendant nor the alleged victim is an Indian.

(ii) Definition of victim

In this subparagraph and with respect to a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction based on a violation of a protection order, the term "victim" means a person specifically protected by a protection order that the defendant allegedly violated.

(B) Defendant lacks ties to the Indian tribe

A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant--

(i) resides in the Indian country of the participating tribe;

(ii) is employed in the Indian country of the participating tribe; or

(iii) is a spouse, intimate partner, or dating partner of--

(I) a member of the participating tribe; or

(II) an Indian who resides in the Indian country of the participating tribe.

(c) Criminal conduct

A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories:

(1) Domestic violence and dating violence

An act of domestic violence or dating violence that occurs in the Indian country of the participating tribe.

(2) Violations of protection orders

An act that--

(A) occurs in the Indian country of the participating tribe; and

(B) violates the portion of a protection order that--

(i) prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;

(ii) was issued against the defendant;

(iii) is enforceable by the participating tribe; and

(iv) is consistent with section 2265(b) of Title 18.

(d) Rights of defendants

In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant--

(1) all applicable rights under this Act;

(2) if a term of imprisonment of any length may be imposed, all rights described in section 1302(c) of this title;

(3) the right to a trial by an impartial jury that is drawn from sources that--

(A) reflect a fair cross section of the community; and

(B) do not systematically exclude any distinctive group in the community, including non-Indians; and

(4) all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.

(e) Petitions to stay detention

(1) In general

A person who has filed a petition for a writ of habeas corpus in a court of the United States under section 1303 of this title may petition that court to stay further detention of that person by the participating tribe.

(2) Grant of stay

A court shall grant a stay described in paragraph (1) if the court--

(A) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and

(B) after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.

(3) Notice

An Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges under this subsection and under section 1303 of this title.

(f) Grants to tribal governments

The Attorney General may award grants to the governments of Indian tribes (or to authorized designees of those governments)--

(1) to strengthen tribal criminal justice systems to assist Indian tribes in exercising special domestic violence criminal jurisdiction, including--

(A) law enforcement (including the capacity of law enforcement or court personnel to enter information into and obtain information from national crime information databases);

(B) prosecution;

(C) trial and appellate courts;

(D) probation systems;

(E) detention and correctional facilities;

(F) alternative rehabilitation centers;

(G) culturally appropriate services and assistance for victims and their families; and

(H) criminal codes and rules of criminal procedure, appellate procedure, and evidence;

(2) to provide indigent criminal defendants with the effective assistance of licensed defense counsel, at no cost to the defendant, in criminal proceedings in which a participating tribe prosecutes a crime of domestic violence or dating violence or a criminal violation of a protection order;

(3) to ensure that, in criminal proceedings in which a participating tribe exercises special domestic violence criminal jurisdiction, jurors are summoned, selected, and instructed in a manner consistent with all applicable requirements; and

(4) to accord victims of domestic violence, dating violence, and violations of protection orders rights that are similar to the rights of a crime victim described in section 3771(a) of Title 18, consistent with tribal law and custom.

(g) Supplement, not supplant

Amounts made available under this section shall supplement and not supplant any other Federal, State, tribal, or local government amounts made available to carry out activities described in this section.

(h) Authorization of appropriations

There are authorized to be appropriated $5,000,000 for each of fiscal years 2014 through 2018 to carry out subsection (f) and to provide training, technical assistance, data collection, and evaluation of the criminal justice systems of participating tribes.

18 U.S.C. § 2261. Interstate domestic violence

(a) Offenses.--
(1) Travel or conduct of offender.--A person who travels in interstate or foreign commerce or enters or leaves Indian country or is present within the special maritime and territorial jurisdiction of the United States with the intent to kill, injure, harass, or intimidate a spouse, intimate partner, or dating partner, and who, in the course of or as a result of such travel or presence, commits or attempts to commit a crime of violence against that spouse, intimate partner, or dating partner, shall be punished as provided in subsection (b).

(2) Causing travel of victim.--A person who causes a spouse, intimate partner, or dating partner to travel in interstate or foreign commerce or to enter or leave Indian country by force, coercion, duress, or fraud, and who, in the course of, as a result of, or to facilitate such conduct or travel, commits or attempts to commit a crime of violence against that spouse, intimate partner, or dating partner, shall be punished as provided in subsection (b).

(b) Penalties.--A person who violates this section or section 2261A shall be fined under this title, imprisoned--

(1) for life or any term of years, if death of the victim results;

(2) for not more than 20 years if permanent disfigurement or life threatening bodily injury to the victim results;

(3) for not more than 10 years, if serious bodily injury to the victim results or if the offender uses a dangerous weapon during the offense;

(4) as provided for the applicable conduct under chapter 109A if the offense would constitute an offense under chapter 109A (without regard to whether the offense was committed in the special maritime and territorial jurisdiction of the United States or in a Federal prison); and

(5) for not more than 5 years, in any other case,

(6) Whoever commits the crime of stalking in violation of a temporary or permanent civil or criminal injunction, restraining order, no-contact order, or other order described in section 2266 of title 18, United States Code, shall be punished by imprisonment for not less than 1 year.

or both fined and imprisoned.

18 U.S.C. § 2261A. Stalking

Whoever--

(1) travels in interstate or foreign commerce or is present within the special maritime and territorial jurisdiction of the United States, or enters or leaves Indian country, with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, and in the course of, or as a result of, such travel or presence engages in conduct that--

(A) places that person in reasonable fear of the death of, or serious bodily injury to--

(i) that person;

(ii) an immediate family member (as defined in section 115) of that person; or

(iii) a spouse or intimate partner of that person; or

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of subparagraph (A); or

(2) with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that--

(A) places that person in reasonable fear of the death of or serious bodily injury to a person described in clause (i), (ii), or (iii) of paragraph (1)(A); or

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A),

shall be punished as provided in section 2261(b) of this title.

18 U.S.C. § 2262. Interstate violation of protection order

(a) Offenses.--

(1) Travel or conduct of offender.--A person who travels in interstate or foreign commerce, or enters or leaves Indian country or is present within the special maritime and territorial jurisdiction of the United States, with the intent to engage in conduct that violates the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person, or that would violate such a portion of a protection order in the jurisdiction in which the order was issued, and subsequently engages in such conduct, shall be punished as provided in subsection (b).

(2) Causing travel of victim.--A person who causes another person to travel in interstate or foreign commerce or to enter or leave Indian country by force, coercion, duress, or fraud, and in the course of, as a result of, or to facilitate such conduct or travel engages in conduct that violates the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person, or that would violate such a portion of a protection order in the jurisdiction in which the order was issued, shall be punished as provided in subsection (b).

(b) Penalties.--A person who violates this section shall be fined under this title, imprisoned--

(1) for life or any term of years, if death of the victim results;

(2) for not more than 20 years if permanent disfigurement or life threatening bodily injury to the victim results;

(3) for not more than 10 years, if serious bodily injury to the victim results or if the offender uses a dangerous weapon during the offense;

(4) as provided for the applicable conduct under chapter 109A if the offense would constitute an offense under chapter 109A (without regard to whether the offense was committed in the special maritime and territorial jurisdiction of the United States or in a Federal prison); and

(5) for not more than 5 years, in any other case,

or both fined and imprisoned.

18 U.S.C. § 922. Unlawful acts

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(g) It shall be unlawful for any person—

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(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATE POLICY ADVOCACY & REFORM CENTER

NICWA
National Indian Child Welfare Association

Improving the Well-being of American Indian and Alaska Native Children and Families through State-Level Efforts to Improve Indian Child Welfare Act Compliance

David E. Simmons
National Indian Child Welfare Association
September 2014

Introduction

The well-being of American Indian and Alaska Native (AI/AN) children and their families is directly connected to the relationship they have with their culture, extended families, and tribal communities. Federal and state child welfare policies and practices have sometimes not well understood or supported these relationships by not recognizing the unique qualities of AI/AN culture and the benefits of nurturing these relationships. The Indian Child Welfare Act (ICWA) was a response to the destructive practices in public and private child welfare systems that broke apart these bonds in many tribal families' lives. Such practices distanced families from the protective factors inherent in tribal communities and culture that can prevent and treat child abuse and neglect concerns.

Since the passage of ICWA in 1978, there has been increasing movement to enhance state policy to support ICWA and address several of the challenges to AI/AN children's well-being. The efforts that have proven most successful have been initiated by tribal governments and AI/AN Indian organizations in collaboration with state governments. This paper will provide background on, and describe, the basic requirements of ICWA, provide an overview of tribal child welfare and court systems, discuss disproportionality and its relationship to trends in ICWA compliance, highlight promising practices in state policy and practice that support ICWA, and underscore the necessity of working with tribal advocates on state child welfare policy change.

The Indian Child Welfare Act

Federal Indian policy, beginning in the late 19th century and continuing into the 1960s, was designed to assimilate AI/AN people through various mechanisms, including removal from their homelands and isolation from their tribal culture. These policies gave rise to the involuntary placement of AI/AN children in military-style boarding schools that emphasized mainstream values and beliefs and punished children for practicing their tribal culture and speaking their language (Crofoot, 2005; Cross, Earle, & Simmons, 2000). AI/AN children placed in these government-funded boarding schools were rarely allowed to return home to visit their families and were taught to reject their tribal identity. The use of these boarding schools affected several generations of tribal families, essentially denying them the opportunity to parent.

Another devastating initiative followed the boarding school era: the Indian Adoption Project, which established a partnership between federal and private agencies that adopted out almost 400 AI/AN children between 1958 and 1967. The adoptions took AI/AN children from 16 western states to White families in the Midwest and Eastern United States (Kreisher, 2002). These efforts were hailed as a victory for civil rights and equality by leaders of the Indian Adoption Project, but tribal leaders and other tribal advocates challenged this view and condemned the policy which led to untold suffering of these children and their tribal families. In 2001, Child Welfare League of America Executive Director Shay Bilchik made a public apology for their role in the Indian Adoption Project in which he said, "No matter how well-intentioned and how squarely in the mainstream this was at the time, it was wrong; it was hurtful; and it reflected a kind of bias that surfaces feelings of shame, as we look back with the 20/20 vision of hindsight." (Indian Child Welfare Act Law Center, n.d.).

In the late 1960s and into the 1970s, tribal advocates began to see a pattern of biased and abusive public and private child welfare practice that was impacting tribal communities across the nation. This spawned investigations into these practices that later led to the passage of the ICWA. The Association on American Indian Affairs (AAIA) was at the forefront of these investigations that resulted in reports documenting the large numbers of AI/AN children being removed from their homes by state and private adoption agencies. AAIA submitted its findings, which estimated that approximately 25-25 percent of all AI/AN children had been removed from their homes and placed in foster care or adoptive home (H.R. Rep. No. 95-1386, 1978). In some states the removal numbers were even higher.

The overwhelming majority of these removals (approximately 85 percent of foster care and 90 percent of adoptions) resulted in AI/AN children being placed in non-Indian homes, often far from their extended family and tribal communities (H.R. Rep. No. 95-1386, 1978). The reasons for these removals were often not related to the threat of abuse or neglect, but rather to a lack of understanding of tribal child-rearing and cultural practices, as well as bias of those involved in making key decisions in the child welfare process. The AI/AN children's tribes were typically not notified or allowed to participate in most of these cases, leaving these children and families at the mercy of public and private child welfare systems that were most often not informed or supportive of tribal culture. The crisis was so severe that the future existence of many tribal communities was threatened.

Congress responded to the crisis by enacting ICWA in 1978, which established federal requirements for states and private agencies regarding the handling of child welfare matters involving AI/AN children and families. In addition, ICWA clarified the role of tribal governments in state and private child welfare matters, including the authority of tribes to intervene in state court proceedings and operate their own community-based child

welfare programs. ICWA's protections for AI/AN children and families are based upon their political status as citizens of a tribal government and not a racial classification (Native American Rights Fund, 2011).

Key Indian Child Welfare Act Requirements

Sections 1903(1) and (4): ICWA applies to "Indian children" (a term as used and defined by ICWA that refers to AI/AN children) who are members of a federally recognized tribe or are eligible for membership and have a birth parent who is a member of a federally recognized tribe when the child is involved in a child custody proceeding.

Section 1911(a): Clarifies that tribes have jurisdiction over child welfare matters on their tribal lands and that a tribe or parent of an Indian child may petition a state court to transfer jurisdiction of the proceedings to a tribal court.

Section 1911(c): Clarifies that an Indian child's tribe or Indian custodian has the right to intervene in state court proceedings regarding the foster care or adoptive placement of an Indian child or termination of parental rights of an Indian child's birth parents (dependency-based guardianships are also included).

Section 1912(a): Requires notice to the Indian child's tribe and birth parents or Indian custodian of foster care placement or termination of parental rights proceedings.

Section 1911(d): Requires states and federal entities give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe related to child custody proceedings as defined by ICWA.

Section 1912(c): Allows a tribe to access all reports or other documents filed with a state court regarding an Indian child that is involved in a state child custody proceeding.

Section 1912(d): Requires active efforts to prevent removal and rehabilitate parents so they can be reunified with their children after a removal. The state court must determine that active efforts have been provided and have proven unsuccessful before a foster care placement or termination of parental rights is ordered. Active efforts are considered a higher standard than reasonable efforts.

Sections 1912(e) and (f): Contains evidentiary standards to place an Indian child in foster care or terminate parental rights (clear and convincing, and beyond a reasonable doubt, respectively).

Sections 1912(e) and (f): Requires a qualified expert witness to testify in proceedings to order a foster care placement for an Indian child or terminate parental rights of an Indian child's parents.

Section 1913: Sets out requirements regarding parental consents for voluntary placements and termination of parental rights that include consent be recorded before a court of competent jurisdiction (foster care or adoption).

Section 1914: Allows federal court review of state actions that violate certain requirements of ICWA and invalidate those actions if they are proven to be out of compliance with ICWA.

Section 1915: Provides placement preferences for foster care and adoptive placements of Indian children (applies to involuntary and voluntary placements).

Section 1931(b): Recognizes tribal foster care licensing standards as equivalent to state licensing standards for the purposes of approving placement and meeting other federal requirements.

Section 1917: Allows Indian adult adoptees to petition the court where their adoption was finalized to access information to establish their tribal affiliation and protect any rights flowing from their tribal relationship.

Section 1919: Authorizes tribes and states to enter into agreements for the care and custody of Indian children. These intergovernmental agreements often address child welfare procedures, access to state and federal funding, and principles of collaboration between these governments.

While implementation has been uneven in many areas, the results of ICWA's requirements have been to:

1) Encourage more intensive examination of the efforts to prevent removals of AI/AN children and rehabilitate their parents,
2) Improve the identification of tribal and relative families who can serve as placement resources for AI/AN children,
3) Increase access to culturally appropriate services,
4) Clarify roles between states and tribes in child welfare matters,
5) Increase sharing of funding and other resources between states and tribes, and
6) Stimulate the development of state policy to improve the effectiveness of services and supports for AI/AN children and families.

Many of ICWA's requirements are considered to be the "gold standard" in child welfare practice and they mirror similar requirements in other federal child welfare laws (*Adoptive Couple v. Baby Girl).* These other federal laws, which are authorized under Titles IV-B and IV-E of the Social Security Act, encourage relative placements, early intervention, collaborative approaches, cross-jurisdictional cooperation, and placing children within the least restrictive settings that are in close proximity to their communities and families.

Tribal Child Welfare and Court Systems

Historically, tribes exercised sovereignty in full, including addressing threats to children's safety and well-being. Natural helping systems utilizing extended family and clan members, and traditions for regulating civil matters such as child custody, acted to protect AI/AN children and help support families (Cross, Earle, & Simmons, 2000). Tribal elders acted as judges. Traditional chiefs governed as the protectors of family well-being. Tribal clan and kinship systems functioned as social service providers. Tribes had no words in their languages for "orphans" because children in need were the responsibility of everyone in the tribe (Cross, 1995). As Europeans migrated to North America and established new governmental structures, laws, and practices, the capacities and resources that allowed full exercise of tribal sovereignty and related governmental functions were diminished by forced dependence and destruction of traditional governmental structures. However, tribal sovereign authority and the responsibility for the protection of tribal children did not diminish as tribes began to adapt to the changing world around them.

Tribal nation sovereignty— the right to self-govern—is recognized in the U.S. Constitution, treaties between the United States and tribal nations, federal law, U.S. Supreme Court decisions, and presidential executive orders (National Congress of American Indians, n.d.). The United States also has a federal trust relationship with tribal governments. This trust relationship evolved from treaties signed between the United States and tribal nations that includes a responsibility for the U.S. government to protect tribal sovereignty and the rights to land, resources, assets, and treaty rights.

The trust responsibility obligates the federal government to provide resources for tribal governments to support the health and well-being of their tribal members, which includes development and operation of basic governmental services like child welfare. In return for these federal resources and other guarantees, tribal nations ceded millions of acres of land that now constitute what we know as the United States. While the amount of federal resources and funding currently available for tribal governments to exercise their sovereignty in child welfare are insufficient, tribal governments continue to use their sovereignty to help protect and support their children and families throughout the United States wherever they may live.

Today, there are 566 federally recognized tribes (also referred to as Indian nations, bands, pueblos, Native villages, and communities) in the United States that have tribal lands in 34 states (U.S. Department of Interior, 2014). Some states like California and Alaska have over 100 tribes within their borders, while others like Connecticut or South Carolina may only have one or two. Regardless of the number of tribes in each state, all 50 states have AI/AN people living within their boundaries.

All tribal governments offer some level of child welfare services and many also operate tribal court systems. The continuum of services varies greatly between tribes, with some offering a full array of child welfare services that are on par with, or exceed, what many state jurisdictions provide, while others may only perform case monitoring functions on cases that are in state court. As an example, many different entities can be involved in the investigation of child abuse or neglect involving AI/AN children either alone or in combination with other entities. Tribes are involved in 65 percent of investigations, states 42 percent, counties 21 percent, Bureau of Indian Affairs 19 percent, and a consortium of area tribes 9 percent (Earle, 2000). Tribes alone without the assistance of any other entities are involved in only 23 percent of child abuse investigations (Earle, 2000). The U.S. Federal Bureau of Investigation may also be involved in criminal child abuse and neglect investigations that involve AI/AN children on tribal lands.

Even when tribes are not able to provide services like child protection, in-home services, or parenting classes, many tribes participate with states in co-case managing state child welfare cases that involve AI/AN children and families. This can include helping state child welfare agencies identify culturally appropriate services, participating in case reviews and court hearings, locating qualified expert witnesses as required under ICWA, identifying potential placement families, accessing tribal resources and benefits for children and families, and guiding transition planning for children going back home or being moved to another permanent home. Such services and consultation are often critical to ensuring compliance with ICWA and creating opportunities to achieve better outcomes for AI/AN children and their families.

Funding is the primary determinant of how broad an array of child welfare services a tribe may provide. As an example, of the almost $13.5 billion in federal child welfare funding distributed to states, territories of the United States, and tribes each year, tribal governments receive approximately 1 percent even though their needs and population numbers would indicate larger allocations (American Humane Association, n.d.; Cooper, DeVooght, Fletcher, and Vaughn, 2012; U.S. Department of Interior, 2012). Currently, AI/AN people comprise 1.7 percent of the U.S. population (U.S. Census Bureau, 2011) and have high rates of several key risk factors for child abuse and neglect that are well above the national average (poverty, number of single parent families, and substance abuse). In addition, economic conditions in most tribal communities do not allow for the development of a sustainable or sufficient tax base to support basic government services and infrastructure.

Unemployment and poverty rates in most tribal communities are well above the national average. Austin's analysis of Ruggles, et al.'s 2013 look at American Community Survey data (as cited in Austin, 2013) indicates unemployment rates nationally for AI/AN adults are 14.6 percent, compared to the White unemployment rate of 7.7 percent, and only 49–50 percent of AI/AN adults 16 and older living on or near tribal lands are in the workforce (U.S. Department of Interior, 2013). Poverty rates for the AI/AN populations are 27.8 percent, almost twice the national average of 14.9 percent, and are even higher on many Indian reservations (U.S. Census Bureau, 2012). These conditions contribute to an overall lack of resources to support basic child welfare services for many tribal communities.

Tribes have always had mechanisms for handling disputes and domestic issues that arise within their communities. Historically, these mechanisms have been informal, unwritten, and based upon holistic values and way of life (Melton, 1995). Today, with the exception of a few tribes that still exclusively operate their tribal justice systems traditionally, most tribal courts utilize written procedures and codes and operate their court system in a manner that resembles their state and federal counterparts (Jones, 2000). However, even courts that use less traditional methods of tribal court operation still incorporate their culture and traditional practices. Of the almost 300 tribes that operate a court system today, all of them have codes and/or procedures that are culturally based and unique to their way of life (Tribal Law and Policy Institute, n.d.).

Tribal courts may have many different forms. Some, like a few of the pueblo tribes in New Mexico, operate exclusively in the traditional manner as they always have. Others may use their tribal council or another body appointed by tribal leadership to adjudicate child welfare matters (Vincenti, 1995). The most common model is a hybrid model that uses elements of the American court system while incorporating tribal customs and traditions. Some examples include alternative dispute forums, like the Peacemaker courts operated by the Navajo Nation, or culturally defined customary adoption that helps children find a permanent home without terminating parental rights while maintaining connections with tribal and extended family relationships (Zion, 1998).

While there is some variance in how tribal courts may be structured, they generally perform many of the same functions that non-tribal courts do. They have hearings for emergency removals, substantiation of abuse or neglect allegations, permanency hearings, and finalize guardianships and adoptions. Several have guardian ad litem or court appointed special advocates programs as well as other judicial positions that you will find in state juvenile court systems.

Tribal court jurisdiction operates within a complex set of laws and court decisions. While many tribes in the lower 48 states have exclusive jurisdiction over child welfare proceedings on their lands, there are areas where states may play a role in investigating, managing cases, and adjudicating child welfare proceedings involving AI/AN children and families living on tribal lands. One such law that changed previous jurisdictional schemes in some parts of Indian Country was Public Law 280 (PL 280). (18 U.S.C. § 1162(2012), 28 U.S.C. § 1360 (2012), 25 U.S.C. §§ 1321-1326).

The practical effect of the law was to limit tribal exclusive jurisdiction over civil causes of action, including those common to child welfare proceedings, by recognizing state concurrent jurisdiction, but stopping short of replacing tribal exclusive jurisdiction on tribal lands. The negative effect of PL 280 has been the slow down of tribal child welfare program and court system development, as policymakers assume that states and counties are adequately addressing child welfare concerns (Jones, Tilden, & Gaines-Stoner, 2008). It has also subjected large numbers of AI/AN families to state or county child welfare systems that have often not well understood tribal child-rearing or tribal culture, and use interventions that are not well suited to helping AI/AN families rehabilitate successfully.

Disproportionality and Critical Issues in Indian Child Welfare Act Compliance

While the federal protections of ICWA have provided benefits for thousands of AI/AN children and families in public and private child welfare systems, there continue to be significant challenges in fully implementing

the law. Even with ICWA requirements such as active efforts designed to reduce the flow of AI/AN children into foster care, AI/AN children continue to be over-represented in state foster care systems (Summers, Woods, & Donovan, 2013).

To understand why disproportionate placement of AI/AN children occurs, it is important to understand how decision making in child welfare impacts placement rates. Reports of abuse or neglect involving AI/AN children are consistent or proportionate with their population numbers. As one moves further into the child welfare system decision-making process, disproportionality increases for AI/AN children and families (Annie E. Casey Foundation, 2007).

Rates at which reports of abuse or neglect involving AI/AN children are investigated, substantiated, and removed from their families and placed in foster care are well beyond their population numbers. One study that looked at systemic bias in the child welfare system found AI/AN families were two times more times likely to be investigated, two times more likely have reported abuse and neglect substantiated, and four times more likely to have their children removed and placed in foster care than their White counterparts (Annie E. Casey Foundation, 2007). This systemic bias is a primary factor in understanding why AI/AN children are disproportionately represented in many state foster care systems.

Congress enacted ICWA because of the disproportionate placement of AI/AN children in public and private child welfare systems. The law was designed to provide protections against systemic bias and reduce the flow of AI/AN children into these systems. This is accomplished through a number of federal requirements that seek to prevent removal whenever possible, ensure that AI/AN families receive culturally appropriate services and parents have opportunities to be rehabilitated, and ensure that tribes are available as resources throughout the child welfare process and nurture and support child and family connections to their culture, extended family, and tribe. Unfortunately, the implementation of the law is uneven in many jurisdictions. Regular oversight that could prevent noncompliance and inform efforts to correct poor performance is not available at the federal level.

The most critical issues of noncompliance involve (1) lack of regular oversight of ICWA implementation, (2) AI/AN children not being identified early in child welfare proceedings, (3) tribes not receiving early and proper notification of child welfare proceedings involving their member children and families, (4) lack of placement homes that reflect the preferences defined within ICWA, (5) limited training and support for state and private agency staff to develop knowledge and skills in implementing ICWA, and (6) inadequate resources for tribal child welfare agencies to participate and support their state and private agency counterparts.

ICWA is the only major federal child welfare law that does not have oversight assigned to a specific federal agency and a regular evaluation of implementation, either process or outcome related. Reports of noncompliance go uninvestigated by any federal agency, no implementation data is regularly collected and analyzed, and performance improvement plans are not required for agencies that are out of compliance even when the noncompliance is documented. ICWA compliance is most often a case-by-case procedure dependent upon the actions and goodwill of legal parties involved, with the greatest penalty available being invalidation of specific ICWA proceedings. This case-by-case approach does not effectively support system reform and relies on anecdotal information that is not generalizable or helpful in understanding larger trends in compliance. A few states have developed their own ICWA compliance systems, which have helped

promote improved compliance and services to AI/AN children, but they are limited in their ability to inform federal policymakers of national trends and help them develop federal responses.

While federal child welfare data requirements mandate the collection of racial classification for children and families that state agencies serve, the data is self-identified and does not track by political classification or tribal membership. For ICWA protections to apply, a child must either be a member of a federally recognized tribe or be eligible for membership and have a parent that is a tribal member. This is a political classification and only the child's tribe can make this determination regarding membership status or citizenship. In many cases, state and private agency workers do not ask about tribal membership status or are not proficient in knowing how to secure tribal information so that a child's tribe can be properly noticed and have an opportunity to assess the child's membership status.

Notice of child welfare proceedings and placement to the child's tribe is a critical element of ensuring ICWA compliance. Under ICWA, tribes have the authority to participate in child welfare proceedings involving their member children and families. Their role in these proceedings is important in helping state and private agencies identify resources and culturally appropriate services for the family, as well as educating agency and court personnel of the requirements of ICWA. Early notice that contains complete and accurate information to help tribes establish membership and participate in a meaningful fashion in the child welfare process is critical. As evidence of the importance of tribal involvement in state child welfare proceedings involving AI/AN children and families, a 2005 Government Accountability Office (GAO) study regarding the implementation of ICWA found that states depended upon tribes to help them successfully implement ICWA (GAO, 2005). When tribes are not notified or are notified late in proceedings, or when the information provided is incomplete, the result is often a higher risk for delays and changes to placements that could have been avoided with early and proper notice.

While it is acknowledged that there is a general lack of sufficient numbers of placement homes for all children in the child welfare system, the number of placement homes for AI/AN children that are compliant with the placement preferences of ICWA is equally low, if not lower, than those for other populations. ICWA requires that AI/AN children placed in foster care, guardianship, or adoption are placed according to the placement preferences. The foster care and guardianship preferences are (1) an extended family member of the child, (2) a tribally licensed or approved foster home of the child's tribe, (3) an AI/AN foster home licensed or approved by a non-Indian licensing authority (e.g., a state agency), and (4) an institution for children approved by a tribe or operated by an Indian organization. The adoption placement preferences are (1) an extended family member of the child, (2) a member of the child's tribe, and (3) another AI/AN family. States depend heavily upon tribes to identify and recruit AI/AN families in individual cases, but more proactive and culturally based recruitment needs to occur if the numbers of AI/AN placement families are going to increase overall. Furthermore, the process for licensing AI/AN foster homes can often be intimidating and offers limited support for families that are willing to consider becoming a licensed placement provider.

In today's child welfare system, the complexity of the work and competing demands can be difficult to manage. Skills-based training and user-friendly tools are the resources that public and private agency staff need to feel competent in their work with the diverse pool of children and families they will come into contact with. Working successfully with AI/AN children and families requires these same type of resources in addition to skills such as how to successfully engage tribes and knowledge of the unique legal and services frameworks that apply to AI/AN children.

However, many public and private agency professionals and judicial personnel do not have access to comprehensive trainings on the legal requirements of ICWA or the practice skills used to implement the requirements. Often the trainings that are available to public and private agency staff are provided by tribal or urban Indian organization child welfare staff who are carrying active caseloads. Many times these trainings are optional so staff may not participate. Judicial staff also need access to ICWA training and resource materials. Juvenile court judges may be very familiar with state laws, but not as comfortable with federal law like ICWA. Opportunities for state court judges to learn more about tribal-state court improvement projects can assist them in their efforts to make the courtroom more responsive to ICWA requirements and the unique needs of AI/AN children and families.

Like other child welfare work, it takes strong partnerships to ensure that AI/AN children and families receive the protections provided by the law and support to ensure good outcomes. The functioning of tribal and state relationships is a primary determinant of how well ICWA is implemented in any given jurisdiction. Where tribal-state relations are positive and functioning well, tribes are viewed as possessing important resources needed to achieve ICWA compliance and positive outcomes for AI/AN children and families. The 2005 GAO ICWA study found that decisions that influence the placement of AI/AN children can be influenced by the level of cooperation between tribes and states (GAO, 2005). States depend upon tribes to help them effectively implement ICWA. Yet, the level of resources that tribes have to participate in these partnerships affects their ability to be resources to states as well as tribal member children and families. The GAO study found that lack of resources was the primary reason that tribes were not able to assist states with ICWA cases (GAO, 2005).

Promising Practices in ICWA Implementation

ICWA has been a catalyst for many very positive and successful new policies and practices in child welfare with AI/AN children and families. These promising practices can be found in a number of states and local county jurisdictions, and are the product of partnerships between tribes, states, and counties, typically at the initiation of tribal governments. The examples described below include state law, intergovernmental agreements, tribal-state forums, consultation policies, court procedures, and state agency policies or guidance. In some cases, the examples are unique to their jurisdiction, while others have been replicated in several states. This is not an exhaustive list and readers should inquire as to whether there are similar resource materials in the states they practice in.

State Law and Policy

- State law defining government-to-government relationship with tribes and consultation process: Oregon Revised Statutes § 182.164 and 182.166

- Government-to-government agreement between a state and tribes establishing the principles and roles for implementing ICWA at the state level: Washington tribal-state exclusive and concurrent jurisdiction agreements, along with local area agreements

- State law requiring state courts that are holding a child welfare hearing inquire as whether the child that is the subject of the hearing is an Indian child under the definition of ICWA. If the court knows or has reason to believe that the child is an Indian child, they will proceed according to ICWA's requirements

until such time the court knows that the child is *not* an Indian child under ICWA: Oregon Revised Statutes 419B 419B.878)

- State law definition of what information should be in a tribal notice of child welfare proceedings: Iowa Code §§ 232B.5(7)

- State law requiring the district attorney or individuals facilitating voluntary placements of AI/AN children to notify the child's tribe and birth parents or Indian custodians of voluntary proceedings: Oklahoma Statute § 40.4

- State law recognizing culturally based permanent placement options of tribes, such as tribal customary adoption: California courts website description of the legislation and related materials

- Bench handbook for state courts providing a substantive and procedural overview of ICWA: California *Bench Handbook: The Indian Child Welfare Act (revised 2013)*

- Guidelines for state agencies, courts, private service providers, and tribes on what constitutes active efforts under ICWA: Oregon *Active Efforts, Principles and Expectations*

- State guidance on what constitutes a qualified expert witness under ICWA: *Qualified Expert Witness: Wisconsin Indian Child Welfare Act Implementing Guidelines 2013*

State Practices and Improvements

- State-tribal reconciliation process to improve intergovernmental relationships and promote development of effective policy: Maine Wabanaki-State Truth and Reconciliation Commission

- State guide to ICWA by New York Office of Children and Family Services: "A Guide to Compliance with the Indian Child Welfare Act"

- State local and regional community advisory bodies that assist state child welfare agency staff who are working on ICWA cases; they help staff case plans, and identify services and other resources

- ICWA checklist for state court judges by National Council of Juvenile and Family Court Judges

- Mandatory training of state social workers on ICWA done jointly with tribal social workers: Washington State Social Work Academy Solution-Based ICWA Training and Curriculum

- State-tribal Indian child welfare forums where representatives of each group meet regularly to discuss child welfare policy and practice issues. These forums can provide a framework for tribal-state consultation required under federal law, such as the Title IV-B consultation requirement regarding ICWA implementation (several states have established these forums including Oregon, Montana, Utah, Oklahoma, Washington, and North Dakota)

- State-tribal court improvement forums where representatives of each court system meet regularly to discuss legal, inter-jurisdictional cooperation, and court procedural issues (several states have established these forums, including California, Michigan, Wisconsin, New York, and New Mexico)

- Pass through of federal or state social services funding to tribes, typically through contract or intergovernmental agreement. Examples include: state general revenue, Title IV-E Foster Care and Adoption Assistance, Social Services Block Grant, Community Mental Health Services Block Grant, and Medicaid (several state pass through funds from one or more of these funding sources, including Arizona, Oregon, Washington, Idaho, Alaska, and Minnesota)

- State evaluation of ICWA implementation performed in partnership with tribes. Data is continuously collected and analyzed to identify trends and areas for improvement: 2009 Washington State Indian Child Welfare Case Review example

- State performance-based contracting requirements for use with private providers that require ICWA compliance, service provision in a culturally competent manner, and training of staff on these skill areas: Washington Department of Social and Health Services state performance-based contracting

Additional Resources

- National Indian Child Welfare Association Online ICWA Training for use with state, private, and tribal child welfare agency staff

- ICWA checklist for state court judges from the National Council of Juvenile and Family Court Judges

- ICWA guide from Native American Rights Fund, "A Practical Guide to the Indian Child Welfare Act"

- State court ICWA monitoring tool (QUICWA)

- Listing of state Indian child welfare laws and policy by the National Conference for State Legislatures

- Reconciliation in child welfare resources and initiative developed in partnership with First Nations Child and Family Caring Society, National Indian Child Welfare Association, Child Welfare League of America, and First Nations Repatriation Institute

Working with Tribal Representatives as Partners in Change

The history of failed federal policy towards AI/AN people and tribes depended upon government support for the philosophy and implementation of colonization rather than self-determination and intergovernmental cooperation. The results were ruinous for tribal communities with the vestiges of those policies still with us today several generations later. Disproportionality and disparate treatment of AI/AN children and families in the child welfare system can only continue when we allow it to continue. Tribal-state partnerships are breaking down the barriers to a more equitable and effective child welfare system for AI/AN children and families. States are increasingly seeing the resources that tribes can provide in this effort and pursuing intergovernmental cooperation at new levels. State leaders who are willing to take the time to listen to their tribal counterparts, and increase their understanding of the needs of tribal communities and the appropriate methods for addressing these needs, will find new opportunities that can benefit both state and tribal governments, as well as the children and families involved in the child welfare system. At a recent state, county, and tribal coordination meeting in Portland, Oregon, two American Indian former foster youth summed up why we need to continue our efforts to partner. "Being in foster care is hard. We talk about foster care as a system, but it has real people in it like us. Don't give up. It is important what you are doing for us." (McConnell and McConnell, 2014).

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The First Focus State Policy Advocacy and Reform Center (SPARC), an initiative funded by the Annie E. Casey Foundation, Jim Casey Youth Opportunities Initiative, and Walter S. Johnson Foundations, aims to improve outcomes for children and families involved with the child welfare system by building the capacity of and connections between state child welfare advocates. You can visit us online at www.childwelfaresparc.org or on Twitter at @ChildWelfareHub.

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FEDERAL REGULATIONS

Frequently Asked Questions
Bureau of Indian Affairs
Final Rule: Indian Child Welfare Act (ICWA) Proceedings

General

What is this rule?

This rule implements the Indian Child Welfare Act (ICWA), which Congress enacted in 1978.

What does this rule do?

This rule incorporates child-welfare best practices and promotes uniformity in State ICWA proceedings—no matter the child welfare worker, judge, or state handling the case—while still taking into account the unique circumstances of each child.

What is ICWA?

ICWA is a statute passed by Congress to address the agency policies and practices that resulted in the wholesale separation of Indian children from their families.

- State and private agencies were removing as many as 25 - 35% of Indian children from their families and placing many of these children in non-Indian foster and adoptive homes.
- Congress determined that cultural ignorance and biases within the child welfare system were significant causes of this problem.
- Congress recognized that it is in the best interest of the child to maintain Tribal connections and that children are vital to Tribes' continued existence, and enacted ICWA to "protect the best interests of Indian children and to promote the stability and security of Indian Tribes and families."

What does ICWA do?

ICWA governs State child-custody proceedings in multiple ways, including: (1) by recognizing Tribal jurisdiction over decisions for their Indian children; (2) by establishing minimum Federal standards for the removal of Indian children from their families; (3) by establishing preferences for placement of Indian children with extended family or other Tribal families; and (4) by instituting protections to ensure that birth parents' voluntary relinquishments of their children are truly voluntary. (See "Statute's Basics" later in this list for additional information).

Why is this rule needed now?

While ICWA has been in place since 1978, compliance with ICWA has been inconsistent across, and even within, States. As a result, many of the issues that ICWA was intended to address continue to exist today:

- Native American children are still disproportionately more likely to be removed from their homes and communities than other children. Indian families continue to be broken up by the removal of their children by non-Tribal public and private agencies. Nationwide, based on 2013 data, Native American children are represented in State foster care at a rate 2.5 times their presence in the general population.[1] In some States,

[1] *National Council of Juvenile and Family Court Judges, Disproportionality Rates for Children of Color in Foster Care tbl. 1 (June 2015).*

Native American children are represented in State foster-care systems at rates as high as 14.8 times their presence in the general population of that State.[2]

- Differing interpretations of ICWA provisions by individual States and State courts have created substantial variation in how this Federal law is applied. This final rule promotes the uniform application of an important Federal law to protect the rights of Indian children, their parents, and their Tribes, regardless of the child welfare worker, judge, or State involved.

How will this rule help Indian children?

The rule includes protections for Indian children that reflect the "gold standard" in child welfare practices. The rule promotes stability for the child by requiring early inquiry as to whether ICWA applies, by minimizing unnecessary separation of children and their parents, and by maximizing early placements of the child with extended family and other preferred placements. The rule also incorporates the best practice in child welfare of favoring extended family placements, including placement within a child's broader kinship community, and placement with siblings (regardless of whether they are also "Indian children").

How will this rule help Indian families faced with involuntary removal of their children?

The rule will help Indian families by ensuring that they receive prompt notice of involuntary proceedings to allow them to participate in protection of their rights. The rule ensures that agencies take active efforts to prevent the breakup of the family. The rule also helps to minimize unnecessary separation of children and families and ensures that emergency placements without the full suite of protections in ICWA are limited in duration.

How will this rule help Indian families who wish to voluntarily put their children up for foster care or adoption?

This rule ensures that parents who choose to put their Indian children up for foster care or adoption do so of their own free will, without threat of removal by a State agency. The rule requires parents' consent to be in writing before a court with certain contents and requires the court to explain the terms and legal consequences of such consent to the parents and certify that the parents understand.

How will this rule help Tribes?

This rule will help Tribal government agencies by ensuring that they receive prompt notice of involuntary proceedings to allow them to exercise their jurisdiction and other rights and help identify preferred placements. The rule also encourages courts to allow alternative methods of participation in State child-custody proceedings, in recognition that Tribes may not have the capability to appear in person at multiple proceedings across the country. Tribes, like other governments, have a sovereign interest in the welfare of their citizens, and in particular, their children.

How will this rule help State courts and State child-welfare agencies?

This rule provides more certainty for State courts and State child-welfare agencies regarding how to comply with ICWA. The rule addresses everything from the initial determination of whether the Tribe or State has jurisdiction over the proceeding, to what recordkeeping is required after closing an ICWA proceeding. The rule will

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[2] *Id.*

help State courts and agencies to identify whether ICWA applies, and if so, which provisions of ICWA apply to the type of proceeding at hand, helps clarify Federal interpretations of ICWA terms and requirements, and establishes parameters for exercising discretion in the application of ICWA's standards.

How will this rule help foster and adoptive parents?

This rule will help foster and adoptive parents who are non-preferred placements by minimizing late discoveries that ICWA applies. The rule will help foster and adoptive parents who are preferred placements by promoting their early identification as preferred placements.

Applicability

Who is subject to ICWA?

ICWA applies to any State child-custody proceeding involving an "Indian child," based on the child's political affiliation with the Tribe. A child is an "Indian child" only if:

(1) The child is himself or herself a member of a federally recognized Tribe; or

(2) The child's parent is a member of a federally recognized Tribe and the child is eligible for membership.

What if I don't want ICWA to apply to me?

ICWA applies only if the child or parent is a citizen of a federally recognized Tribe. Parents may choose to not apply for Tribal citizenship for themselves or their child, or may renounce their Tribal citizenship. If a parent of the child is not a Tribal citizen, and the child is not a Tribal citizen, ICWA does not apply.

Does ICWA allow Tribes to "claim" children?

No. ICWA applies only to children who are citizens of a federally recognized Tribe, or who are eligible for citizenship and the child's parent is a citizen of the Tribe.

Rule Specifics

Where will the rule be located?

The rule will be located at 25 CFR 23. The bulk of the rule will be in a new subpart I within 25 CFR 23.

What, specifically, does this rule do?

Provisions in the new rule:

- Clarify ICWA's applicability.
- Require State courts to ask, in every child custody proceeding, whether the Act applies.
- Establish limits on the duration of emergency placements before full ICWA rights are afforded to the child, parents or Indian custodians, and Tribes.
- Require notice to the parents and Tribe of involuntary proceedings.

- Clarify the procedures for transfer to a Tribal court and establish parameters of what is "good cause" to deny transfer.
- Clarify who may serve as a qualified expert witness.
- Clarify when placement preferences apply and what placement preferences apply in foster care, preadoptive, and adoptive placements, and establish parameters of what is "good cause" to depart from the placement preferences.
- Clarify requirements for voluntary proceedings.
- Confirm adult adoptees' rights to information about their Tribal affiliation.
- Identify records States and BIA must maintain regarding implementation of ICWA.
- Highlight the statutory right to invalidate an action taken in violation of ICWA.

How does the rule clarify the applicability of ICWA?

The rule clarifies that ICWA applies to any child custody proceeding involving an "Indian child," as that term is defined by the Act. Generally, ICWA applies to any Indian child custody proceeding, any emergency proceeding involving an Indian child, and any proceeding involving status offenses resulting in the need for out-of-home placement of the child.

How does the rule address the so-called "existing Indian family (EIF)" exception?

The Bureau of Indian Affairs (BIA) agrees with the large number of courts that rejected the EIF exception as incompatible with the plain language of ICWA. The final rule clarifies that ICWA applies whenever an "Indian child" is involved in a child-custody proceeding and codifies that State courts may not rely on certain listed factors (the factors a minority of courts continue to use in the EIF exception) as the basis for excepting a case from ICWA's applicability.

How does the rule emphasize the importance of early inquiry?

The rule requires State courts to 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 rule also lists what factors indicate a "reason to know" a child is an "Indian child" as that term is defined by the Act.

What are the rule's requirements for emergency proceedings?

The rule reinforces that emergency removals and emergency placements should occur only in limited circumstances (when there is imminent physical damage or harm to the child). The rule does not further define "imminent physical damage or harm," as that statutory phrase is already clear and understandable as written. The BIA understands the phrase to reflect the endangerment of the child's health, safety and welfare, not just bodily injury or death.

The rule also provides that emergency placements should be of a limited duration. Under the rule, when an emergency removal/placement has occurred, the emergency removal/placement may not last more than 30 days unless the court makes a determination that:

(1) Restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm; and

(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" subject to ICWA's notice and other requirements.

What are the rule's requirements for notice?

The rule incorporates the statute's requirements for notice in involuntary proceedings, requiring the party seeking placement to provide notice to the Tribe and parent or Indian custodian. The rule affords some flexibility by allowing notice by certified mail with return receipt requested, in lieu of registered mail with return receipt requested. The rule also specifies the information that should be provided as part of such notice.

What are the rule's requirements for transferring child-custody proceedings to Tribal court?

The rule reinforces that, for proceedings involving children domiciled outside an Indian reservation (where the Tribe's jurisdiction and State's jurisdiction are concurrent), the State court must transfer the proceeding to the Tribe upon the request of the Tribe or parent/Indian custodian, unless a parent objects to the transfer, the Tribal court declines transfer, or there is "good cause" to deny the transfer. The rule establishes parameters on what may be considered "good cause" to deny transfer, by establishing that the State court must not consider:

- Whether the foster-care or termination of parental rights proceeding is at an advanced stage if the parent, Indian custodian, or Indian child's Tribe did not receive notice of the proceeding until an advanced stage;
- Whether there have been prior proceedings involving the child for which no petition to transfer was filed;
- Whether transfer could result in a change in the placement of the child;
- The Indian child's cultural connections with the Tribe or reservation; or
- Socio-economic conditions or any negative perception of Tribal or BIA social services or judicial systems.

What are the rule's requirements for qualified expert witnesses?

The rule reinforces that the State court's order for foster care placement or termination of parental rights must be based upon evidence supported by the testimony of one or more qualified expert witnesses. The rule establishes that the qualified expert witness should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe and 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.

Does the rule include the proposed rule's list of qualified expert witnesses?

No. The final rule does not include the proposed rule's list of qualified expert witnesses; rather, it focuses on the fact that a qualified expert witness must be qualified to testify as to whether continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. In addition, it emphasizes that the qualified expert witness should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe.

Does the qualified expert witness need to have knowledge of Tribal culture?

The final rule provides that the qualified expert witness should have knowledge of the prevailing social and cultural standards of the Indian child's Tribe by being qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. This helps ensure that relevant information about Tribal social and cultural standards is provided to the courts, and can inform the determination about whether the continued custody of the child by the parent is likely to result in serious emotional of physical damage to the child.

How do I find a qualified expert witness with knowledge of the Tribe's social and cultural standards?

The final rule provides that the Indian child's Tribe may designate a person as having knowledge of the prevailing social and cultural standards of the Tribe and that 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.

Are there any other limits on who can serve as a qualified expert witness?

Yes, the final rule prohibits the social worker regularly assigned to the Indian child from serving as a qualified expert witness in child-custody proceedings concerning the child.

What are the rule's requirements for placement preferences?

In any foster care or preadoptive placement of an Indian child, where the Indian child's Tribe has not established a different order of preference, preference must be given to placement of the child with:

- A member of the child's extended family;
- A foster home approved or specified by the child's Tribe;
- An Indian foster home; or
- An institution for children approved by a Tribe or operated by an Indian organization which has a program to meet the child's needs.

In adoptive placements of Indian children, where the Indian child's Tribe has not established a different order of preference, preference must be given to the placement with:

- A member of the Indian child's extended family;
- Other members of the Indian child's Tribe; or
- Other Indian families.

Does the rule allow State courts to depart from the placement preferences if a child has bonded with a non-preferred placement?

The rule establishes what may constitute good cause to depart from the placement preferences, and explicitly prohibits courts from relying solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA. The child is best served by identifying, as early as possible, whether ICWA applies, and seeking out preferred placements.

What if no preferred placements are available?

If no suitable preferred placements are available, then a State court may find good cause to depart from the placement preferences, but only if the court determines that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located.

How does the rule clarify ICWA's applicability to voluntary proceedings?

The rule clarifies ICWA does not apply to voluntary placements in which the parent or Indian custodian may have the child returned upon verbal request without any formalities or contingencies. For all other voluntary placements, the rule requires a determination of whether the child is an "Indian child" and, if so, requires compliance with the placement preferences and requirements regarding informed consent.

Does the rule require notifying Tribes and extended family of voluntary adoptions?

No. The final rule does not include the proposed rule's provisions that would have required agencies to notify a birth parent's extended family of a pending adoption. The final rule does require taking all reasonable steps to verify whether the child is an Indian child, if there is a reason to know that he or she is an Indian child. 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.

How does the rule protect a birth parent's privacy in voluntary proceedings?

The final rule includes several protections to ensure confidentiality. Among these are the following:

- With regard to inquiry and verification of the Indian child's status and identifying preferred placements, the final rule provides that, where a consenting parent requests anonymity, both the State court and Tribe must keep relevant documents and information confidential. *See* FR § 23.107(d).
- With regard to a parent or Indian custodian's consent to a placement or termination of parental rights, the final rule provides that, where confidentiality is requested or indicated, the parent or Indian custodian does not need to execute the consent in a session of court that is open to the public. *See* FR § 23.125(d).

Does this rule affect a parent's right to choose who adopts their child in voluntary adoptions?

No. Parents may choose adoptive parents as long as they attest that they have reviewed the placement options, if any, that comply with ICWA's order of preference.

Effective Date

When is this rule effective?

The final rule is effective 180 days after its publication in the Federal Register. None of the provisions of the rule affects proceedings that are initiated prior to the effective date.

If a child custody proceeding is already underway on the effective date of this rule, does the rule apply to the proceeding?

The rule will apply to all proceedings that begin on or after the date the rule becomes effective.

BIA Expertise

What role does ICWA provide for the Bureau of Indian Affairs (BIA)?

ICWA authorizes the Secretary of the Interior to promulgate implementing regulations. The Secretary has delegated this authority to BIA.

What expertise does BIA have in child welfare issues?

BIA has significant expertise in ICWA and child welfare issues and administers ICWA in many ways (see list below). BIA's Office of Indian Services, through its Division of Human Services employs a team of child protection social workers and employs an ICWA Policy Social Worker who serves as the central BIA expert and liaison on ICWA matters. Tribal and Department caseworkers are the first responders for child and family services on reservations in Indian country—this requires social-service workers to frequently engage families through face-to-face contacts, assess the safety of children, monitor case progress, and ensure that essential services and support are provided to the child and her family. This experience is critical toward understanding the areas where ICWA is or is not working at the State level, as well as the necessary standards to address ongoing problems.

The Department has also consulted extensively with the Children's Bureau of the Administration for Children and Families, Department of Health and Human Services, and the Department of Justice to produce a final rule that reflects the expertise of all three agencies.

How does BIA currently administer ICWA?

BIA administers ICWA in many ways. For example, BIA:

- Collects information from Tribes on their ICWA activities for the Indian Child Welfare Quarterly and Annual Report,
- Ensures that ICWA processes and resources are in place to facilitate implementation of ICWA,
- Administers the notice process under Section 1912 of the Act,
- Publishes a nationwide contact list of Tribally designated ICWA agents for service of notice,
- Administers ICWA grants,
- Maintains a central file of adoption records under ICWA,
- Provides technical assistance to State social workers and courts on ICWA and Indian child welfare in general, including but not limited to assisting in locating expert witnesses and identifying language interpreters,
- Is a significant Federal funding source for Indian child-welfare programs run by Tribes.

Implementation

Will BIA be offering any training to State courts and agencies?

BIA plans to offer both on-line training modules and in-person training at regional locations for State courts and agencies on the rule.

How does this rule affect ICWA funding to Tribes?

This rule has no effect on ICWA funding to Tribes or other entities.

Statute's Basics

Tribal Jurisdiction Over Decisions for Their Indian Children

ICWA recognizes that Tribes have exclusive jurisdiction over child-custody proceedings in certain instances: specifically, where the Indian child is domiciled or resides on the reservation, or the child is a ward of Tribal court. In all other cases, the Tribe's jurisdiction over the Indian child custody proceeding is concurrent with that of the State, and ICWA provides that, if the Tribe or parent/Indian custodian requests transfer of the proceeding to Tribal court, the State court *must* transfer the proceeding, in the absence of good cause to the contrary unless a parent objects to transfer, the Tribal court declines transfer, or there is "good cause" to deny the transfer.

Minimum Federal Standards for Removal of Indian Children

ICWA's minimum Federal standards embody the best practices in child welfare of allowing families to remain together or be reunified. Specifically, ICWA:

- Limits emergency removals and emergency placements in use and in time;
- Requires notice to be given to Tribes and parents or Indian custodians of any involuntary foster care, preadoptive, or adoptive placement or termination of parental rights;
- Provides time for the Tribes and parents or Indian custodians to prepare for involuntary proceedings;
- Requires qualified expert witnesses to testify prior to foster care or adoptive placements in involuntary Indian child custody proceedings; and
- Establishes a clear-and-convincing evidentiary standard for involuntary foster care placement and a beyond-a-reasonable-doubt evidentiary standard for involuntary termination of parental rights.

Preferences for Placement of Indian Children

ICWA encourages kinship and community placements by requiring that Indian children be placed in preferred foster homes and adoptive homes (i.e., in accordance with placement preferences), in the absence of good cause to the contrary.

Protections in Voluntary Foster Care and Adoptions

ICWA imposes safeguards to ensure a parent's consent to removal and placement is truly voluntary.

Further Information

Who can I contact for more information about this rule?

For questions regarding the regulation and its development, please contact Elizabeth K. Appel, Director, Office of Regulatory Affairs & Collaborative Action – Indian Affairs, Elizabeth.appel@bia.gov, (202) 273-4680.

For questions regarding implementation of this regulation, please contact Debra Burton, Indian Child Welfare Specialist, Office of Indian Services, Bureau of Indian Affairs, Debra.burton@bia.gov, (202) 513-7610.

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Part II

Department of the Interior

Bureau of Indian Affairs

25 CFR Part 23
Indian Child Welfare Act Proceedings; Final Rule

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 23

[K00103 12/13 A3A10; 134D0102DR–DS5A300000–DR.5A311.IA000113]

RIN 1076–AF25

Indian Child Welfare Act Proceedings

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule.

SUMMARY: This final rule adds a new subpart to the Department of the Interior's (Department) regulations implementing the Indian Child Welfare Act (ICWA), to improve ICWA implementation. The final rule addresses requirements for State courts in ensuring implementation of ICWA in Indian child-welfare proceedings and requirements for States to maintain records under ICWA.

DATES: This rule is effective on December 12, 2016.

FOR FURTHER INFORMATION CONTACT: Ms. Elizabeth Appel, Office of Regulatory Affairs & Collaborative Action—Indian Affairs, U.S. Department of the Interior, 1849 C Street NW., MS 3642, Washington, DC 20240, (202) 273–4680; *elizabeth.appel@bia.gov*.

SUPPLEMENTARY INFORMATION:

Note: This preamble uses the prefix ''FR § '' to denote regulatory sections in this final rule, and ''PR § '' to denote regulatory sections in the proposed rule published March 20, 2015 at 80 FR 14,480.

I. Executive Summary

A. Introduction

This final rule promotes the uniform application of Federal law designed to protect Indian children, their parents, and Indian Tribes. In conjunction with this final rule, the Solicitor is issuing an M Opinion addressing the implementation of the Indian Child Welfare Act by legislative rule. *See* M–37037. Congress enacted the Indian Child Welfare Act (ICWA), 25 U.S.C. 1901 *et seq.,* in 1978 to address an ''Indian child welfare crisis [ ] of massive proportions'': an estimated 25 to 35 percent of all Indian children had been separated from their families and placed in adoptive homes, foster care, or institutions. H.R. Rep. No. 95–1386, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7531. Although the crisis flowed from multiple causes, Congress found that nontribal public and private agencies had played a significant role, and that State agencies and courts had often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. 25 U.S.C. 1901(4)–(5). To address this failure, ICWA establishes minimum Federal standards for the removal of Indian children from their families and the placement of these children in foster or adoptive homes, and confirms Tribal jurisdiction over child-custody proceedings involving Indian children. 25 U.S.C. 1902.

Since its passage in 1978, ICWA has provided important rights and protections for Indian families, and has helped stem the widespread removal of Indian children from their families and Tribes. State legislatures, courts, and agencies have sought to interpret and implement this Federal law, and many States should be applauded for their affirmative efforts and support of the policies animating ICWA.

However, the Department has found that implementation and interpretation of the Act has been inconsistent across States and sometimes can vary greatly even within a State. This has led to significant variation in applying ICWA's statutory terms and protections. This variation means that an Indian child and her parents in one State can receive different rights and protections under Federal law than an Indian child and her parents in another State. This disparate application of ICWA based on where the Indian child resides creates significant gaps in ICWA protections and is contrary to the uniform minimum Federal standards intended by Congress.

The need for consistent minimum Federal standards to protect Indian children, families, and Tribes still exists today. The special relationship between the United States and the Indian Tribes and their members upon which Congress based the statute continues in full force, as does the United States' direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian Tribe. 25 U.S.C. 1901, 1901(2). Native American children, however, are still disproportionately more likely to be removed from their homes and communities than other children. *See, e.g.,* Attorney General's Advisory Committee on American Indian and Alaska Native Children Exposed to Violence, *Ending Violence So Children Can Thrive* 87 (Nov. 2014); National Council of Juvenile and Family Court Judges, *Disproportionality Rates for Children of Color in Foster Care, Fiscal Year 2013* (June 2015). In addition, some State court interpretations of ICWA have essentially voided Federal protections for groups of Indian children to whom ICWA clearly applies. And commenters provided numerous anecdotal accounts where Indian children were unnecessarily removed from their families and placed in non-Indian settings; where the rights of Indian children, their parents, or their Tribes were not protected; or where significant delays occurred in Indian child-custody proceedings due to disputes or uncertainty about the interpretation of the Federal law.

B. Overview of Final Rule

The final rule updates definitions and notice provisions in the existing rule and adds a new subpart I to 25 CFR part 23 to address ICWA implementation by State courts. It promotes nationwide uniformity and provides clarity to the minimum Federal standards established by the statute. In many instances, the standards in this final rule reflect State interpretations and best practices, as reflected in State court decisions, State laws implementing ICWA, or State guidance documents. The rule provisions also reflect comments from organizations and individuals that serve children and families (including, in particular, Indian children) and have substantial expertise in child-welfare practices.

The final rule promotes compliance with ICWA from the earliest stages of a child-welfare proceeding. Early compliance promotes the maintenance of Indian families, and the reunification of Indian children with their families whenever possible, and reduces the need for disruption in placements. Timely notification of an Indian child's Tribe also ensures that Tribal government agencies have meaningful opportunities to provide assistance and resources to the child and family. And early implementation of ICWA's requirements conserves judicial resources by reducing the need for delays, duplication, and appeals.

In particular, the final rule addresses the following issues:

- *Applicability.* The final rule clarifies when ICWA applies, while making clear that there is no exception to applicability based on certain factors used by a minority of courts in defining and applying the so-called ''existing Indian family,'' or EIF, exception.
- *Initial Inquiry.* The final rule clarifies the steps involved in conducting a thorough inquiry at the beginning of child-custody proceedings as to whether the child is an ''Indian child'' subject to the Act.
- *Emergency proceedings.* Recognizing that emergency removal and placements are sometimes required to protect an Indian child's safety and welfare, the final rule clarifies the distinction between the requirements for emergency proceedings and other child-custody proceedings involving Indian children and includes provisions that help to ensure that emergency removal and placements are as short as possible, and that, when necessary, proceedings subject to the full suite of ICWA protections are promptly initiated.
- *Notice.* The final rule describes uniform requirements for prompt notice to parents and Tribes in involuntary proceedings to facilitate compliance with statutory requirements.
- *Transfer.* The final rule clarifies the requirement that a State court determine whether the State or Tribe has jurisdiction and, where jurisdiction is concurrent, establishes standards to guide the determination whether good cause exists to deny transfer (including factors that cannot properly be considered) and addresses transfer of proceedings to Tribal court.
- *Qualified expert witnesses.* The final rule provides interpretation of the term ''qualified expert witness.''
- *Placement preferences.* The final rule clarifies when and what placement preferences apply in foster care, pre-adoptive, and adoptive placements, provides presumptive standards for what may constitute good cause to depart from the placement preferences, and prohibits courts from considering

certain factors as the basis for departure from placement preferences.

• *Voluntary proceedings.* The final rule clarifies certain aspects of ICWA's applicability to voluntary proceedings, including addressing the need to determine whether a child is an ''Indian child'' in voluntary proceedings and specifying the requirements for obtaining consent.

• *Information, recordkeeping, and other rights.* The final rule addresses the rights of adult adoptees to information and sets out what records States and the Secretary must maintain.

The Department carefully considered the comments on the proposed rule and made changes responsive to those comments. The reasons for the changes are described in the section-by-section analysis below. In particular, while the proposed rule would have been directed to both State courts and agencies, the Department has focused the final rule on the standards to be applied in State-court proceedings. Most ICWA provisions address what standards State courts must apply before they take actions such as exercising jurisdiction over an Indian child, ordering the removal of an Indian child from her parent, or ordering the placement of the Indian child in an adoptive home. The final rule follows ICWA in this regard. Further, State courts are familiar with applying Federal law to the cases before them. Several ICWA provisions do apply, either directly or indirectly, to State and private agencies, *see, e.g.,* 25 U.S.C. 1915(c); *id.* 1922; *see also id.* 1912(a). Nothing in this rule alters these obligations. And agencies need to be alert to the standards identified in the final rule, since these will determine what a court will require with respect to issues like notice to parents and Tribes (FR § 23.111), emergency proceedings (FR § 23.113), active efforts (FR § 23.120), and placement preferences (FR § 23.129–132).

The Department is cognizant that child-custody matters address some of the most fundamental elements of human life—children, familial ties, identity, and community. They often involve circumstances unique to the parties before the court and may require difficult and sometimes heart-wrenching decisions. The Department is also fully aware of the paramount importance of Indian children to their immediate and extended families, their communities, and their Tribes. In the final rule, the Department carefully balanced the need for more uniformity in the application of Federal law with the legitimate need for State courts to exercise discretion over how to apply the law to each case, while keeping in mind that Congress enacted ICWA in part to address a concern that State courts were exercising their discretion inappropriately, to the detriment of Indian children, parents, and Tribes. In some cases, the Department determined that particular standards or practices are better suited to guidelines; the Department anticipates issuing updated guidelines prior to the effective date of this rule (180 days from issuance). These considerations are discussed further in the section-by-section analysis below.

II. Background

A. Background Regarding Passage of ICWA

Congress enacted ICWA in 1978 to address the policies and practices that resulted in the ''wholesale separation of Indian children from their families.'' *See* H.R. Rep. No. 95–1386, at 9. After several years of investigation, Congress had found that an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies. 25 U.S.C. 1901(4). The congressional investigation, which resulted in hundreds of pages of legislative testimony compiled over the course of four years of hearings, deliberation, and debate, revealed ''the wholesale separation of Indian children from their families.'' [1] H.R. Rep. No. 95–1386, at 9. The empirical and anecdotal evidence showed that Indian children were separated from their families at significantly higher rates than non-Indian children. In some States, between 25 and 35 percent of Indian children were living in foster care, adoptive care, or institutions. *Id.* Indian children removed from their homes were most often placed in non-Indian foster care and adoptive homes. AIPRC Report at 78–87. These separations contributed to a number of problems, including the erosion of a generation of Indians from Tribal communities, loss of Indian traditions and culture, and long-term emotional effects on Indian children caused by loss of their Indian identity. *See* 1974 Senate Hearing at 1–2, 45–51 (statements of Sen. James Abourezk, Chairman, Subcomm. on Indian Affairs and Dr. Joseph Westermeyer, Dep't of Psychiatry, University of Minn.).

Congress found that removal of children and unnecessary termination of parental rights were utilized to separate Indian children from their Indian communities. The four leading factors contributing to the high rates of Indian child removal were a lack of culturally competent State child-welfare standards for assessing the fitness of Indian families; systematic due-process violations against both Indian children and their parents during child-custody procedures; economic incentives favoring removal of Indian children from their families and communities; and social conditions in Indian country. H.R. Rep. No. 95–1386, at 10–12.

Congress also found that many of these problems arose from State actions, *i.e.,* that the States, exercising their recognized jurisdiction over Indian child-custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. 25 U.S.C. 1901(5). The standards used by State and private child-welfare agencies to assess Indian parental fitness promoted unrealistic non-Indian socioeconomic norms and failed to account for legitimate cultural differences in Indian families. Time and again, ''social workers, ignorant of Indian cultural values and social norms, ma[d]e decisions that [we]re wholly inappropriate in the context of Indian family life and so they frequently discover[ed] neglect or abandonment where none exist[ed].'' H.R. Rep. No. 95–1386, at 10. For example, Indian parents might leave their children in the care of extended-family members, sometimes for long periods of time. Social workers untutored in the ways of Indian family life assumed leaving children in the care of anyone outside the nuclear family amounted to neglect and grounds for terminating parental rights. Yet, the House Report noted, this is an accepted practice for certain Tribes. *Id.*

[1] *See Problems that American Indian Families Face in Raising Their Children and How These Problems Are Affected by Federal Action or Inaction: Hearing Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs,* 93rd Cong. (1974) (hereinafter, ''1974 Senate Hearing''); Task Force Four: Federal, State, and Tribal Jurisdiction, American Indian Policy Review Commission Task Force Four, *Report on Federal, State, and Tribal Jurisdiction* (1976) (hereinafter ''AIPRC Report''); 123 Cong. Rec. 21042–44 (June 27, 1977); *To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs,* 95th Cong. (1977) (hereinafter ''1977 Senate Hearing''); S. Rep. No. 95–597 (1977); 123 Cong. Rec. 37223–26 (Nov. 4, 1977); *To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, To Prevent the Breakup of Indian Families, and for Other Purposes: Hearing on S. 1214 Before the Subcomm. On Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs,* 95th Cong. 29 (1978) (hereinafter, ''1978 House Hearing''); H.R. Rep. No. 95–1386 (1978); 124 Cong. Rec. H38101–12 (1978).

Non-Indian socioeconomic values that State agencies and judges applied in the child-welfare context similarly were found to not account for the difference in family structure and child-rearing practice in Indian communities. *Id.* Layered together with cultural bias, the result, the House Report concluded, was unequal and incongruent application of child-welfare standards for Indian families. *Id.* For example, parental alcohol abuse was one of the most frequently advanced reasons for removing Indian children from their parents; however, in areas where Indians and non-Indians had similar rates of problem drinking, alcohol abuse was rarely used as grounds to remove children from non-Indian parents. *Id.*

Congress heard testimony that removing Indian children from their families had become a regular, encouraged practice. Congress came to understand that ''agencies established to place children have an incentive to find children to place.'' *Id.* at 11. Indian leaders alleged that federally subsidized foster care homes encouraged non-Indians to take in Indian children to supplement their incomes with foster care payments, and that some non-Indian families sought to foster Indian children to gain access to the child's Federal trust account. *See id.; See also* 1974 Senate Hearing at 118. While economic incentives encouraged the removal of Indian children, the economic conditions in Indian country prevented Tribes from providing their own foster-care facilities and certified adoptive parents. Poverty and substandard housing were prolific on reservations, and obtaining State foster-care licenses required a standard of living that was often out of reach in Indian communities. Otherwise loving and supportive Indian families were accordingly prevented from becoming foster parents, which promoted the placement of Indian children in non-Indian homes away from their Tribes. *See* H.R. Rep. No. 95–1386, at 11.

In addition, State procedures for removing Indian children from their natural homes commonly violated due process. Social workers sometimes obtained ''voluntary'' parental-rights waivers to gain access to Indian children using coercive and deceitful measures. 1974 Senate Hearing at 95. Sometimes Indian parents with little education, reading comprehension, and understanding of English signed ''voluntary'' waivers without knowing what rights they were forfeiting. H.R. Rep. No. 95–1386, at 11. Moreover, State courts failed to protect the rights of Indian children and Indian parents. For example, in involuntary removal proceedings, the Indian parents and children rarely were represented by counsel and sometimes received little if any notice of the proceeding, and termination of parental rights was seldom supported by expert testimony. 1974 Senate Hearing at 67–68; H.R. Rep. No. 95–1386, at 11. Rather than helping Indian parents correct parenting issues, or acknowledging that the alleged problems were the result of cultural and socioeconomic differences, social workers claimed removal was in the child's best interest. 1974 Senate Hearing at 62.

Congress understood that these issues significantly impacted children who lived off of reservations, not just on-reservation children. Congress was concerned with the effect of the removal of Indian children ''whose families live in urban areas or with rural nonrecognized tribes,'' noting that there were approximately 35,000 such children in foster care, adoptive homes, or institutions. 124 Cong. Rec. H38102; 123 Cong. Rec. H21043. In the Final Report of the American Indian Policy Review Commission, which was included as part of the Senate Report on ICWA, the Commission recommended legislation addressing the fact that, because ''[m]any Indian families move back and forth from a reservation dwelling to border communities or even to distant communities, depending on employment and educational opportunities,'' problems could arise when Tribal and State courts offered competing child-custody determinations, and that legislation therefore had to address situations where ''an Indian child is not domiciled on a reservation and [is] subject to the jurisdiction of non-Indian authorities.'' S. Rep. No. 95–597, at 51–52 (1977).

Congress further recognized that the ''wholesale removal of [Tribal] children by nontribal government and private agencies constitutes a serious threat to [Tribes'] existence as on-going, self-governing communities,'' and that the ''future and integrity of Indian tribes and Indian families are in danger because of this crisis.'' 124 Cong. Rec. H38103. As one Tribal representative testified before Congress, ''[t]he ultimate preservation and continuation of [Tribal] cultures depends on our children and their proper growth and development.'' *See* 1977 Senate Hearing at 169. Commenters on the proposed legislation also noted that, because ''[p]robably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships,'' the ''chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their people.'' *Id.* at 157. Thus, in addition to protecting individual Indian children and families, Congress was also concerned about preserving the integrity of Tribes as self-governing, sovereign entities and ensuring that Tribes could survive both culturally and politically. *See* 124 Cong. Rec. H38,102.

B. Overview of ICWA's Provisions

In light of the information presented about State child-custody practices for Indian children, Congress passed ICWA to ''protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.'' H.R. Rep. No. 95–1386, at 23. Congress further declared 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. 25 U.S.C. 1902. And although Congress described ''the failure of State officials, agencies, and procedures to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future,'' H.R. Rep. No. 95–1386, at 19, the legislature carefully considered the traditional role of the States in the arena of child welfare outside Indian reservations, and crafted a statute that would balance the interests of the United States, the individual States, Indian Tribes, and Indians, noting:

While the committee does not feel that it is necessary or desirable to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits, it does feel the need to establish minimum Federal standards and procedural safeguards in State Indian child-custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe.

H.R. Rep. No. 95–1386, at 19.

ICWA therefore applies to ''child-custody proceedings,'' defined as foster-care placements, terminations of parental rights, and pre-adoptive and adoptive placements, involving an ''Indian child,'' defined as any unmarried person who is under age eighteen and either is: (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. In such proceedings, Congress accorded Tribes

''numerous prerogatives . . . through the ICWA's substantive provisions . . . as a means of protecting not only the interests of individual Indian children and their families, but also of the tribes themselves.'' *Miss. Band of Choctaw Indians* v. *Holyfield,* 490 U.S. 30, 49 (1989). In addition, ICWA provides important procedural and substantive standards to be followed in State-administered proceedings concerning possible removal of an Indian child from her family. *See, e.g.,* 25 U.S.C. 1912(d) (requiring provision of ''active efforts'' to prevent the breakup of the Indian family); *id.* 1912(e)–(f) (requiring specified burdens of proof and expert testimony regarding potential damage to child resulting from continued custody by parent, before foster-care placement or termination of parental rights may be ordered).

The ''most important substantive requirement imposed on state courts'' by ICWA is the placement preference for any adoptive placement of an Indian child. *Holyfield,* 490 U.S. at 36–37. In any adoptive placement of an Indian child under State law, ICWA requires that a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family (regardless of whether they are Tribal citizens); (2) other members of the Indian child's Tribe; or (3) other Indian families. 25 U.S.C. 1915(a). ICWA requires similar placement preferences for pre-adoptive placement and foster-care placement. 25 U.S.C. 1915(a)–(b). These preferences reflect ''Federal policy that, where possible, an Indian child should remain in the Indian community.'' *Holyfield,* 490 U.S. at 36–37 (internal citations omitted).

C. Need for These Regulations

Although the Department initially hoped that binding regulations would not be ''necessary to carry out the Act,'' *see* 44 FR 67,584 (Nov. 23, 1979), a third of a century of experience has confirmed the need for more uniformity in the interpretation and application of this important Federal law.

Need for Uniform Federal Standard. For decades, various State courts and agencies have interpreted the Act in different, and sometimes conflicting, ways. This has resulted in different standards being applied to ICWA adjudications across the United States, contrary to Congress's intent. *See Holyfield,* 490 U.S. at 43–46; *see also* 25 U.S.C. 1902; H.R. Rep. No. 95–1386, at 19; *see generally* Casey Family Programs, *Indian Child Welfare Act: Measuring Compliance* (2015), *www.casey.org/media/measuring-compliance-icwa.pdf.* Perhaps the most noted example is the ''existing Indian family,'' or EIF, exception, under which some State courts first determine the ''Indian-ness'' of the child and family before applying the Act. As a result, children who meet the statutory definition of ''Indian child'' and their parents are denied the protections that Congress established by Federal law. This exception to the application of ICWA was created by some State courts, and has no basis in ICWA's text or purpose. Currently, the Department has identified State-court cases applying this exception in a few states while other State courts have rejected the exception. *See, e.g., Thompson* v. *Fairfax Cty. Dep't of Family Servs.,* 747 SE.2d 838, 847–48 (Va. Ct. App. 2013) (collecting cases); *In re Alexandria P.,* 176 Cal. Rptr. 3d 468, 484–85 (Cal. Ct. App. 2014) (noting split across California jurisdictions). The question whether an Indian child, her parents, and her Tribe will receive the Federal protections to which they are entitled must be uniform across the Nation, as Congress mandated.

This type of conflicting State-level statutory interpretation can lead to arbitrary outcomes, and can threaten the rights that the statute was intended to protect. For example, in *Holyfield,* the Court concluded that the term ''domicile'' in ICWA must have a uniform Federal meaning, because otherwise parties or agencies could avoid ICWA's application ''merely by transporting [the child] across state lines.'' 490 U.S. at 46. State courts also differ as to what constitutes ''good cause'' for departing from ICWA's child placement preferences, weighing a variety of different factors when making the determination. *See, e.g., In re A.J.S.,* 204 P.3d 543, 551 (Kan. 2009); *In re Adoption of F.H.,* 851 P.2d 1361, 1363–64 (Alaska 1993); *In re Adoption of M.,* 832 P.2d 518, 522 (Wash. 1992). States are also inconsistent as to how to demonstrate sufficient ''active efforts'' to keep a family intact. *See State ex rel. C.D.* v. *State,* 200 P.3d 194, 205 (Utah Ct. App. 2008) (noting State-by-State disagreement over what qualifies as ''active efforts''). In other instances, State courts have simply ignored ICWA requirements outright. *Oglala Sioux Tribe & Rosebud Sioux Tribe* v. *Van Hunnik,* 100 F. Supp. 3d 749, 754 (D.S.D. 2015) (finding that the State had ''developed and implemented policies and procedures for the removal of Indian children from their parents' custody in violation of the mandates of the Indian Child Welfare Act''). The result of these inconsistencies is that many of the problems Congress intended to address by enacting ICWA persist today.

The Department's current nonbinding guidelines are insufficient to fully implement Congress's goal of nationwide protections for Indian children, parents, and Tribes. *See* 44 FR at 67,584–95. While State courts will sometimes defer to the guidelines in ICWA cases (*see In re Jack C.,* 122 Cal. Rptr. 3d 6, 13–14 (Cal. Ct. App. 2011); *In the Interest of Tavian B.,* 874 N.W.2d 456, 460 (Neb. 2016)), State courts frequently characterize the guidelines as lacking the force of law and conclude that they may depart from the guidelines as they see fit. *See, e.g.,Gila River Indian Cmty.* v. *Dep't of Child Safety,* 363 P.3d 148, 153 (Ariz. Ct. App. 2015).

These State-specific determinations about the meaning of key terms in the Federal law will continue absent a legislative rule, with potentially devastating consequences for the children, families, and Tribes that ICWA was designed to protect. Consider a child who is a Tribal citizen and who lives with his mother, who is also a Tribal citizen. The mother and child live far from their Tribe's reservation because of her work, and they are not able to regularly participate in their Tribe's social, cultural, or political events. If the State social-services agency seeks to remove the child from the mother and initiates a child-custody proceeding, the application of ICWA to that proceeding—which clearly involves an ''Indian child''—will depend on whether that State court has accepted the existing Indian family exception. Likewise, even if the court agrees that ICWA applies, the actions taken to provide remedial and rehabilitative programs to the family will be uncertain because there is no uniform interpretation of what constitutes ''active efforts'' under ICWA. This type of variation was not intended by Congress and actively undermines the purposes of the Act.

Need for Protections for Tribal Citizens Living Outside Indian Country. The need for more uniform application of ICWA in State courts is reinforced by the fact that approximately 78% of Native Americans live outside of Indian country,[2] where judges may be less familiar with ICWA requirements generally, or where a Tribe may be less

[2] *See* United States Census Bureau, Fact for Features: American Indian and Alaska Native Heritage Month: November 2012 (Oct. 25, 2012), *https://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb12-ff22.html* (summary files for 2015 are not yet available).

likely to find out about custody adjudications involving their citizens. Some commenters have pointed to the large number of Tribal citizens living off-reservation as proof that off-reservation Indians have made a conscious choice to distance themselves from their Tribe and its culture, and that ICWA's protections are unnecessary. They have accordingly questioned the need for a legislative rule, based on the assumption that off-reservation Indians do not want the Federal protections that accompany their status as Indians.

These comments misapprehend the reasons for high off-reservation Indian populations and the nature of Tribal citizenship generally, and do not diminish the need for the final rule. First, the fact that many Indians live off-reservation is, in part, a result of past, now-repudiated Federal policies encouraging Indian assimilation with non-Indians and, in some cases, terminating Tribes outright. For example, Congress passed the Indian General Allotment Act, 24 Stat. 388, codified at 25 U.S.C. 331 (1887) (repealed), which authorized the United States to allot and sell Tribal lands to non-Indians and take them out of trust status. The purpose of the Act was to ''encourage individual land ownership and, hopefully, eventual assimilation into the larger society,'' *Bugenig* v. *Hoopa Valley Tribe,* 266 F.3d 1201, 1205 (9th Cir. 2001), and to ''promot[e] interaction between the races and . . . encourage[e] Indians to adopt white ways,'' *Mattz* v. *Arnett,* 412 U.S. 481, 496 (1973). Many Indian lands subsequently passed out of Tribal control, which often led to Tribal citizens dispersing from their reservations.

Likewise, during the so-called ''termination era'' of the 1950s, Congress passed a series of acts severing its trust relationship with more than 100 Tribes. Terminated Tribes lost not only their land base but also myriad Federal services previously arising from the trust relationship, including education, health care, housing, and emergency welfare. *See Sioux Tribe of Indians* v. *United States,* 7 Cl. Ct. 468, 478 n.8 (Cl. Ct. 1985) (describing the termination policy). Lacking these basic services, which often did not otherwise exist in rural Tribal communities, many Indians were forced to move to urban areas. And in 1956, the Relocation Act was passed with funds to support the voluntary relocation of any young adult Indian willing to move from on or near a reservation to a selected urban center. Act of Aug. 3, 1956, Public Law 84–959, 70 Stat. 986. Thus, today's off-reservation population is not a new phenomenon; ICWA itself was enacted with Congress's awareness that many Indians live off-reservation. *See* 1978 House Hearings at 103; H.R. Rep. No. 95–1386, at 15. The fact that an Indian does not live on a reservation is not evidence of disassociation with his or her Tribe. In fact, citizens of many Tribes do not have the option to live on reservation land, as over 40 percent of Tribes have no reservation land.

Second, the comments ignore the fact that, regardless of geographic location of a Tribal citizen, Tribal citizenship (aka Tribal membership) is voluntary and typically requires an affirmative act by the enrollee or her parent. Tribal laws generally include provisions requiring the parent or legal guardian of a minor to apply for Tribal citizenship on behalf of the child. *See, e.g.,* Jamestown S'Klallam Tribe Tribal Code § 4.02.04(A)—Applications for Enrollment. Tribes also often require an affirmative act by the individual seeking to become a Tribal citizen, such as the filing of an application. *See, e.g.,* White Mountain Apache Enrollment Code, Sec. 1–401—Application Form: Filing. As ICWA is limited to children who are either enrolled in a Tribe or are eligible for enrollment and have a parent who is an enrolled member, that status inherently demonstrates an ongoing Tribal affiliation even among off-reservation Indians.

Rather than simply moving off-reservation, those enrolled Tribal citizens who do want to renounce their affiliation with a Tribe may voluntarily relinquish their citizenship. Tribal governing documents often include provisions allowing adult citizens to relinquish Tribal citizenship, sometimes also requiring a notarized or witnessed written statement. *See, e.g.,* Jamestown S'Klallam Tribe Tribal Code § 4.04.01(C)—Loss of Tribal Citizenship; White Mountain Apache Enrollment Code Sec. 1–702—Relinquishment. These procedures, and not an individual's geographic location, are the proper determinant of whether an individual retains an ongoing political affiliation with a Tribe (both generally and for the purposes of the ICWA placement preferences).

Commenters who raised this point also argued that a legislative rule would continue to apply Tribal placement preferences to individuals who have low Indian blood quantum. Several noted that the Indian child in *Adoptive Couple* v. *Baby Girl,* 133 S. Ct. 2552 (2013), purportedly was 3/256 Cherokee by blood, and questioned why ICWA should apply to such individuals, particularly when they live off-reservation. This argument mistakes and over-simplifies the nature of Indian status. Tribes have a wide variety of citizenship-eligibility requirements. For example, the Jamestown S'Klallam Tribe requires the applicant to produce ''documentary evidence such as a notarized paternity affidavit showing the name of a parent through whom eligibility for citizenship is claimed.'' Jamestown S'Klallam Tribe Tribal Code § 4.02.04(C)—Applications for Enrollment. Other Tribes include blood-quantum requirements. For example, the White Mountain Apache Tribe requires the applicant to be at least one fourth (1/4) degree White Mountain Apache blood. *See* White Mountain Apache Constitution, Article II, sec. 1—Membership. Federal courts have repeatedly recognized that determining citizenship (membership) requirements is a sovereign Tribal function. *See, e.g., Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49, 72 n.32 (1978) (''A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.''); *Montgomery* v. *Flandreau Santee Sioux Tribe,* 905 F. Supp. 740, 746 (D.S.D. 1995) (''Giving deference to the Tribe's right as a sovereign to determine its own membership, the Court holds that it lacks subject matter jurisdiction to determine whether any plaintiffs were wrongfully denied enrollment in the Tribe.''); *In re Adoption of C.D.K.,* 629 F. Supp. 2d 1258, 1262 (D. Utah 2009) (holding that ''the Indian tribes' 'inherent power to determine tribal membership' entitles determinations of membership by Indian tribes to great deference''). The act of fulfilling Tribal citizenship requirements is all that is necessary to demonstrate Tribal affiliation, and thus qualify as an ''Indian'' or ''Indian child'' under ICWA.

These types of objections, which are based on fundamental misunderstandings of Indian law, history, and social and cultural life, actually demonstrate the need for a legislative rule. Too often, State courts are swayed by these types of arguments and use the leeway afforded by the lack of regulations to craft ad hoc ''exceptions'' to ICWA. A legislative rule is necessary to support ICWA's underlying purpose and to address those areas where a lack of binding guidance has resulted in inconsistent implementation and noncompliance with the statute.

Continued Need for ICWA Protections. ICWA's requirements remain vitally important today. Although ICWA has helped to prevent the wholesale separation of Tribal

children from their families in many regions of the United States, Indian families continue to be broken up by the removal of their children by non-Tribal public and private agencies. Nationwide, based on 2013 data, Native American children are represented in State foster care at a rate 2.5 times their presence in the general population. *See* National Council of Juvenile and Family Court Judges, *Disproportionality Rates for Children of Color in Foster Care* tbl. 1 (June 2015). This disparity has *increased* since 2000. *Id.* (showing disproportionality rate of 1.5 in 2000). In some States, including numerous States with significant Indian populations, Native American children are represented in State foster-care systems at rates as high as 14.8 times their presence in the general population of that State. *Id.* While this disproportionate overrepresentation of Native American children in the foster-care system likely has multiple causes, it nonetheless supports the need for this rule.

Through numerous statutory provisions, ICWA helps ensure that State courts incorporate Indian social and cultural standards into decision-making that affects Indian children. For example, section 1915 requires foster-care and adoptive placement preference be given to members of the child's extended family. This requirement comports with findings that Tribal citizens tend to value extended family more than the Euro-American model, often having several generations of family and aunts and uncles participating in primary child-rearing activities. *See, e.g.,* John G. Red Horse, *Family Preservation: Concepts in American Indian Communities* (Casey Family Programs and National Indian Child Welfare Assoc. Dec. 2000). Likewise, from the adoptee's perspective, extended-family-member involvement and strong connection to Tribe shape reunification. Ashley L. Landers et al., *Finding Their Way Home: The Reunification of First Nations Adoptees,* 10 First Peoples Child & Family Review no. 2 (2015).

D. The Department's Implementation of ICWA

As required by ICWA, the Department issued regulations in 1979 to establish procedures through which a Tribe may reassume jurisdiction over Indian child-custody proceedings, 44 FR 45092 (Jul. 24, 1979) (codified at 25 CFR part 23), as well as procedures for notice of involuntary Indian child-custody proceedings, payment for appointed counsel in State courts, and procedures for the Department to provide grants to Tribes and Indian organizations for Indian child and family programs. 44 FR 45096 (Jul. 24, 1979) (codified at 25 CFR part 23). In January 1994, the Department revised its ICWA regulations to convert the competitive-grant process for Tribes to a noncompetitive funding mechanism, while continuing the competitive award system for Indian organizations. *See* 59 FR 2248 (Jan. 13, 1994).

In 1979, the Department published recommended guidelines for Indian child-custody proceedings in State courts. 44 FR 24000 (Apr. 23, 1979) (proposed guidelines); 44 FR 32,294 (Jun. 5, 1979) (seeking public comment); 44 FR 67584 (final guidelines). Several commenters remarked then that the Department had the authority to issue regulations and should do so. The Department declined to issue regulations and instead revised its recommended guidelines and published them in final form in November 1979. 44 FR 67584.

More recently, the Department determined that it may be appropriate and necessary to promulgate additional and updated rules interpreting ICWA and providing uniform standards for State courts to follow in applying the Federal law. In 2014, the Department invited public comments to determine whether to update its guidelines to address inconsistencies in State-level ICWA implementation that had arisen since 1979 and, if so, what changes should be made. The Department held several listening sessions, including sessions with representatives of federally recognized Indian Tribes, State-court representatives (*e.g.,* the National Council of Juvenile and Family Court Judges (NCJFCJ) and the National Center for State Courts' Conference of Chief Justices Tribal Relations Committee), the National Indian Child Welfare Association, and the National Congress of American Indians. The Department received comments from those at the listening sessions and also received written comments, including comments from individuals and additional organizations. The Department considered these comments and subsequently published updated Guidelines (2015 Guidelines) in February 2015. *See* 80 FR 10146 (Feb. 25, 2015).

Many commenters on the 2015 Guidelines requested not only that the Department update its ICWA guidelines but that the Department also issue binding regulations addressing the requirements and standards that ICWA provides for State-court child-custody proceedings. Commenters noted the role that regulations could provide in promoting uniform application of ICWA across the country, along with many of the other reasons discussed above why ICWA regulations are needed. Recognizing that need, the Department began a notice-and-comment process to promulgate formal ICWA regulations. The Department issued a proposed rule on March 20, 2015 that would ''incorporate many of the changes made to the recently revised guidelines into regulations, establishing the Department's interpretation of ICWA as a binding interpretation to ensure consistency in implementation of ICWA across all States.'' 80 FR 14480, 14481 (Mar. 20, 2015).

As part of its process collecting input on the proposed regulations, Interior held five public hearings and five Tribal-consultation sessions across the country, as well as one public hearing and one Tribal consultation by teleconference. Public hearings and Tribal consultations were held on April 22, 2015, in Portland Oregon; April 23, 2015, in Rapid City, South Dakota; May 5, 2015, in Albuquerque, New Mexico; May 7, 2015, in Prior Lake, Minnesota; May 11 and 12, 2015, by teleconference; and May 14, 2015, in Tulsa, Oklahoma. All sessions were transcribed. In addition to oral comments, the Department received over 2,100 written comments.

After the public-comment period closed on May 19, 2015, the Department reviewed comments received and, where appropriate, made changes to the proposed rule in response. This final rule reflects the input of all comments received during the public-comment period and Tribal consultation. The comments on the proposed rule and the contents of the final rule are discussed in detail below in Section IV.

In crafting this final rule, the Department is drawing from its expertise in Indian affairs generally, and from its extensive experience in administering Indian child-welfare programs specifically. BIA's Office of Indian Services, through its Division of Human Services, collects information from Tribes on their ICWA activities for the Indian Child Welfare Quarterly and Annual Report, ensures that ICWA processes and resources are in place to facilitate implementation of ICWA, administers the notice process under section 1912 of the Act, publishes a nationwide contact list of Tribally designated ICWA agents for service of notice, administers ICWA grants, and maintains a central file of adoption records under ICWA. In addition, BIA provides technical assistance to State social workers and courts on ICWA and Indian child welfare in general,

including but not limited to assisting in locating expert witnesses and identifying language interpreters. Currently, BIA employs a team of child protection social workers who provide this assistance on an as-needed basis as part of their daily duties. BIA also employs an ICWA Policy Social Worker, who is both an attorney and a social worker, and who serves as the central BIA expert and liaison on ICWA matters.

The Department is a significant Federal funding source for Indian child-welfare programs run by Tribes. Social-services funding is used to support Tribal and Department-operated Child Protection and Child Welfare Services (CPS/CW) on or near reservations and designated service areas. Tribal and Department caseworkers are the first responders for child and family services on reservations in Indian country. CPS/CW work is labor-intensive, as it requires social-service workers to frequently engage families through face-to-face contacts, assess the safety of children, monitor case progress, and ensure that essential services and support are provided to the child and her family. This experience is critical toward understanding the areas where ICWA is or is not working at the State level, as well as the necessary standards to address ongoing problems.

Congress also tasked the Department with affirmatively monitoring State compliance with ICWA by accessing State records of placement of Indian children, including documentation of State efforts to fulfill ICWA placement preferences. *See* 25 U.S.C. 1915(e). State courts are further responsible for providing the Department with a final decree or adoptive order for any Indian child within 30 days after entering such a judgment, together with any information necessary to show the Indian child's name, birthdate, and Tribal affiliation, the names and addresses of the biological and adoptive parents, and the identity of any agency having relevant information relating to the adoptive parent. *See* 25 CFR 23.71. The Department's experience administering these programs has informed development of this rule.

The Department has also consulted extensively with the Children's Bureau of the Administration for Children and Families, Department of Health and Human Services, and the Department of Justice in the formulation of this final rule. The Children's Bureau partners with Federal, State, and Tribal agencies to improve the overall health and well-being of children and families, and has significant expertise in child abuse and neglect. The Children's Bureau also administers capacity-building centers for States, Tribes, and courts. The Department of Justice has significant expertise in court practice, Indian law, and court decisions addressing ICWA. This close coordination with the Children's Bureau and the Department of Justice has helped produce a final rule that reflects the expertise of all three agencies.

Finally, in issuing this final rule, the Department has considered the trust obligation of the United States to Indian Tribes, which Congress expressly referenced in ICWA. 25 U.S.C. 1901(3). The Department has also kept in mind the canon of construction, applied by Federal courts, that Federal statutes should be liberally construed in favor of Indians, with ambiguous provisions interpreted for their benefit. *See, e.g., Montana* v. *Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985); *Doe* v. *Mann,* 415 F.3d 1038, 1047 (9th Cir. 2005).

III. Authority for Regulations

The Department's primary authority for this rule is 25 U.S.C. 1952. Section 1952 states that, within one hundred and eighty days after November 8, 1979, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter. This expansive language evinces clear congressional intent that the Secretary (or in this case, her delegee, the Assistant Secretary-Indian Affairs, who oversees the Bureau of Indian Affairs) will issue rules to implement ICWA.

As discussed above, the Department issued several rules implementing ICWA in 1979. These included regulations to establish procedures by which an Indian Tribe may reassume jurisdiction over Indian child-custody proceedings as authorized by § 1918 of ICWA, *see* 44 FR 45092 (codified at 25 CFR part 13); regulations addressing topics such as notice in involuntary child-custody proceedings, payment for appointed counsel, grants to Indian Tribes and Indian organizations for Indian child and family programs, and recordkeeping and information availability, *see* 44 FR 45096 (codified at 25 CFR part 23); and interpretive guidelines for State courts to apply in Indian child-custody proceedings. *See* 44 FR 67584. Some of these rules and regulations have been amended since their original issuance. *See, e.g.,* 59 FR 2248 (Jan. 13, 1994).

Having carefully considered public comments on the issue and having reflected on statements the Department made in 1979, all of which are discussed further below, the Department determines that the rulemaking grant in § 1952 encompasses jurisdiction to issue rules at this time that set binding standards for Indian child-custody proceedings in State courts. ICWA provides a broad and general grant of rulemaking authority that authorizes the Department to issue rules and regulations as may be necessary to implement ICWA. Similar grants of rulemaking authority have been held to presumptively authorize agencies to issue rules and regulations addressing matters covered by the statute unless there is clear congressional intent to withhold authority in a particular area. *See, e.g., AT&T Corp.* v. *Iowa Utils. Bd.,* 525 U.S. 366, 378 (1999); *Am. Hospital Ass'n* v. *Nat'l Labor Relations Bd.,* 499 U.S. 606, 609–10 (1991) (general grant of rulemaking authority ''was unquestionably sufficient to authorize the rule at issue in this case unless limited by some other provision in the Act''); *Mourning* v. *Family Publ'ns Ser*v., *Inc.,* 411 U.S. 356, 369 (1973) (''[w]here the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act,' we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation'''); *see also City of Arlington* v. *FCC,* 133 S. Ct. 1863, 1874 (2013) (finding not ''a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field''); *Qwest Communic'ns Int'l Inc.* v. *FCC,* 229 F.3d 1172, 1179 (D.C. Cir. 2000) (''[t]he grant of authority relied upon by a federal agency in promulgating regulations need not be specific; it is only necessary 'that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued'''') (quoting *Chrysler Corp.* v. *Brown,* 441 U.S. 281, 308 (1979)). As discussed elsewhere in this preamble, the Department finds that this regulation is ''necessary to carry out the provisions'' of ICWA, 25 U.S.C. 1952, and thus falls squarely within the statutory grant of rulemaking authority.

ICWA's legislative history is consistent with the understanding that the statute's grant of rulemaking authority is broad and inclusive. The original versions of the House and Senate bills that led to the enactment of ICWA, as well as the version of the bill that passed the Senate, included the general grant of rulemaking authority

but also included specific, additional procedural requirements. *See* S. 1214, 95th Cong., 1st Sess., Section 205; *see also* S. Rep. No. 95–597 (Nov. 3, 1977). In particular, the bills required that within six months, the Secretary must consult with Tribes and Indian organizations ''in the consideration and formulation of rules and regulations to implement the provisions of this Act''; within seven months, present the proposed rules to congressional committees; within eight months, publish proposed rules for notice and comment; and within ten months, promulgate final rules and regulations to implement the provisions of the Act. *See* S. 1214, sec. 205(b)(1). The bills authorized the Secretary to revise the rules and regulations, but required that they be presented to the congressional committees first. *Id.* 205(c). These requirements were considered during hearings held on February 9 and March 9, 1978, before the House of Representatives Committee on Interior and Insular Affairs. *See* 1978 House Hearings at 47.

During debate of the bill on the House floor, the bill sponsor, Representative Udall, offered an amendment to change the rulemaking grant to its current text. Representative Udall explained that this amendment was designed to remove the burdens of submitting regulations to congressional committees, but did not indicate that the scope of the grant of rulemaking authority was to change in any way. *See* 124 Cong. Rec. H38,107 (1978). ICWA thus does not impose procedural requirements on rulemaking that exceed those required by the Administrative Procedure Act. Moreover, the Department views it as unlikely that Congress would have introduced and considered bills throughout the 95th Congress that would have imposed burdensome procedural requirements on the agency if Congress did not intend that § 1952 would provide the Department with a broad grant of rulemaking authority.

A. Statements Made in the 1979 Guidelines

The Department has reconsidered and no longer agrees with statements it made in 1979 suggesting that it lacks the authority to issue binding regulations. At that time, although it undertook a notice-and-comment process, the Department made clear that the final issued guidelines addressing State-court Indian-child-custody proceedings were not intended to have binding effect. *See* 44 FR 67584. The Department cited a number of reasons for issuing nonbinding guidelines, a course of action that was opposed by numerous commenters.[3] *Id.* As described above, the Department concludes today that this binding regulation is within the jurisdiction of the agency, was encompassed by the statutory grant of rulemaking authority, and is necessary to implement the Act.

While the Department stated in 1979 that binding regulations were ''not necessary to carry out the Act,'' 37 years of real-world ICWA application have thoroughly disproven that conclusion and underscored the need for this regulation. *See* discussion *supra* at Section II.C. The intervening years have shown both that State-court application of the statute has been inconsistent and contradictory across, and sometimes within, jurisdictions. This, in turn, has impeded the statutory intent of providing minimum Federal standards that would protect Indian children, families, and Tribes, and has allowed problems identified in the 1970s to remain in the present day. The lack of clarity and uniformity regarding the meaning of key ICWA provisions also creates confusion, delays, and appeals in individual cases involving Indian children.

For these reasons, the Department's decision to issue binding regulations finds strong support in the Supreme Court's carefully reasoned decision in *Mississippi Band of Choctaw Indians* v. *Holyfield,* 490 U.S. 30 (1989). There, the Supreme Court addressed whether a State court had jurisdiction over a child-custody proceeding involving two Indian children. As the sole disputed issue in the case was whether the children were ''domiciled'' on a reservation for ICWA purposes, the Court confronted the initial question whether Congress intended the definition of ''domicile'' to be a matter of State law. The Court noted that ''the meaning of a federal statute is necessarily a federal question in the sense that its construction remains subject to this Court's supervision.'' *Id.* at 43. The Court further noted the rule of statutory construction that ''Congress when it enacts a statute is not making the application of the federal act dependent on state law.'' *Id.* The Court explained that one reason for this rule ''is that federal statutes are generally intended to have uniform nationwide application'' and another reason for the rule is ''the danger that the federal program would be impaired if state law were to control.'' *Id.* at 43–44.

The Court then discussed its prior holding in *NLRB* v. *Hearst Publications Inc.,* 322 U.S. 111 (1944), where it rejected an argument that the term ''employee'' in the Wagner Act should be defined by State law. It quoted that decision's finding that ''[t]he Wagner Act is . . . intended to solve a national problem on a national scale.'' 490 U.S. at 44. The Court concluded that what it said of the Wagner Act ''applies equally well to the ICWA.'' *Id.* In explaining the reasons for this conclusion, the Court noted, *inter alia,* that ''Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities'' and ''that Congress perceived the States and their courts as partly responsible for the problem it intended to correct.'' *Id.* at 45. ''Under these circumstances, it is most improbable that Congress would have

[3] *See, e.g.,* Letter from Bob Aitken, Director, Social Services, The Minnesota Chippewa Tribe to David Etheridge (May 23, 1979) (on file with the Department of the Interior) (''I feel strongly the Bureau of Indian Affairs should not be putting any of the act in 'guideline' form. The 'recommended guidelines for state courts' should be in rule or regulation form for state courts to follow. It appears the state courts will have a choice on whether or not to follow the Act. In my opinion, the Act *does* delegate to the Interior Department the authority to mandate such procedures.''); Letter from Henry Sockheson, Chairman, Steering Committee of the National Association of Indian Legal Services, to David Etheridge (May 17, 1979) (on file with the Department of the Interior) (''Fearful of a constitutional challenge by states, a possibility soundly discredited and rejected by the lawmakers, the Secretary has adopted a position which flies in the face of clear Congressional intent to the contrary, *i.e.,* that he, even as a steward of Congressional purpose, cannot mandate procedures for state or tribal courts, the very meat & potatoes of the whole of Title I of the Act. In the place of these badly needed regulations, therefore, was substituted a Notice of 'Recommended Guidelines for State Courts-Indian Child-custody proceedings', which will have the practical effect of regulations without the protections afforded to the public under the Administrative Procedures Act. . . . It is apparent that the delicate relationships sought to be preserved by the Act justified and required regulatory action with regard to state court procedures by the Bureau and cannot be subjected to the whim of what surely Congress believed were recalcitrant state courts now functioning under questionable 'guidelines.' ''); Letter from Alexander Lewis, Sr., Governor, Gila River Indian Community, to David Etheridge (May 21, 1979) (on file with the Department of the Interior) (''[A]bsent regulations [and] without force and effect, the guidelines are useless and the aims of the Act will be made more difficult to achieve. . . . By virtue of the Supremacy Clause of the United States Constitution, and this Act of Congress—the Indian Child Welfare Act, the Secretary of the Interior does have authority to promulgate regulations regarding the transfer of jurisdiction of Indian child proceedings from State to Tribal Court. I urge that you reconsider this action and promulgate regulations instead of guidelines, so that the provisions of the Act will not be emasculated.''); Letter from Frank Stede, Vice-Chief, Mississippi Band of Choctaw Indians, to David Etheridge (May 22, 1979) (on file with the Department of the Interior) (''[T]he notices should have been issued [as] regulations contrary to what the Interior Department presents as an [argument] for not issuing the guide lines as notices, the Congress clearly gave the Secretary authority to mandate procedures for State or Tribal court by passing legislation which deals with State and Tribal [i]ssue[s] in such an extensive fashion, clearly Congress would not have [g]one to such details if it had intended that compliance to [be] voluntary.'').

intended to leave the scope of the statute's key jurisdictional provision subject to definition by state courts as a matter of state law.'' *Id.* The *Holyfield* Court also recognized that Congress intended the implementation of ICWA to have nationwide consistency, so ''Congress could hardly have intended the lack of nationwide uniformity that would result from state-law definitions of domicile.'' *Id.*

In 1979, the Department had neither the benefit of the *Holyfield* Court's carefully reasoned decision nor the opportunity to observe how a lack of uniformity in the interpretation of ICWA by State courts could undermine the statute's underlying purposes. In practice, the meaning of various provisions of the Act has been subject to differing interpretation by each of the 50 States, and within the States, by various courts. What was intended to be a uniform Federal minimum standard now varies in its application based on the State or even the judicial district. *See* discussion *supra* at Section II.C. The Department thus has come to recognize that, as the Supreme Court stated in *Holyfield,* ''a statute under which different rules apply from time to time to the same child, simply as a result of his or her transport from one State to another, cannot be what Congress had in mind.'' *Id.* at 46.

Many commenters cited, or made comments that repeated, specific statements made by the Department in 1979 in arguing that the Department should or should not issue a binding regulation. These statements, and the reasons why the Department is now departing from them, are discussed further below in the responses to comments.

B. Comments Agreeing That Interior May Issue a Binding Regulation

Some commenters, including a group of law professors and the Tribal Law and Policy Institute, asserted that the Department has sufficient authority to issue binding regulations and that the legal basis for regulatory action is strong. These commenters pointed to 25 U.S.C. 1952 authorizing the Department to promulgate such rules and regulations as may be necessary to carry out the provisions of the Act and 25 U.S.C. 2 and 9, which provide Interior with general authority to prescribe regulations to carry into effect any provision of any Act of Congress relating to Indian affairs. These commenters further pointed to the fact that Congress's intent was to establish ''minimum Federal standards'' to be applied in State child-custody proceedings, and noted that in the last few decades, there have been divergent interpretations of ICWA provisions by State courts and uneven implementation by State agencies that undermine this purpose. Congress passed ICWA to address State-court and -agency application of child-welfare laws to provide a minimum Federal floor for such proceedings. These commenters asserted that regulations to enforce the minimum standards and address inconsistencies in implementation are well within the authority that Congress delegated to the Department.

Other commenters stated that deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council,* 467 U.S. 837 (1984), would apply to the regulations because the regulations are within the grant of authority from Congress and directly address areas that are enforced inconsistently by the States in derogation of congressional intent. A commenter pointed out that there is no case in which a general conferral of rulemaking authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field.

Some commenters noted that under established case law, the Department's statements in 1979 concerning its authority to issue a binding regulation do not preclude it from issuing this binding regulation. Commenters further stated that issuance of the regulation is fully consistent with the Tenth Amendment, discounted the Federalism concerns potentially implicated by the regulation, and dismissed any suggestion that the regulation is unconstitutional. Some of these commenters stated that domestic family law is no longer the exclusive purview of States, if it ever was. Many commenters urged the Department to include in this preamble a thorough discussion of its authority to issue this binding regulation, including the citations to case law, in an effort to ensure that State courts will adhere to the regulations.

The Department agrees with these comments for the detailed reasons set forth in this preamble.

C. Comments Disagreeing That the Department Has Authority To Issue a Binding Regulation

Other commenters asserted that the Department does not have the authority to promulgate regulations. These commenters generally stated that ICWA provides the Department with authority for rulemaking only with respect to limited matters, such as with respect to grants to Tribes. The reasons cited in support of these comments are discussed separately below.

1. Agency Expertise

Comment: Some commenters stated that the BIA does not have expertise with respect to the child-welfare matters addressed by ICWA. These commenters pointed to a number of Supreme Court cases that establish domestic-relations law as being within the realm of State law.

Response: The Department respectfully disagrees with these commenters. ICWA addresses Indian affairs, is premised on Congress's plenary Indian-affairs power and trust responsibility, and seeks to prevent unwarranted State intrusion into Tribal affairs and sovereignty and to protect the integrity of Indian families. *See* 25 U.S.C. 1901, 1902. An express purpose of the statute was to provide safeguards against State officials who may not understand Tribal cultural or social standards. 25 U.S.C. 1901.

These are all areas squarely within the mandate and expertise of the BIA. The BIA is the Federal agency charged with the management of all Indian affairs and of all matters arising out of Indian relations, 25 U.S.C. 2, and may proscribe such regulations as [it] may think fit for carrying into effect the various provisions of any act relating to Indian affairs. 25 U.S.C. 9. The BIA's special expertise regarding Indian affairs, including Indian cultural values and social norms related to child-rearing, as well as Indian family and child service programs, make it logical for Congress to have entrusted the Department with rulemaking authority for the statute.[4] *Cf. Runs After* v. *United States,* 766 F.2d 347, 352 (9th Cir. 1985) (''It cannot be denied that the BIA has special expertise and extensive experience in dealing with Indian affairs.''); *Golden Hill Paugussett Tribe of Indians* v. *Weicker,* 39 F.3d 51, 60 (2d Cir. 1994).

Further, BIA has extensive and longstanding experience in Indian child-welfare matters. Congress statutorily charged BIA with providing child-welfare services to all federally recognized Tribes. BIA social services and law enforcement are often the first responders in matters involving families and children. *See, e.g.,* 25 CFR part 20.

[4] Indeed, the BIA has a long-established hiring preference for qualified Indian individuals, which was designed ''to increase the participation of tribal Indians in BIA operations'' and ''make the BIA more responsive to the needs of its constituent groups.'' *Morton* v. *Mancari,* 417 U.S. 535, 543–44, 554 (1974). The BIA is thus particularly well-suited to set standards that ensure consideration of Tribal cultural and social practices, and protect the integrity of Tribes.

These regulations fall squarely under the Department's broad responsibilities for Indian affairs. Finally, BIA has consulted extensively with the Children's Bureau of the Administration for Children and Families, Department of Health and Human Services, in formulating this final rule. The Children's Bureau partners with Federal, State, Tribal, and local governments to improve the overall health and well-being of children and families, and has significant expertise in child abuse and neglect. The Children's Bureau also administers capacity building centers for States, Tribes, and courts. BIA also consulted with the Department of Justice, which has significant expertise in court practice, Indian law, and court decisions addressing ICWA. Close coordination with these agencies has helped produce a final rule that reflects the substantial expertise of the Federal government in this area.

2. Chevron Deference

Comment: Commenters also asserted that courts will not grant these regulations deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council,* 467 U.S. 837 (1984), because, they assert, *Chevron* deference applies only to interpretations of statutes that the agency administers and the Department has no statutory authority over child welfare. Commenters also asserted that no deference is warranted because of the statements the Department made in 1979 concerning the scope of its rulemaking authority. These commenters also assert that the regulations represent an interpretation of ICWA that is not within the range of reasonable interpretations, and that the Department's interpretation of certain provisions would render ICWA unconstitutional.

Response: The authority of the Department to issue this rule has been addressed above, and the rule is entitled to *Chevron* deference by Federal and State courts. As discussed in more detail in this preamble, the provisions of the final rule represent reasonable interpretations of the statute and do not raise constitutional concerns. Moreover, under any circumstances, the Department's interpretation of a statutory provision in this rule cannot render the *statute* unconstitutional.

3. Primary Responsibility for Interpreting the Act

Comment: Some commenters cited, or made statements that mirrored, the Department's statement in 1979 that ''primary responsibility'' for interpreting portions of ICWA that do not expressly delegate responsibility to the Department ''rests with the courts that decide Indian child custody cases.'' In support of this statement, these commenters noted that the Department cited ICWA's legislative history, which states that the term ''good cause,'' was ''designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child.''

Response: As noted above, the language in § 1952 authorizing the Department to ''promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter'' provides authority for this rulemaking. Accordingly, contrary to the Department's suggestion in 1979, the Department has authority to interpret the portions of ICWA addressed in this rule.

As discussed above, the Department's conclusion is in accord with ICWA's legislative history and the carefully reasoned decision in *Holyfield,* where the Supreme Court noted that the meaning of key ICWA terms and requirements necessarily raises Federal questions and that conflicting interpretations of the statute can lead to arbitrary outcomes that threaten the rights that ICWA was intended to protect. In 1979, the Department gave excessive weight to a single statement in the legislative history indicating that the term ''good cause'' was designed to provide State courts with flexibility when making certain determinations. 44 FR at 67584. That single statement was not addressing the reach of the Department's rulemaking authority. S. Rep. No. 95–597, at 17. Moreover, to the extent that the Department then believed that providing *any* regulatory guidance on the meaning of terms such as ''good cause'' improperly intrudes on a State court's flexibility to address particular factual scenarios, that interpretation was incorrect. The Department's standards relating to ''good cause'' in the final rule continue to leave State courts with flexibility, consistent with the legislative history. And other statements in the legislative history, which were not referenced by the Department in 1979, suggest Congress desired Federal agencies to be more involved in State removals of Indian children. *See, e.g.,* 1974 Senate Hearing at 463–65.

The Department also finds that the congressional purpose in passing ICWA supports its decision to issue this rule. Congress found that the States, exercising their recognized jurisdiction over Indian child-custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. *See* 25 U.S.C. 1901(5); *see also* H.R. Rep. No. 95–1386, at 10–12 (identifying as two of the leading factors contributing to the high rates of Indian-child removal the lack of culturally competent State child-welfare standards for assessing the fitness of Indian families and systematic due-process violations against both Indian children and their parents during child-custody proceedings).

In *Holyfield,* the Supreme Court reviewed Congress's findings, which demonstrate that Congress ''perceived the States and their courts as partly responsible for the problem it intended to correct.'' 490 U.S. at 45. The Court concluded that ''[u]nder these circumstances it is most improbable that Congress would have intended to leave the scope of the statute's key jurisdictional provision subject to definition by state courts as a matter of state law.'' *Id.* The Department similarly concludes here that ''[u]nder these circumstances,'' it is improbable that Congress intended the broad grant of rulemaking authority in § 1952 to authorize the Department to issue binding rules that interpret only those portions of ICWA that expressly delegate responsibility to the Department.

4. Tenth Amendment and Federalism

Comment: Some commenters asserted that the proposed rule violates the Tenth Amendment of the U.S. Constitution because it commandeers State courts, or for unspecified reasons. Commenters also cited, or made statements that repeated, Federalism concerns that the Department briefly referenced in 1979. These commenters pointed out that the Department stated in 1979 that it would have been extraordinary for Congress to authorize the Department to exercise supervisory authority over State or Tribal courts, or to legislate for them with respect to Indian child-custody matters, in the absence of an express congressional declaration to that effect. *See* 44 FR 67584. The Department also stated that nothing in ICWA's legislative history indicated that Congress intended to delegate such extraordinary authority. *Id.* Several commenters stated that the rule violates Federalism principles because it tells State-court judges what they may and may not consider, and exactly how to interpret a Federal law.

Response: The Department has reflected on these comments and has reconsidered the statements it made in 1979. While ICWA does not ''oust the

States of their traditional jurisdiction over Indian children falling within their geographical limits,'' H.R. Rep. No. 95–1386, at 19, Congress enacted ICWA to curtail State authority in certain respects. At the heart of ICWA are provisions that address the respective jurisdiction of Tribal and State courts. Other important provisions of ICWA require State courts to apply minimum Federal standards and procedural safeguards in child-custody proceedings for Indian children. This rule serves to clarify ICWA's requirements, with the goal of promoting uniform application of the statute across States.

While a few commenters asserted that this rule violates the Tenth Amendment, the Supreme Court repeatedly has reaffirmed the ''power of Congress to pass laws enforceable in state courts.'' *New York* v. *United States,* 505 U.S. 144, 178 (1992); *Testa* v. *Katt,* 330 U.S. 386, 394 (1947); *F.E.R.C.* v. *Mississippi,* 456 U.S. 742, 760–61 (1982). The Court also has explained that ''[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States.'' *New York,* 505 U.S. at 156. Here, Congress enacted ICWA primarily pursuant to the Indian Commerce Clause, which provides Congress with plenary power over Indian affairs. 25 U.S.C. 1901(1). In clarifying ICWA's requirements, the Department is exercising the authority that Congress delegated to it. Having considered the nature of this rule, the comments received, and the relevant case law, the Department concludes that this rule does not violate the Tenth Amendment for the same reasons that ICWA does not violate the Tenth Amendment.

The Department also has reflected on the Federalism concerns it noted in 1979. The Department does not view this rule as an ''extraordinary'' exercise of authority involving an assertion of ''supervisory control'' over State courts. While the Department's promulgation of this rule may override what some courts believed to be the best interpretation of ambiguous provisions of ICWA or how these courts filled gaps in ICWA's requirements, the Supreme Court has reasoned that such a scenario is not equivalent to making ''judicial decisions subject to reversal by executives.'' *Nat'l Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.,* 545 U.S. 967, 983 (2005). Rather, the Department's rule clarifies a limited set of substantive standards and related procedural safeguards that courts will apply to the particular cases before them.[5] For these reasons, and because Congress unambiguously provided the Department authority to issue this rule, the Department does not view Federalism concerns as counseling against the issuance of this rule.[6]

5. Federalism Executive Order

Comment: A few commenters additionally stated that the rule has Federalism implications because it has substantial direct effects on States, on the relationship between the national government and States, and on the distribution of power and responsibilities among the various levels of government. A commenter stated that the Department violates the Federalism executive order because the rule preempts State law, and the Department did not provide ''all affected State and local officials'' notice and opportunity to comment on that preemption as required.

Response: The Department stated in the proposed rule that ''[u]nder the criteria in Executive Order 13132, this rule has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' The Department thus ''determined that this rule complies with the fundamental Federalism principles and policymaking criteria established in EO 13132.'' The Department reaffirms these determinations, and respectfully disagrees with commenters who stated or suggested that these determinations are incorrect.

ICWA balances the Federal interest in protecting the integrity of Indian families and the sovereign authority of Indian Tribes with the States' sovereign interest in child-welfare matters. Congress carefully crafted ICWA's jurisdictional scheme so as to recognize the authority of each of these sovereigns. In crafting this scheme, Congress recognized a need to curtail certain State authority and enacted ICWA to address Indian child welfare through a statutory framework intended to apply uniformly across States. Since 1978, States have been required to comply with ICWA, and this regulation serves to interpret and fill gaps in the Federal minimum standards and procedural safeguards set forth in the statute. Many of the standards included in this rule are already being followed by a number of States.

In the notice of the proposed rule, the Department specifically solicited comments on the proposed rule from State officials, including suggestions for how the rule could be made more flexible for State implementation. 80 FR 14883. The Department carefully considered and addressed in this rulemaking all comments received concerning this regulation, some of which were submitted by State judges and other State officials.

6. Change in Position From Statements Made in 1979

Comment: Several commenters expressed concern that the Department's issuance of a binding regulation would be inconsistent with, or impermissible in light of, statements the Department made in 1979 regarding its authority to promulgate binding regulations. These commenters asserted that the Department's issuance of a binding regulation would conflict with established case law and that the binding regulation would ''sweep aside 37 years of state appellate court decisions regarding rights of children and families.''

Response: The Department has described its reasons for departing from the statements it made in 1979. Under well-established case law, the Department's prior statements pose no bar to this regulation. The Department also notes that the final rule does not disregard State appellate-court decisions. To the contrary, the Department carefully considered State appellate-court decisions, State legislation, and State guidance documents in promulgating the final rule. Many State standards and practices are reflected in the final rule. And on many issues, the Department's review of disparate State standards reinforced the Department's view that more uniformity in the interpretation of ICWA is needed.

7. Timeliness

Comment: Some commenters who argued the regulations are unauthorized focused on the fact that ICWA imposed a deadline of November 8, 1978 for the Department to promulgate regulations; these commenters state that the

[5] The Supreme Court has explained that ''[v]alid regulations establish legal norms. Courts can give them proper effect even while applying the law to newfound facts, just as any court conducting a trial in the first instance must conform its rulings to controlling statutes, rules, and judicial precedents.'' *United States* v. *Haggar Apparel Co.,* 526 U.S. 380, 391 (1999). Of course, the construction of ICWA by State courts will ''remain[ ] subject to [the Supreme] Court's supervision.'' *Holyfield,* 490 U.S. at 43.

[6] In evaluating these concerns, the Department also notes that Congress provides a substantial amount of Federal funding to States for child-welfare programs, *see, e.g.,* Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113–235); Emilie Stoltzfus, Child Welfare: An Overview of Federal Programs and Their Current Funding (Congressional Research Service 2015), and that other Federal statutes address State family law. *See, e.g.,* 42 U.S.C. 652.

authority for promulgating regulations expired after that date.

Response: ICWA states that ''within'' 180 days after November 8, 1978, the Department shall promulgate such rules and regulations as may be necessary to carry out ICWA. *See* 25 U.S.C. 1952. Regulations may be issued after the passage of a statutory deadline, however, so long as the statute, as is the case with ICWA, does not spell out explicit consequences for late action. *See, e.g., Barnhart* v. *Peabody Coal Co.,* 537 U.S. 149, 159 (2003); *Brock* v. *Pierce Cty.,* 476 U.S. 253, 262 (1986).

IV. Discussion of Rule and Comments

A. Public Comment and Tribal Consultation Process

1. Fairness in Proposing the Rule

Comment: Commenters asserted that the 2015 Guidelines and the proposed regulations were drafted without any outreach or request for comment from adoption agencies, attorneys, or other adoption professionals. One commenter stated that all the comments that were incorporated into the proposed regulations were only from the position of Indian Tribes, and did not reflect any input from State Attorney Generals, State child-welfare agencies, or others.

Other commenters stated their appreciation for the Department's diligence in seeking input from the public. Commenters stated that the experts on Indian child-welfare matters are Tribes, because they work in the field on a daily basis and have no special interest in determining the best interest of Tribal children beyond wanting the children to succeed and be connected to their culture and community. A number of States commented favorably on the proposed rule, and provided helpful comments to improve the final rule.

Response: The Department disagrees with the assertion that the 2015 Guidelines or proposed rule were developed without public input. As part of the preparation of the updated guidelines, the Department invited comments from federally recognized Indian Tribes, State-court representatives, and organizations concerned with Tribal children, child welfare, and adoption. *See* 80 FR at 10146–67. Those comments, the recommendations of the Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence, developments in ICWA jurisprudence, and the expertise of the Department and other Federal agencies were all considered in updating the guidelines as well as the drafting of the proposed rule. Since issuing the proposed rule, the Department has engaged in a robust public comment process, as discussed above and as evidenced by the large number of written comments received by BIA on this rulemaking.

2. Locations of Meetings/Consultations

Comment: Several commenters opposed the locations where the Department held the public hearings on the proposed rule during the public comment process. The commenters noted that all the hearings were held west of the Mississippi River, and none were held in any of the most populous States. Some commenters requested additional hearings in various locations.

Response: The Department chose locations for public hearings based on general areas where there are likely to be larger populations of Indian children and thus more ICWA proceedings. The Department also hosted a national teleconference to accommodate other interested persons who were unable to attend an in-person session including, but not limited to, anyone who may reside far from where the in-person sessions were held. A total of 215 persons participated by teleconference. In addition, Tribal consultation sessions and public hearings were held in Oklahoma, Alaska, and several other locations. More than 2,100 written comments were received.

B. Definitions

1. ''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). ICWA does not define ''active efforts.'' The Department finds, however, that Congress intended this requirement to provide vital protections to Indian children and their families by requiring that support be provided to keep them together, whenever possible. In particular, Congress recognized that many Indian children were removed from their homes because of poverty, joblessness, substandard housing, and related circumstances. Congress also recognized that Indian parents sometimes suffered from ''cultural disorientation, a [ ] sense of powerlessness, [and] loss of self-esteem,'' and that these forces ''arise, in large measure from our national attitudes as reflected in long-established Federal policy and from arbitrary acts of Government.'' H.R. Rep. No. 95–1386, at 12. But, Congress concluded, ''agencies of government often fail to recognize immediate, practical means to reduce the incidence of neglect or separation.'' *Id.* The ''active efforts'' requirement is one of the primary tools provided in ICWA to address this failure, and should thus be interpreted in a way that requires substantial and meaningful actions by agencies to reunite Indian children with their families. The ''active efforts'' requirement is designed primarily to ensure that services are provided that would permit the Indian child to remain or be reunited with her parents, whenever possible. This is viewed by some child-welfare organizations as part of the ''gold standard'' of what services should be provided in child-welfare proceedings.

The Department finds that there are compelling reasons for setting a nationwide definition for this critical statutory term. Although there is substantial agreement, among those State courts that have considered the issue, that active efforts requires more than simply formulating a case plan for the parent of an Indian child, there is still variation among the States as to what level of efforts is required. This means that the standard for what constitutes ''active efforts'' can vary substantially among States, even for similarly situated Indian children and their parents. The final rule will reduce this variation, thus promoting nationwide consistency in the implementation of this Federal right.

The final rule defines ''active efforts'' and provides examples of what may constitute active efforts in a particular case. The final rule retains the language from the proposed rule that active efforts means actions intended primarily to maintain and reunite an Indian child with his or her family. The final rule clarifies that, where an agency is involved in the child-custody proceeding, active efforts involve assisting the parent through the steps of a case plan, including accessing needed services and resources. This is consistent with congressional intent—by its plain and ordinary meaning, ''active'' cannot be merely ''passive.''

The final rule indicates that, to the extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions of the Indian child's Tribe, and in partnership with the child, parents, extended family, and Tribe. This is consistent with congressional direction in ICWA to conduct Indian child-welfare proceedings in a way that reflects the cultural and social standards prevailing in Indian communities and families. There is also evidence that services that are adapted to the client's cultural backgrounds are better. *See, e.g.,* Mental Health: Culture, Race, and

Ethnicity: A Supplement to Mental Health: A Report of the Surgeon General (2001); Substance Abuse and Mental Health Services Administration, A Treatment Improvement Protocol: Improving Cultural Competence (2015); Smith, T.B. *et al., (2011), Culture,* J. Clin. Psychol. 67, 166–175 (meta-analysis finding the most effective psychotherapy treatments tended to be those with greater numbers of cultural adaptations); Benish, S.G. *et al.*, (2011), *Culturally Adapted Psychotherapy and the Legitimacy of Myth: A Direct-Comparison Meta-Analysis,* 58 J. of Counseling Psychol. No. 3, 279–289 (meta-analysis finding that culturally adapted psychotherapy is more effective than unadapted psychotherapy).

Unlike the proposed rule, the final rule does not define ''active efforts'' in comparison to ''reasonable efforts.'' After considering public comments on this issue, the Department concluded that referencing ''reasonable efforts'' would not promote clarity or consistency, as the term ''reasonable efforts'' is not in ICWA and arises from different laws (*e.g.,* the Adoption Assistance and Child Welfare Act of 1980, as modified by the Adoption and Safe Families Act (ASFA), *see* 42 U.S.C. 670, *et seq.,* as well as State laws). Such reference is unnecessary because the definition in the final rule focuses on what actions are necessary to constitute active efforts.

The Department recognizes that what constitutes sufficient ''active efforts'' will vary from case-to-case, and the definition in the final rule retains State court discretion to consider the facts and circumstances of the particular case before it.

Comment: Several commenters stated their support for the definition and examples of active efforts. Several commenters, including States and State-court judges, noted the term ''active efforts'' is in need of clarification. Commenters noted that, while agencies are required to provide active efforts, there has not been a clear understanding of the level and types of services required and the term is interpreted differently from State to State and even county to county. One commenter noted that it receives numerous questions about active efforts each year and published a guide on this topic but that a nationwide regulation would further clarify the requirements. Several commenters supported the language stating that active efforts are above and beyond the reasonable efforts standard for non-ICWA cases. One commenter stated that California courts have construed active efforts as ''essentially equivalent to reasonable efforts to provide or offer reunification services to a non-ICWA case.'' Some of these commenters requested even stronger language distinguishing the two. Other commenters opposed defining active efforts in relation to reasonable efforts. Commenters stated that BIA has no authority to determine how reasonable efforts and active efforts would compare and that comparing them raises equal protection concerns. One commenter stated that the term does not need a definition.

Response: The proposed rule defined ''active efforts'' in a manner that compared it to ''reasonable efforts'' because many understand active efforts and reasonable efforts as relative to each other, where active efforts is higher on the continuum of efforts required and reasonable efforts is lower on that continuum. *See, e.g., In re Nicole B.,* 927 A.2d 1194, 1206–07 (Md. Ct. Spec. App. 2007). However, as commenters pointed out, the terms are used in separate laws and are subject to separate analyses. The term ''reasonable efforts'' is not used in ICWA; rather, it is used in the Adoption Assistance and Child Welfare Act of 1980, as modified by the Adoption and Safe Families Act (ASFA). *See* 42 U.S.C. 670, *et seq.* ASFA establishes ''reasonable efforts'' as a State responsibility in order to be eligible for Federal foster-care placement funding. Some State laws also utilize a ''reasonable efforts'' standard.

ICWA, however, requires ''active efforts'' prior to foster-care placement of or termination of parental rights to an Indian child, regardless of whether the agency is receiving Federal funding. Having considered the concerns of commenters with the use of the term ''reasonable efforts'' as a point of comparison, the Department has decided to delete reference to ''reasonable efforts'' from the definition of ''active efforts'' in the final rule. Such reference is unnecessary because the definition now focuses on the actions necessary to constitute active efforts, as affirmative, active, thorough, and timely efforts. Instead, the final rule provides additional examples and clarifications as to what constitutes active efforts.

Comment: A commenter pointed out that the ''active efforts'' requirement in the Act applies only to the ''Indian family'' and not to the Tribal community.

Response: The final rule deletes reference to ''Tribal community'' in the definition.

Comment: A commenter noted that the legislative history of the ''active efforts'' provision demonstrates that Congress intended to require States to affirmatively provide Indian families with substantive services and not merely make the services available.

Response: The Department agrees and the final rule's definition of ''active efforts'' reflects this.

Comment: A few commenters suggested adding appointment of legal counsel for both parents and children as a requirement for active efforts.

Response: Appointment of legal counsel does not clearly fall within the scope of remedial services and rehabilitative programs designed to prevent the breakup of the Indian family for which active efforts is required. 25 U.S.C. 1912(d). Further, 25 U.S.C. 1912(b) separately provides for appointment of counsel for the parent or Indian custodian in any case in which the court determines indigency.

Comment: Many commenters supported the proposed examples of ''active efforts'' in the definition, one saying they will be ''extremely helpful'' for determining whether services comply with the higher standard. The Oregon Juvenile Court Improvement Program noted that many of the examples reinforce Oregon's document ''Active Efforts Principles and Expectations.'' A few commenters suggested clarifying that the list is not exhaustive. Some suggested requiring a minimum number of the items on the list to be met to reach the ''active efforts'' threshold, while others requested clarifying that not all the items are required to be met to reach the threshold. A few commenters suggested shortening and simplifying the list. Others suggested including in each item a requirement to work with the Tribe. Several commented on the specifics of each example of ''active efforts'' listed in the definition. Some suggested adding new examples.

Response: The final rule simplifies the list somewhat by combining similar examples and clarifies that the list is not an exhaustive list of examples. The minimum actions required to meet the ''active efforts'' threshold will depend on unique circumstances of the case. The final rule also states, consistent with the BIA 1979 and 2015 Guidelines, that whenever possible, active efforts should be provided in partnership with the Indian child's Tribe, and should be provided in a manner consistent with the prevailing cultural and social conditions and way of life of the Indian child's Tribe. This practice is consistent with Congress' intent in ICWA that State child-custody proceedings better incorporate and consider Tribal values and culture. Further, as discussed above, culturally adapted treatment strategies have been shown to be more effective.

Comment: A commenter stated that the definition of ''active efforts'' reveals an assumption that the child has had a connection with the Tribal community, by using the terms ''maintain'' and ''reunite.'' The commenter states that this assumption is imbedded in the Act, which suggests that a relationship with the Tribal community was already in existence, and so the Act should not apply to children raised outside their Tribal communities prior to removal; otherwise, the Act would force the child to assume a new cultural identity on the basis of ancestry alone.

Response: The Act and the regulations require ''active efforts'' to prevent the breakup of the Indian child's family. Neither the text of the statute nor its legislative history suggests that this requirement is limited to circumstances where a State court determines that the Indian child has a sufficient pre-existing connection to a Tribal community. Indeed, Congress applied the ''active efforts'' requirement to Indian children residing outside of a reservation, and it can be presumed that Congress understood that for reasons of distance and age, some of these children may not have yet developed extensive connections to their Tribal community. Congress also found that State agencies and courts ''have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.'' 25 U.S.C. 1901(5). In light of this, the Department finds that it would not comport with congressional intent to require State courts to assess an Indian child's connection with her Tribal community.

Nothing in the Act or these regulations forces the child to assume a new cultural identity or assume a relationship with a Tribe or Tribal community that was not pre-existing. ICWA applies only to Indian children who have a political relationship (either through their citizenship, or through the citizenship of a parent and their own eligibility for citizenship) with a federally recognized Indian Tribe.

2. ''Agency''

The final rule defines ''agency'' as an organization that performs, or provides services to biological parents, foster parents, or adoptive parents to assist in, the administrative and social work necessary for foster, preadoptive, or adoptive placements. The definition includes non-profit, for-profit, or governmental organizations. This comports with the statute's broad language imposing requirements on ''any party'' seeking placement of a child or termination of parental rights. *See, e.g.* 25 U.S.C. 1912 (a), (d).

Comment: A few commenters stated that the definition should clarify that ''agencies'' are covered by the regulations even if they are not licensed by the State. One commenter stated that the definition should also include attorneys and others who participate in private placements, so that they will also be subjected to requirements for ICWA compliance.

Response: The final rule updates the definition of ''agency'' to mean organizations including those who may assist in the administrative or social work aspects of seeking placement. An ''agency'' may also be assisting in the legal aspects of seeking placement, but the definition does not include attorneys or law firms, standing alone, because as used in the final rule, ''agencies'' are presumed to have some capacity to provide social services. Attorneys and others involved in court proceedings are addressed separately in various provisions in the final rule.

3. ''Child-Custody Proceeding''

See ''Applicability'' section below.

4. ''Continued Custody'' and ''Custody''

The final rule makes two changes from the proposed rule to the definition of ''continued custody,'' in response to comments. First, it clarifies that physical and/or legal custody may be defined by applicable Tribal law or custom, or by State law. This comports with ICWA's recognition that custody may be defined by any of these sources. *See, e.g.,* 25 U.S.C. 1903(6). Second, it clarifies that an Indian custodian may have continued custody, because the statute recognizes that Indian custodians may have legal or physical custody of an Indian child and are entitled to ICWA's statutory protections. The definition of ''custody'' did not substantively change from the proposed rule.

Comment: A few commenters suggested adding ''Indian custodian'' in addition to ''parent'' in the definition of ''continued custody.''

Response: The final rule makes this change, as discussed above.

Comment: Several commenters supported the ''continued custody'' definition as clarifying that parents who may never have had physical custody are nevertheless covered by ICWA if they had legal custody. A few commenters suggested clarifications in light of the Supreme Court's decision in *Adoptive Couple* v. *Baby Girl,* 133 S. Ct. 2552 (2013), that the father in that case did not have legal or physical custody. One commenter requested that the final rule add that the father has ''continued custody,'' even without physical or legal custody, unless he abandoned the child prior to birth.

Response: The final rule retains the definition of ''continued custody'' as proposed, which includes custody the parent or Indian custodian ''has or had at any point in the past.'' It clarifies that the parent or custodian may have physical and/or legal custody under any applicable Tribal law or Tribal custom or State law. The definition is consistent with *Adoptive Couple* v. *Baby Girl,* which determined under the facts of that case that the father never had custody. The Department finds that this definition is also most consistent with ICWA, which in other contexts defines legal custody as well as parental rights in reference to Tribal and State law. *See* 25 U.S.C. 1903(6), (9).

Comment: A few commenters stated that the definition should require a ''preexisting state'' of custody prior to the child-custody proceeding, or require custody for a certain period of time.

Response: The final rule does not add the requested requirement for a ''preexisting state'' of custody because there are situations in which a parent could be considered to have had custody but lost it for some period of time prior to the child-custody proceeding, or may have had, at the time of the commencement of the proceeding, custody for only a brief period of time. There is no evidence that Congress intended temporary disruptions (*e.g.,* surrender of child to another caregiver for a period) not to be included in ''continued custody.'' The Department believes that including this requirement could permit evasion of ICWA's protections, since it could create incentives to disrupt a parent's custodial rights prior to initiating a child-custody proceeding.

Comment: Some commenters requested that the definition emphasize the narrow holding of the Supreme Court in *Adoptive Couple* v. *Baby Girl* as not applying to a parent that ''at least had at some point in the past'' custody of the child.

Response: The proposed and final rule already defined ''continued custody'' to include custody a parent ''had at any point in the past,'' which is substantively the same as the language used by the Supreme Court in *Adoptive Couple* v. *Baby Girl.*

Comment: Several commenters suggested adding provisions to ''continued custody'' allowing putative fathers to assert custodial rights.

Response: Neither the statute nor the final rule directly addresses the ability of putative fathers to assert custodial

rights; in the final rule, custodial rights may be established under Tribal law or custom or State law.

Comment: Several commenters supported the proposed definition of ''custody'' as including Tribal law or Tribal custom. One commenter requested adding that ''continued custody,'' like ''custody,'' is based on Tribal law or Tribal custom. Another commenter suggested adding that State law may only be used in the absence of applicable Tribal law or Tribal custom.

Response: The final rule adds ''under any applicable Tribal law or Tribal custom or State law'' to the definition of ''continued custody'' to better parallel the definition of ''custody.'' The final rule does not establish an order of preference among Tribal law, Tribal custom, and State law because the final rule provides that custody may be established under any one of the three sources.

5. ''Domicile''

The final rule provides a more complete description of how to determine domicile for an adult, to better comport with Federal common law. The rule's definition is consistent with the definition of domicile provided by Black's Law Dictionary, a standard legal reference resource. The final rule also changes the definition of domicile for an Indian child whose parents are not married to be the domicile of the Indian child's custodial parent, in keeping with legal authority on this point.

Comment: With regard to the first part of the definition of ''domicile,'' addressing the domicile of ''parents or any person over the age of 18,'' a commenter suggested replacing ''any person over the age of 18'' with ''Indian custodian.''

Response: The final rule replaces ''any person over the age of 18'' with ''Indian custodian'' as suggested in this comment because the context in which the term ''domicile'' is used includes only parents or Indian custodians (children are addressed in another part of the definition).

Comment: One commenter suggested that domicile should be defined by Tribal law or custom of the Indian child's Tribe, and that a Federal definition should apply only in the absence of such law or custom.

Response: The U.S. Supreme Court found that Congress intended a uniform Federal law of domicile for ICWA. *See Miss. Band of Choctaw Indians* v. *Holyfield,* 490 U.S. 30, 44–47 (1989).

Comment: Several commenters stated that the reliance on physical presence in the definition of domicile is too narrow. Some recommended changing the definition to the common-law definition of domicile. These commenters noted that the common-law definition would better consider persons who may leave the reservation temporarily (*e.g.,* to obtain education, pursue work, or enter the military) and that the court in *Holyfield* stated that ''domicile'' is not necessarily synonymous with ''residence.'' One commenter suggested changing ''physical presence'' to ''was physically present'' to account for this difference. A commenter stated that a person's intent to return should be the main focus.

Response: The final rule adopts the commenters' suggestions by revising the definition of ''domicile'' to better reflect the common-law definition, which acknowledges that a person may reside in one place but be domiciled in another.

Comment: With regard to the second part of the definition, addressing the domicile of the child, several commenters stated that, in the case of an Indian child whose parents are not married to each other, the domicile is not necessarily that of the Indian child's mother. These commenters pointed out that the father or a guardian may have custody of the child, and some noted that some Tribes are patriarchal and this definition would conflict with those Tribes' cultural traditions. Some stated that the domicile of the child in this case should instead be the domicile of the custodial parent with whom the child lives most often and if the child lives with neither parent, then the domicile should be that of the mother or the Indian child's Tribe. Others stated the domicile should be that of the custodial parent (or primary custodial parent), Indian custodian, or legal guardian.

Response: The Supreme Court stated that a child born out of wedlock generally takes the domicile of his or her mother. *Holyfield,* 490 U.S. at 43–48. This rests on an underlying assumption that the mother is the child's custodial parent. This may generally be true at the time of the birth of the child. The general rule, however, is that a minor has the same domicile as the parent with whom he lives. *See, e.g.* Restatement (Second) of Conflict of Laws 22 (Am. Law. Inst. 1971). As one State court recognized, where the father is the custodial parent, the child's domicile is not that of the mother but rather follows that of the custodial parent. *Tubridy* v. *Iron Bear (In re S.S.),* 657 NE.2d 935, 942 (Ill. 1995). Thus, the final rule accepts the suggestion that the child's domicile should be the custodial parent's domicile when the parents are unwed.

6. ''Emergency Proceeding''

The statute treats emergency proceedings differently from other child-custody proceedings. *See* 25 U.S.C. 1922. In response to comments that reflected a lack of clarity on this point, the final rule adds a definition of ''emergency proceedings.'' ''Emergency proceedings'' are defined as court actions involving emergency removals and emergency placements. These proceedings are distinct from other types of ''child-custody proceedings'' under the statute. While States use different terminology (*e.g.,* preliminary protective hearing, shelter hearing) for emergency hearings, the regulatory definition of emergency proceedings is intended to cover such proceedings as may necessary to prevent imminent physical damage or harm to the child. *See* ''Emergency Proceedings'' section below for more information and responses to comments.

7. ''Extended Family Member''

This definition has not changed from the proposed rule, and tracks the statutory definition.

Comment: A few commenters suggested expanding the definition of ''extended family member'' to include various other individuals (*e.g.,* great-grandparents, great-aunts, and great-uncles).

Response: The definition of ''extended family member'' in the proposed rule and final rule matches the statutory definition. Additional categories of individuals may be included in the meaning of the term if the law or custom of the Indian child's Tribe includes them. ''Extended family member'' is not limited to Tribal citizens or Native individuals.

8. ''Hearing''

See ''Applicability'' section below.

9. ''Imminent Physical Damage or Harm''

The final rule does not provide a definition of ''imminent physical damage or harm.'' The Department has determined that statutory phrase is clear and understandable as written, such that no further elaboration is necessary.

The Department has concluded that the definition it included in the proposed rule, ''present or impending risk of serious bodily injury or death,'' is too constrained and does not capture circumstances that Congress would have considered as presenting ''imminent physical damage or harm.'' Commenters noted that situations of sexual abuse,

domestic violence, or child labor exploitation could arguably be excluded by the proposed definition. The Department did not, however, intend that such situations would fall outside the scope of ''imminent physical damage or harm.'' Since the statutory phrase reflects endangerment of the child's health, safety, and welfare, not just bodily injury or death, the Department has decided not to use the proposed definition.

The ''imminent physical damage or harm'' standard applies only to emergency proceedings, which are not subject to the same procedural and substantive protections as other types of child-custody proceedings, as discussed in Section IV.H below. In using this standard, Congress established a high bar for emergency proceedings that occur without the full suite of protections in ICWA. There are circumstances in which it may be appropriate to provide services to the parent or initiate a child-custody proceeding with the attendant ICWA protections (*e.g.,* those in 25 U.S.C. 1912 and elsewhere in the statute), but removal or placement on an emergency basis is not appropriate. Thus, section 1922 and these rules require that any emergency proceeding must terminate immediately when the emergency proceeding is not necessary to prevent imminent physical damage or harm to the child. This standard is substantially similar to the emergency removal provisions of many states. See, *e.g.,* W. Va. Code 49–4–6–2 (2015); N.Y. Fam. Ct. Act 1024 (McKinney 2009); Idaho Code 16–1608 (2016); Texas Fam. Code 262.104 (West 2015); N.J. Stat. Ann. 9:6–8.29 (West. 2012); Va. Code Ann. 16.1–251 (2015), Cal. Welf. & Inst. Code 305 (West).

Comment: Many commenters opposed the proposed definition of ''imminent physical harm or damage'' because they asserted:

- States should be able to define imminent harm in accordance with their State protection laws;
- The proposed definition is too narrow in omitting neglect and emotional or mental (psychological) harm and would preclude emergency measures to protect a child from these types of harms;
- By requiring ''serious'' bodily injury, the proposed definition would exclude physical harm such as domestic violence that does not rise to a major injury and exclude threatened physical harm (*e.g.,* present or impending sexual abuse, child labor exploitation, or misdemeanor assaults);
- The proposed definition would result in equal protection violations denying Indian children the same level of protections as non-Indian children because research shows that exposure to domestic violence produces significant and long-lasting harm to the child psychologically, even when the child does not himself experience physical injury; and
- The proposed definition would exclude some State and Federal crimes that would normally justify protection of the child.

Several other commenters supported the proposed definition of ''imminent physical harm or damage,'' to the extent it would apply to emergency situations. These commenters asserted:

- A narrow threshold for emergency removal is necessary because, in some jurisdictions, little more than being an Indian child on a reservation apparently constitutes ''imminent physical damage or harm,'' and the proposed definition would require a closer examination of whether the emergency removal was necessary;
- Not including minor physical harm or emotional harm is appropriate for emergency removal because a child experiencing those types of harm could be removed following the commencement of a child-custody proceeding rather than by emergency removal; and
- The proposed definition is in line with State laws that keep a child in his or her home unless the child is in need of immediate protection due to an imminent safety threat.

Even among commenters that supported the proposed definition, many had suggested changes, such as:

- Clarifying that situations like sexual abuse would be grounds for emergency removal;
- Including ''serious emotional damage'' only if the child displays specific symptoms such as severe anxiety, depression or withdrawal;
- Clarifying ''imminent'' rather than the degree of harm; and
- Clarifying that imminent physical harm or damage is not present when the implementation of a safety plan or intervention would otherwise protect the child while allowing them to remain in the home.

Response: The final rule does not use the proposed definition of ''imminent physical damage or harm'' because the Department has concluded that the statutory phrase encapsulates a broader set of harms than was reflected in the proposed definition. The Department agrees with commenters that the phrase focuses on the child's health, safety, and welfare, and would include, for example, situations of sexual abuse, domestic violence, or child labor exploitation.

The Department also agrees with commenters who emphasized that the section 1922 language focuses on the imminence of the harm, because the immediacy of the threat is what allows the State to temporarily suspend the initiation of a full ''child-custody proceeding'' subject to ICWA. Where harm is not imminent, issues that might at some point in the future affect the Indian child's welfare may be addressed either without removal, or with a removal on a non-emergency basis (complying with the Act's section 1912 requirements). We also agree with commenters that being an Indian child on a reservation does not justify emergency removal; Congress used the standard of ''imminent physical damage or harm'' to guard against emergency removals where there is no imminent physical damage or harm.

Comment: A few commenters stated that the only place ''imminent physical damage or harm to a child'' appears in ICWA is at section 1922, which addresses emergency removal only of children domiciled on a reservation, so it should not apply to State removal of children who are not domiciled on a reservation.

Response: The final rule is based on the premise that the emergency removal or placement of an Indian child may be conducted under State law in order to keep the child safe. *See* FR § 23.113. 25 U.S.C. 1922 requires, however, that any emergency proceeding terminate immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child. Both the legislative history and the decisions of multiple courts support the conclusion that this provision applies to emergency proceedings involving Indian children who are both domiciled off of the reservation and domiciled on the reservation, but temporarily off of the reservation. *See* H. Rep. No. 95–1386, at 25; *see also Oglala Sioux Tribe* v. *Hunnik,* No. 13–5020, 2016 WL 697117 (D.S.D. Feb. 19, 2016); *In re T.S.,* 315 P.3d 1030 (Okla. Civ. App. 2013); *In re H.T.,* 343 P.3d 159, 167 n.3 (Mont. 2015); *Cheyenne River Sioux Tribe* v. *Davis,* 822 N.W.2d 62, 65 (S.D. 2012); *State ex rel. Children, Youth & Families Dep't* v. *Marlene C. (In re Esther V.),* 248 P.3d 863, 873 (N.M. 2011). Unless section 1922 is read to apply to children on and off of the reservation, ICWA could be read to prohibit the emergency removal of such Indian child in order to prevent imminent physical harm. *See e.g.,* H. Rep. 95–1386 (section 1922 is intended to ''permit'' such removal

''notwithstanding the provisions of this title'').

10. ''Indian Child''

The final rule retains the definition used in the statute with the addition of the terms ''citizen'' and ''citizenship'' because these terms are synonymous with ''member'' and ''membership'' in the context of Tribal government.

Comment: A commenter noted that the regulations sometimes refer to the Indian child being ''a member or eligible for membership'' without specifying that if the child is not a member, then the child's parent must be a member and the child must be eligible for membership.

Response: The statute specifies that if the child is not a Tribal member, then the child must be a biological child of a member and be eligible for membership, in order for the child to be an ''Indian child.'' 25 U.S.C. 1903(4). The final rule addresses this oversight by clarifying in each instance that the biological parent must be a member in addition to the child being eligible for membership.

Comment: One commenter queried whether it is constitutional to include ''eligible'' children in the definition, since these children are not yet Tribal members.

Response: The final rule reflects the statutory definition of ''Indian child,'' which is based on the child's political ties to a federally recognized Indian Tribe, either by virtue of the child's own citizenship in the Tribe, or through a biological parent's citizenship and the child's eligibility for citizenship. Congress recognized that there may not have been an opportunity for an infant or minor child to be enrolled in a Tribe prior to the child-custody proceeding, but nonetheless found that Congress had the power to act for those children's protection given the political tie to the Tribe through parental citizenship and the child's own eligibility. *See, e.g.,* H.R. Rep. No. 95–1386, at 17. This is consistent with other contexts in which the citizenship of a parent is relevant to the child's political affiliation to that sovereign. *See, e.g.,* 8 U.S.C. 1401 (providing for U.S. citizenship for persons born outside of the United States when one or both parents are citizens and certain other conditions are met); *id.* 1431 (child born outside the United States automatically becomes a citizen when at least one parent of the child is a citizen of the United States and certain other conditions are met).

Comment: One commenter stated that if the child grows up on the reservation and participates in Tribal rituals and community, that child is an Indian child regardless of whether the child is allowed to be a member.

Response: The statute defines ''Indian child'' based on a political connection with the Tribe rather than residence or participation in Tribal rituals and community. The regulation reflects the statutory definition.

Comment: Several commenters requested clarification that the child needs to be under age 18 only at the commencement of the initial child-custody proceeding for ICWA to apply for the duration of the case.

Response: ICWA defines an ''Indian child'' as a person under the age of 18. Other Federal law allows for States receiving Federal funding to extend foster care to persons up to age 21. *See* 42 U.S.C. 675(8)(B)(iii). And, the majority of States have statutes that explicitly allow child-welfare agencies to continue providing foster care to young people after they turn 18. *See* Keely A. Magyar, *Betwixt and Between But Being Booted Nonetheless: A Developmental Perspective on Aging Out of Foster Care,* 79 Temple L. Rev. 557 (2006) (summarizing State laws). Where State and/or Federal law provides for a child-custody proceeding to extend beyond an Indian child's 18th birthday, ICWA would not stop applying to the proceeding simply because of the child's age. This is to ensure that a set of laws apply consistently throughout a proceeding, and also to discourage strategic behavior or delays in ICWA compliance in circumstances where a child's 18th birthday is near. Thus, the final rule interprets the statutory definition to mean that the person need be under the age of 18 only at the commencement of the proceeding for ICWA to apply. The final rule adds clarification to the applicability section that ICWA will not cease to apply simply because the child turns 18. *See* FR § 23.103(d).

11. ''Indian Child's Tribe''

The final rule retains the definition used in the statute.

Comment: One commenter stated that the definition of ''Indian child's Tribe'' is too restrictive and could eliminate opportunities for multiple Tribes to be involved in a case because a child could have equal contacts with multiple Tribes for which they are eligible for membership, and each should have the opportunity to ensure the connection is maintained.

Response: The statute contemplates that one Tribe will be designated as the ''Indian child's Tribe,'' *see* 25 U.S.C. 1903(5), and the regulation reflects this.

12. ''Indian Custodian''

The definition in the final rule largely tracks the statutory definition. It clarifies that whether an individual has legal custody may be determined by looking to either the relevant Tribe's law or custom, or to State law.

Comment: A few commenters stated their support of the definition of ''Indian custodian'' and particularly the consideration of Tribal law or custom because there are informal Indian caretakers who may raise Indian children without a court order.

Response: Like the statute, the final rule includes a definition of ''Indian custodian'' that allows for consideration of Tribal law or custom.

13. ''Parent''

The final rule retains the definition used in the statute.

Comment: A few commenters supported the definition of ''parent'' and recommended no change. Several commented on the definition's approach to unwed fathers and suggested unwed biological fathers should be included. One commenter suggested adding that ''parent'' includes persons whose paternity has been established by order of a Tribal court, to ensure Tribal court orders acknowledging or establishing paternity are given full faith and credit by State courts. A few commenters suggested adding that paternity may be acknowledged or established ''in accordance with Tribal law, Tribal custom, or State law in the absence of Tribal law or Tribal custom.''

Response: The rule's definition of ''parent'' mirrors that of ICWA.

ICWA requires States to give full faith and credit to the public acts, records, and judicial proceedings of any Tribe applicable to Indian child-custody proceedings to the same extent that such entities give full faith and credit to any other entity. 25 U.S.C. 1911(d). This includes Tribal acknowledgement or establishment of paternity.

Comment: A few commenters recommended adding a Federal standard for what constitutes an acknowledgment or establishment of paternity, in accordance with Justice Sotomayor's dissent in *Adoptive Couple* v. *Baby Girl* and to address a split in State courts. These commenters recommended language requiring an unwed father to ''take reasonable steps to establish or acknowledge paternity'' and recommended listing examples of such steps to include acknowledging paternity in the action at issue and establishing paternity through DNA testing. Another commenter requested clarification on when the father must

acknowledge or establish paternity, because timing impacts due process and permanency for the child.

Response: The final rule mirrors the statutory definition and does not provide a Federal standard for acknowledgment or establishment of paternity. The Supreme Court and subsequent case law has already articulated a constitutional standard regarding the rights of unwed fathers, *see Stanley* v. *Illinois,* 405 U.S. 645 (1972); *Bruce L.* v. *W.E.,* 247 P.3d 966, 978–979 (Alaska 2011) (collecting cases)—that an unwed father who ''manifests an interest in developing a relationship with [his] child cannot constitutionally be denied parental status based solely on the failure to comply with the technical requirements for establishing paternity.'' *Bruce L.,* 247 P.3d at 978–79. 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. *Id.* At this time, the Department does not see a need to establish an ICWA-specific Federal definition for this term.

Comment: One commenter suggested accounting for situations where extended family and non-relatives are exercising both physical and legal custody of the child, by adding that an Indian child may have several parents simultaneously if Tribal law so provides.

Response: The definition of ''parent'' includes adoptions under Tribal law or custom.

Comment: One commenter suggested deleting the word ''lawfully'' from the definition of ''parent'' to avoid disputes over what constitutes a lawful adoption.

Response: The final rule retains the word ''lawfully'' because it is used in the statute. *See* 25 U.S.C. 1903.

14. ''Reservation''

The definition in the final rule tracks the statutory definition.

Comment: Two commenters stated that ''reservation'' should be expanded to include traditional Tribal territories in Alaska because there is only one reservation in Alaska.

Response: The regulatory definition is similar to the statutory definition, and includes land that is held in trust but not officially proclaimed a ''reservation.''

15. ''Status Offenses''

This definition was not changed from the proposed rule.

Comments: Some commenters supported the definition of ''status offenses.'' Commenters also asked that the final rule clarify that status offenses are included in the definition of child-custody proceedings, pursuant to 25 U.S.C. 1903(1).

Response: See the ''Applicability'' discussion below. The final rule definition of ''child-custody proceeding'' is updated to make clear that its scope includes proceedings where a child is placed in foster care or another out-of-home placement as a result of a status offense. This reflects the statutory definition of ''child-custody proceeding,'' which is best read to include placements based on status offenses, while explicitly excluding placement[s] based upon an act which, if committed by an adult, would be deemed a crime. *See* 25 U.S.C. 1903(1).

16. ''Tribal Court''

The final rule retains the definition used in the statute.

Comment: A few commenters suggested changing the definition of ''Tribal court'' to explicitly recognize that the Tribal governing body, such as the Tribal council, may sit as a court and have jurisdiction over child-custody proceedings. Commenters also suggested that the term ''Tribal court'' should reflect that a Tribe may have other mechanisms for making child-custody decisions.

Response: The definition of ''Tribal court'' in both the statute and the final rule addresses these comments because the definition includes any other administrative body of a tribe vested with authority over child-custody proceedings. *See* 25 U.S.C. 1903(12); 25 CFR 23.2.

17. ''Upon Demand''

The term ''upon demand'' is important for determining whether a placement is a ''foster-care placement'' (because the parent cannot have the child returned upon demand) under § 23.2, and therefore subject to requirements for involuntary proceedings for foster-care placement. The rule also specifies that other placements where the parent or Indian custodian can regain custody of the child upon demand are not subject to ICWA. FR § 23.103(b)(4). The final rule clarifies that ''upon demand'' means that custody can be regained by a verbal request, and ''without any formalities or contingencies.'' Examples of formalities or contingencies are formal court proceedings, the signing of agreements, and the repayment of the child's expenses.

Comment: A commenter stated that the example ''repaying the child's expenses'' should be deleted from the definition of ''upon demand'' because it could unnecessarily limit interpretation of what is considered a contingency. A few other commenters suggested adding more examples for what ''upon demand'' means, to include ''being placed into custody'' because the return of the child upon demand is not a reality when the end result is that the agency may remove the child. Some commenters suggested ''upon demand'' should mean without having to resort to legal proceedings or make a filing in court.

Response: The final rule eliminated the use of examples, and now refers broadly generally to ''formalities or contingencies.''

18. ''Voluntary Placement,'' ''Voluntary Proceeding,'' and ''Involuntary Proceeding''

Comment: A few commenters requested clarifying the difference between a ''voluntary placement'' and a ''voluntary proceeding.''

Response: The final rule distinguishes the terms by eliminating the definition for ''voluntary placement'' and including only a definition of ''voluntary proceeding.'' For clarity, the rule also includes a definition of ''involuntary proceeding.'' The term ''voluntary placement'' is now used only in FR § 23.103(b), addressing what the rule does not apply to. The rule does not apply to voluntary placements when the parent or Indian custodian can regain custody of the child upon verbal demand without any formalities or contingencies.

Comment: A few commenters suggested changing the definition of ''voluntary placement'' from a placement that ''either parent'' has chosen to instead be a placement that ''both known biological parents'' have chosen. One commenter suggested addressing the situation where one parent refuses consent, by adding ''if either parent refuses to consent to the placement, the placement shall not be considered voluntary.''

Response: The proposed rule allowed for ''either parent'' to choose the placement to address situations where only one parent is known or reachable. The final rule adds ''both parents'' to allow for situations where both parents are known and reachable. The final rule does not add that ''if either parent refuses to consent to the placement, the placement shall not be considered voluntary'' because in some cases, efforts to find the other parent may be unsuccessful. If a parent refuses to consent to the foster-care, preadoptive, or adoptive placement or termination of parental rights, the proceeding would meet the definition of an ''involuntary proceeding.'' Nothing in the statute

indicates that the consent of one parent eliminates the rights and protections provided by ICWA to a non-consenting parent.

Comment: A few commenters requested clarification that a placement made only upon the threat of losing custody is not ''voluntary,'' stating that they are aware of instances in which a State agency threatens parents with removal of their children if they do not ''voluntarily'' place the child elsewhere and then argue that these are ''voluntary placements'' under ICWA.

Response: The final definition of ''voluntary proceeding'' specifies that placements where the parent agrees to the placement only under threat of losing custody is not ''voluntary,'' by adding the phrase ''without a threat of removal by a State agency.'' The final rule also specifies that a voluntary proceeding must be of the parent's or Indian custodian's free will. This revision is intended to clarify that a proceeding in which the parent agrees to an out-of-home placement of the child under threat that the child will otherwise be removed is not ''voluntary.''

Comment: A commenter suggested replacing ''voluntary placement'' with ''voluntary foster-care placement or termination of parental rights'' (excluding adoptive placements) to track the language in 25 U.S.C. 1913.

Response: The final rule now defines the term ''voluntary proceeding,'' which includes foster-care, preadoptive, and adoptive placements and termination of parental rights.

Comment: A commenter suggested changing ''chosen for'' to ''consented to'' because it could be erroneously interpreted as providing that the parents' choice can override the placement provisions in 25 U.S.C. 1915, which apply in all adoption proceedings (voluntary and involuntary).

Response: This suggestion was adopted. The distinguishing factor for a ''voluntary proceeding'' is the parent(s) or Indian custodian's consent, not whether they personally ''chose'' the placement for their child.

19. Suggested New Definitions

a. ''Best Interests''

Comment: Several commenters requested that a definition of ''best interests of the Indian child'' be added because State courts have used a general ''best interest of the child'' determination to avoid application of ICWA. These commenters point out that ICWA provides a framework to ensure the long-term (for the Indian child's entire life) best interests of an Indian child, rather than just a short-term view of what the best interests of an Indian child may be in that child-custody situation. Some recommended a variation on the definition of ''best interest'' found in Wisconsin's Indian Child Welfare Act. Another commenter suggested defining best interest ''in accordance with the child's indigenous culture, traditions and customs.''

Response: It is unnecessary to define the term ''best interests'' because it does not appear in the final rule.

Comment: Many commenters, without specifically defining what ''best interests'' means, argued that various provisions of the proposed rule would act to prohibit a judge from protecting the ''best interests'' of the child.

Response: The Department disagrees with these comments, as ICWA was specifically designed to protect the best interests of Indian children. 25 U.S.C. 1902. In order to achieve that general goal, Congress established specific 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. *Id.* Congress implemented the general goal of protecting the best interests of children through specific provisions that are designed to protect children and their relationship with their parents, extended family, and Tribe.

One of the most important ways that ICWA protects the best interests of Indian children is by ensuring that, if possible, children remain with their parents and that, if they are separated, support for reunification is provided. This is consistent with the guiding principle established by most States for determining the best interests of the child. *See* U.S. Dept' of Health and Human Servs., Children's Bureau, Child Welfare Information Gateway, *Determining the Best Interests of the Child* (2013) at 2 (identifying the ''importance of family integrity and preference for avoiding removal of the child from his/her home'' as by far the most frequently stated guiding principle). Should a child need to be removed from her family, however, ICWA's placement preferences continue to protect her best interests by favoring placements within her extended family and Tribal community. Other ICWA provisions also serve to protect a child's best interests by, for example, ensuring that a child's parents have sufficient notice about her child-custody proceeding and an ability to fully participate in the proceeding (25 U.S.C. 1912(a),(b),(c)) and helping an adoptee access information about her Tribal connections (25 U.S.C. 1917).

Congress, however, also recognized that talismanic reliance on the ''best interests'' standard would not actually serve Indian children's best interests, as that ''legal principle is vague, at best.'' H.R. Rep. No. 95–1386, at 19. Congress understood, as did the Supreme Court, that ''judges [] may find it difficult, in utilizing vague standards like 'the best interests of the child', to avoid decisions resting on subjective values.'' *Id.* (citing *Smith* v. *Org. of Foster Families for Equality & Reform,* 431 U.S. 816, 835 n.36 (1977)). These subjective values are exactly what Congress passed ICWA to address, as demonstrated by the legislative history discussed above.

Instead of a vague standard, Congress provided specific procedural and substantive protections through pre-established, objective rules that avoid decisions being made based on the subjective values that Congress was worried about. By providing courts with objective rules that operate above the emotions of individual cases, Congress was facilitating better State-court practice on these issues and the protection of Indian children, families, and Tribes. *See* National Council of Juvenile and Family Court Judges, *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* 14 (2000).

While ICWA and this rule provide objective standards, however, judges may appropriately consider the particular circumstances of individual children and protect the best interests of those children as envisioned by Congress.

b. Other Suggested Definitions

Several commenters suggested adding new definitions, including the following.

Comment: ''Abandon''—One commenter suggested adding a definition for abandon to address the Supreme Court's determination that ICWA does not apply to ''a parent [who] has abandoned a child prior to birth and the child has never been in the Indian parent's legal or physical custody.'' *See Adoptive Couple* v. *Baby Girl,* 133 S. Ct. at 2563. This commenter notes that ''abandon'' is a term of art that varies greatly from State to State.

Response: The final rule does not define the term ''abandon'' because it is not used in the Act or final regulations.

Comment: ''Guardianship''—A few commenters suggested adding a definition for ''guardianship if resulting from placement involving an agency or private adoption attorney.'' These commenters believe such a definition is necessary because agencies have instructed families to obtain

guardianship of children to avoid notice to Tribes and allow time to pass in which to bond with the children prior to giving notice to the Tribe or filing a petition to adopt, in order to avoid ICWA's placement preferences.

Response: The final rule does not add a definition for ''guardianship'' because the term ''guardianship'' is not used in the final rule. The statute defines ''foster-care placement'' as including any action removing an Indian child from its parent or Indian custody for temporary placement in the . . . home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand. 25 U.S.C. 1903(1). Where a guardianship meets these criteria, it is subject to applicable ICWA requirements for child-custody proceedings. The discussion on applicability, below, addresses guardianships in voluntary proceedings.

Comment: ''ICWA-Compliant Placement''—A few commenters recommended adding a definition of an ''ICWA-compliant placement'' to mean only those placements in accordance with the placement preferences in section 1915. One commenter suggested excluding all placements that are outside the identified placement preferences, regardless of whether there has been a good cause finding to deviate from the placement preferences.

Response: The final rule does not add this term because it is not used in the regulation, and because the Department believes that it could introduce confusion. The statute provides for certain placement preferences ''in the absence of good cause to the contrary.'' 25 U.S.C. 1915(a), (b). If a State court properly found good cause to not place an Indian child with a preferred placement, the placement complies with ICWA.

Comment: ''Indian home''—A few commenters requested a definition for ''Indian home'' stating that States in the past have identified non-Indian foster families to be ''Indian homes'' by virtue of the Indian child being placed there.

Response: The final rule includes a definition of ''Indian foster home,'' a term used in 25 U.S.C. 1915(b) and FR § 23.131. The statute already defines the term ''Indian'' as a person who is a member of a federally recognized Indian Tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 43 U.S.C. 1606. *See* 25 U.S.C. 1903(3). The new definition simply clarifies that an ''Indian foster home'' is one in which one or more of the foster parents is an Indian.

Comment: ''Indian family''—A few commenters requested a definition of ''Indian family'' as including at least one parent meeting the definition of ''Indian'' for reasons similar to those forming the basis for the request for a definition of ''Indian home.'' One commenter stated that it witnessed a State agency take the position that a non-Indian foster family was an Indian family due to a vague connection to a Tribe.

Response: The Department declines to add a definition of this term because it finds that the meaning of the term in the statute and regulations is adequately clear. The term ''Indian family'' is found in 25 U.S.C. 1915(a), which includes ''other Indian families'' in the placement preferences. The term ''Indian'' is defined by statute, *see* 25 U.S.C. 1903(3), and the term ''Indian family'' in this context thus refers to a family with one or more individuals that meet this definition. The term ''Indian family'' is also found in 25 U.S.C. 1912(d) (requiring active efforts designed to prevent the breakup of the Indian family), and it is clear from context that this means the Indian child's family. *See also* the discussion of the existing Indian family exception in the Applicability section.

Comment: ''Indian''—One commenter stated that the term ''Indian'' is offensive and should instead be ''indigenous peoples'' or ''First Nations.''

Response: The term ''Indian'' is used in the statute; therefore, the regulation also uses this term.

Comment: ''Party''—A few commenters suggested adding a definition of ''party'' for the purposes of section 1912 to include any party seeking foster-care placement or termination of parental rights because often these placements are made by individuals or attorneys rather than agencies. A few other commenters suggested adding a definition of ''party'' to exclude ''de facto parents,'' because these are generally foster parents who do not have legal status on par with a parent or Indian custodian.

Response: State courts and Tribal courts define the parties to a proceeding; therefore, the final rule does not add a definition for this term. The Department notes, however, that the statute and regulation define the term ''parent'' as meaning any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law and custom. *See* 25 U.S.C. 1903(9); 25 CFR 23.2. Thus, a ''de facto parent'' that does not otherwise qualify under this definition would not be entitled to the rights a ''parent'' is provided under ICWA.

Comment: ''State courts''—One commenter suggested adding a definition of ''State courts'' to include all officers of the court, to clarify that all legal professionals must comply with ICWA.

Response: The final rule does not add a definition for ''State courts'' because the term is adequately clear.

Comment: ''Indian organization''—A commenter suggested moving the definition for ''Indian organization'' to § 23.2 (from § 23.102).

Response: The definition of ''Indian organization'' in § 23.102 applies only to subpart I of part 23 because a different meaning of the term ''Indian organization'' related to eligibility of grants applies to other subparts of part 23. For this reason, the final rule defines the term at § 23.102 with a definition that applies only to subpart I.

Comment: ''Tribal Representative''—Several commenters requested that the final rule add a definition of ''Tribal representative'' or ''Tribal designee'' to remove restrictions on Tribes participating in ICWA proceedings via non-attorney representatives. These commenters asserted that the final rule must require States to allow non-attorney representatives because Tribes may not have the resources to send a licensed attorney to appear in every proceeding in multiple courts and may only be able to send social workers or court-appointed special advocates, and the rights and interests of the Tribe to participate in ICWA proceedings outweigh the rights and interests of a State with regard to requiring licensure by all who appear before the court. Commenters also stated that the new definition should clarify that even if the Tribal representative is an attorney, the State may not require licensure in the jurisdiction where the child-custody proceeding is located. A commenter stated that appearing *pro hac vice* is often not a viable alternative because of the cost, number of appearances, requirements for local co-counsel, and ultimately the discretion of the State to deny the application to appear *pro hac vice.*

Response: The Department declines to adopt the comments' suggestion at this time. The suggested definition and requirements for State courts were not included in the proposed rule, and the Department believes that it is advisable to obtain the views of State courts and other interested stakeholders before such provisions are included in a final rule.

The Department recognizes that it may be difficult for many Tribes to participate in State court proceedings, particularly where those actions take

place outside of the Tribe's State. Section 23.133 encourages State courts to permit alternative means of participation in Indian child-custody proceedings in order to minimize burdens on Tribes and other parties. The Department agrees with the practice adopted by the State courts that permit Tribal representatives to present before the court in ICWA proceedings regardless of whether they are attorneys or attorneys licensed in that State. *See e.g., J.P.H.* v. *Fla. Dep't of Children & Families,* 39 So.3d 560 (Fla. Dist. Ct. App. 2010) (per curiam); *State* v. *Jennifer M. (In re Elias L.),* 767 N.W.2d 98, 104 (Neb. 2009); *In re N.N.E.,* 752 N.W.2d 1, 12 (Iowa 2008); *State ex rel. Juvenile Dep't of Lane Cty.* v. *Shuey,* 850 P.2d 378 (Or. Ct. App. 1993).

C. Applicability

The final rule clarifies the terms ''child-custody proceeding'' and ''hearing.'' Both of those terms were used at various points in the draft rule, but only ''child-custody proceeding'' was defined in the proposed rule. The comments demonstrated confusion regarding the use of those terms. Thus, in order to be clearer about the distinctions made in certain provisions of the rule between ''child-custody proceedings'' and ''hearings,'' the final rule includes definitions for those terms.

The final rule adds a definition of ''hearing'' that reflects the common understanding of the term as used in a legal context. As defined in the final rule, a hearing is a single judicial session held for the purpose of deciding issues of fact or of law. That definition is consistent with the definition in Black's Law Dictionary, a standard legal reference resource. In order to demonstrate the distinction between a hearing and a child-custody proceeding, the definition of ''child-custody proceeding'' explains that there may be multiple hearings involved in a single child-custody proceeding.

Consistent with the proposed rule, the final rule defines a ''child-custody proceeding'' to be an activity that may culminate in foster-care placement, a preadoptive placement, an adoptive placement, or a termination of parental rights. The final rule uses the phrase ''may culminate in one of the following outcomes,'' rather than the less precise phrase ''involves,'' used in the draft rule, in order to make clear that ICWA requirements would apply to an action that may result in one of the placement outcomes, even if it ultimately does not. For example, ICWA would apply to an action where a court was considering a foster-care placement of a child, but ultimately decided to return the child to his parents. Thus, even though the action did not result in a foster-care placement, it may have culminated in such a placement and, therefore, should be considered a ''child-custody proceeding'' under the statute.

The final rule deletes as unnecessary the use of the word ''proceeding'' as part of the definition of child-custody proceeding. It also explicitly excludes emergency proceedings from the scope of a child-custody proceeding, as emergency proceedings are addressed separately in the statute and in the rule. The definition further makes clear that a child-custody proceeding that may culminate in one outcome (*e.g.,* a foster-care placement) would be a separate child-custody proceeding from one that may culminate in a different outcome (*e.g.,* a termination of parental rights), even though the same child may be involved in both proceedings.

The final rule definition of ''child-custody proceeding'' is also updated to make clear that its scope includes proceedings involving status offenses if any part of the proceeding results in the need for out-of-home placement of the child. This reflects the statutory definition of ''child-custody proceeding,'' which is best read to include placements based on status offenses, while explicitly excluding placement[s] based upon an act which, if committed by an adult, would be deemed a crime. *See* 25 U.S.C. 1903(1).

As discussed in more depth below, the final rule also removes from the regulatory text an explicit mention by name of the so-called ''existing Indian family'' (EIF) exception: A judicially created exception to ICWA's applicability that has since been rejected by the court that created it. Although the reference to the EIF exception by name was removed, the final rule makes clear that the inquiry into whether ICWA applies to a case turns solely on whether the child is an ''Indian child'' under the statutory definition. The rule, consistent with the Act, thus focuses exclusively on a child's political membership with a Tribe, rather than any particular cultural affiliation.

The commenters who asserted that various ICWA provisions are inapplicable to some children who have ''assimilated into mainstream American culture'' are wrong under a plain reading of the statute. In order to make this clear, the final rule prohibits consideration of listed factors because they are not relevant to the inquiry of whether the statute applies. The inclusion of this prohibition prevents application of any EIF exception, which both ''frustrates'' ICWA's purpose to ''curtail state authorities from making child custody determinations based on misconceptions of Indian family life,'' *In re A.J.S.,* 204 P.3d at 551 (citation omitted), and encroaches on the power of Tribes to define their own rules of membership.

1. ''Child-Custody Proceeding'' and ''Hearing'' Definitions

—''Any proceeding or Action''

Comment: A few commenters requested clarification of ''any proceeding or action.'' A few commenters suggested clarifying that a proceeding or action may include an *ex parte* placement, a court-ordered placement or ''any court hearing, proceeding, or action by an agency or court.'' One commenter stated that ''proceeding'' should include any authorized use of State power that may result in a parent losing custody of the child and ''action'' to be the manner in which such power is employed in discrete instances of conduct (*e.g.,* an emergency removal would be an action). Similarly, another commenter requested clarification that ICWA applies to any situation in which the State has taken action involving an Indian child and there is a possibility that neither parent will have custody.

Response: See the discussion above regarding the definition of ''child-custody proceeding'' and ''hearing.'' Further, whereas the draft rule stated that a child-custody proceeding ''means and includes any proceeding or action that involves'' certain outcomes, the final rule uses only the word ''action.'' In addition to the word ''proceeding'' being duplicative, the use of the term ''action'' is also more consistent with the statute, as the statute uses that term several times in its definition of ''child-custody proceeding.'' *See* 25 U.S.C. 1903(1).

—Guardianships

Comment: Several commenters suggested clarifying whether ICWA applies to guardianships and conservators. A few commenters noted there have been various State interpretations of this issue. Several commenters stated that the rule should explicitly apply to private guardianships in which someone assumes the role of caretaker without State or Tribal intervention, so that the action of placing the child would still be subject to ICWA.

Response: The statute defines ''child-custody proceeding'' to include removal of an Indian child for temporary placement in . . . the home of a

guardian or conservator. 25 U.S.C. 1903(1)(i). The fact that an agency places the child in the home of a guardian or conservator rather than in a foster home or institution does not affect applicability of the Act, as such placement would be a ''child-custody proceeding.''

If a parent entrusts someone with the care of the child without State or Tribal involvement, that arrangement would not prohibit the parent from having the child returned upon demand, and therefore would not meet the definition of a ''child-custody proceeding.''

—Custody Disputes Between Family Members

Comment: Several commenters stated that the rule should include intra-family disputes as a ''child-custody proceeding'' because a minority of State courts have excluded disputes where the petitioner is a family member. Another commenter stated intra-family disputes should not be included as a ''child-custody proceeding'' and that the rule should clarify that ICWA is not about resolving grandparent custody battles.

Response: The statute and final rule exclude custody disputes between parents (*see* next response), but can apply to other types of intra-family disputes, assuming that such disputes otherwise meet the statutory and regulatory definitions. ICWA can apply to other types of intra-family disputes because the statute makes only two exceptions, neither of which are for intra-family disputes other than parental custody disputes. 25 U.S.C. 1903(1) (ICWA does not apply to the custody provisions of a divorce decree or to delinquency proceedings). While at least one court held that ICWA excludes intra-family disputes (*see In re Bertelson,* 617 P.2d 121, 125–26 (Mont. 1980)), several subsequent court decisions have ruled to the contrary. *See, e.g., Starr* v. *George,* 175 P.3d 50 (Alaska 2008); *In re Custody of A.K.H.,* 502 N.W.2d 790, 794 (Minn. Ct. App. 1993); *In re Q.G.M.,* 808 P.2d 684, 687–88 (Okla. 1991); *In re S.B.R.,* 719 P.2d 154, 156 (Wash. Ct. App. 1986); *A.B.M.* v. *M.H.,* 651 P.2d 1170, 1173 (Alaska 1982). BIA has concluded that, if the intra-family dispute meets the definition of a ''child-custody proceeding,'' the provisions of this rule would apply. There is no general exception from ICWA for actions by grandparents or other family members.

—Divorce Proceedings

Comment: A few commenters stated that many custody cases do not occur within the context of a divorce proceeding because in many cases the parents are not married. These commenters requested clarification that ICWA does not apply to custody cases between parents, regardless of whether the custody case is within the context of a divorce proceeding.

Response: The Act does not include placement with a parent as an ''Indian child-custody proceeding'' because ''foster-care placement'' does not include placement with a parent. 25 U.S.C. 1903(1)(i). While the Act specifically exempts from ICWA's applicability awards of custody to one of the parents ''in divorce proceedings,'' the exemption necessarily includes awards of custody to one of the parents in other types of proceedings as well. *See, e.g., John* v. *Baker,* 982 P.2d 738, 746–47 (Alaska 1999). For this reason, the final rule clarifies that ICWA does not apply to an award of custody to one of the parents, in a divorce proceeding or otherwise.

If, however, the proceeding is one that meets the definition of a ''child-custody proceeding,'' in that the Indian child has been removed from his or her parent and any party seeks to place the Indian child in a temporary placement other than the alternate parent, then provisions of ICWA and this rule would apply. *See e.g., In re Jennifer A.,* 103 Cal. App. 4th 692, 700 (Cal. 2002) (finding that ICWA requirements applied because the ''issue of possible foster-care placement was squarely before the juvenile court,'' even though the child was eventually placed with the noncustodial father). In addition, if a proceeding seeks to terminate the parental rights of one parent, that proceeding squarely falls within ICWA's definition of ''child-custody proceeding.'' *See* 25 U.S.C. 1903(1).

—Adoptions Without Termination of Parental Rights, Including Tribal Customary Adoptions

Comment: A commenter noted that while the definition of ''child-custody proceeding'' is consistent with the definition of preadoptive placement in § 1903(1), there are situations in which preadoptive placements may occur without termination of parental rights under Tribal law or State law. This commenter suggested adding that ''child-custody proceeding'' does not preclude preadoptive placements after it has been determined that the child cannot or should not be returned to the home of his or her parents or Indian custodian, but where termination of parental rights is not a prerequisite to the finalization of the adoption under State or Tribal law. Likewise, a few commenters requested expanding ''adoptive placement'' to include Tribal customary adoptions in which there is no termination of parental rights, when such adoptions are conducted as part of a State-court proceeding.

Response: BIA does not believe that the definition of a ''child-custody proceeding'' needs to be adjusted to address these comments. Adoptions that do not involve termination of parental rights are included within the definition of ''child-custody proceeding'' as either a ''foster-care placement'' or an ''adoptive placement,'' because these terms, as defined, do not require termination of parental rights. *See* 25 U.S.C. 1903.

—Withdrawal of Consent as ''Upon Demand''

Comment: A few commenters suggested that the ''foster-care placement'' portion of the definition of ''child-custody proceeding,'' which states that foster-care placement is when the parent or Indian custodian ''cannot have the child returned upon demand'' conflicts with section 1913 of the Act, which provides that the parent can withdraw consent to a foster-care placement. These commenters suggest adding the following language to the definition after ''cannot have the child returned upon demand:'' ''(except as provided in § 103(b) [25 U.S.C. 1913(b)] of the Act).'' *See In re Adoption of K.L.R.F.,* 515 A.2d 33 (Pa. Super. Ct. 1986).

Response: The term ''foster-care placement'' as used in the Act includes only foster care where the parent cannot have the child returned ''upon demand.'' The final rule clarifies the definition of ''upon demand'' to mean simply a verbal demand without any formalities or contingencies. A parent's withdrawal of consent to a foster-care placement under section 1913 of the Act is also a situation where the parent cannot have the child returned ''upon demand'' because the withdrawal of consent must be more formal than a mere verbal request. FR § 23.127. Truly voluntary placements not covered by ICWA are those in which the parent can have the child returned upon a mere verbal request, without any express or implied formalities or contingencies.

2. Juvenile Delinquency Cases

Comment: Several commenters requested clarification on the interplay between PR § 23.102(a) and (e) as to whether ''juvenile delinquency proceedings'' are covered by ICWA, noting that § 1903(1) of the statute states that ICWA does not apply to placements based on an act that would be deemed a crime if committed by an adult. These

commenters requested clarification that ICWA would apply to placements based on ''status offenses'' (an act that would not be deemed a crime if committed by an adult, such as truancy or incorrigibility). The proposed rule provided that ''juvenile delinquency proceedings'' involving status offenses are not covered by the Act, but one commenter pointed out that in New York, juvenile delinquency proceedings, by definition, exclude status offenses because the term refers only to proceedings for youth who committed an act that would constitute a crime if committed by an adult. Another commenter noted that the California Supreme Court has ruled that placements in delinquency proceedings are presumptively exempt from ICWA, but noted that an Indian child may be placed in a foster home rather than a detention center as a result of delinquency proceedings.

Response: The final rule deletes the term ''juvenile delinquency proceedings'' and instead clarifies in FR § 23.103(a) that ICWA applies to proceedings involving acts that are status offenses (as defined in the rule to be acts that would not be a crime if committed by an adult) and in FR § 23.103(b) that ICWA does not apply to proceedings involving criminal acts that are not status offenses. While ICWA does not apply to proceedings involving non-status offense crimes, States may nevertheless determine that it is appropriate to notify the Tribe in these instances and provide other protections to the parents and child.

Comment: A commenter stated that the final rule should clarify the Tribe has jurisdiction in cases in which the placement is based on a status offense, even in PL–280 States.

Response: If the placement is based upon a status offense, ICWA provisions apply, regardless of whether the State is a PL–280 State.

Comment: Several commenters recommended adding that ICWA applies to ''any placement of an Indian child in foster care as a result of a juvenile delinquency proceeding'' or to proceedings that ''have the potential to result in'' (rather than ''result in'') the need for foster care, preadoptive or adoptive placement or the termination of parental rights. Some commenters suggested additional factors for ICWA applicability to juvenile delinquency proceedings.

Response: The final rule continues to state that ICWA applies to any status offense proceeding that results in a placement of the Indian child because of the status offense. *See* FR § 23.103(a). The final rule does not incorporate the commenters' suggestion for ICWA applicability where the proceeding has the ''potential to result in'' the need for foster care because this language is overly broad, in that nearly all status offense proceedings initially have a potential to result in foster care. The final rule's language makes clear that if a child is placed in foster care or another out-of-home placement as a result of a status offense, that proceeding is an ICWA proceeding and ICWA's standards (*e.g.,* notice, timing, intervention) apply.

Comment: One commenter requested clarification as to whether foster care is intended to include facilities operated primarily for the detention of children who are determined to be delinquent.

Response: A placement, including juvenile detention, resulting from status offense proceedings meets the statutory definition of ''foster-care placement'' and such placement is therefore subject to ICWA.

3. Existing Indian Family Exception

Comment: A large number of commenters expressed their strong support of the proposed provision stating that there is no ''existing Indian family exception'' to ICWA. Many stated that this judicially created exception has denied ICWA protections to Indian children. These commenters stated that the clarification is a confirmation of the Supreme Court's decision in *Adoptive Couple* v. *Baby Girl,* and mirrors the ''overwhelming trend in State legislatures and courtrooms.'' A few commenters stated that the clarification is necessary for consistency because a small number of States are continuing to apply the exception, and parties continue to argue in favor of its application. These commenters note that the exception inappropriately invites scrutiny into Indian culture and identity and allows a court to substitute its judgment for a Tribe's determination of a child's membership. A few commenters noted that the court that created the exception (Kansas Supreme Court) in 1982 has since rejected it. Commenters also pointed out that Congress identified ''Indian child'' as the threshold for ICWA applicability and that the definition does not invite State court investigation into a child's blood quantum, the extent to which the parent or child is involved with the Tribal cultural or other activities, or stereotypical ideas of ''Indian-ness.''

Other commenters opposed the rejection of the EIF exception. A few stated that the Department lacks the authority to override the interpretations of those remaining State courts that still apply the EIF exception. These commenters stated that the EIF exception addresses whether ICWA may be constitutionally applied to children who are classified as ''Indian'' solely because of their heritage, when they have no social, cultural, or political connection to a Tribe. One commenter stated that ICWA assumes the parent maintains social and cultural ties with the Tribe, and points to various locations within the Act referring to prevailing standards of Indian communities, values of Indian culture, and contacts with the Tribe. Another commenter stated that the EIF exception is consistent with ICWA because Congress was not concerned with children whose families were fully assimilated, lived far from Indian country, and maintained little contact with the Tribe. This commenter stated that ICWA cannot treat a child from a reservation the same as a child that never lived near a reservation and that has not been exposed to any Tribal culture. Another commenter argued that the EIF exception must be available for families and children that choose not to live on a reservation.

Response: Congress clearly defined when ICWA would apply to a State court child-custody proceeding—when the child-custody proceeding involves an ''Indian child'' as defined by statute. *See, e.g.,* 25 U.S.C. 1903(1), 1903(4), 1911, 1912, 1915. ''Indian child'' is defined based on the child's political affiliation with a federally recognized Indian Tribe. *See* 25 U.S.C. 1901 (defining ''Indian child'' as a Tribal member or child of a Tribal member who is eligible in a Tribe). The statute includes no provision for a court to determine the applicability of ICWA based on an Indian child's or parent's social, cultural, or geographic ties to the Tribe. To the contrary, Congress expressly recognized that State courts and agencies often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. 25 U.S.C. 1901(5). It would be illogical to read into the statute a requirement that State courts conduct the very inquiry that Congress determined they were often ill-equipped to make. *In re A.J.S.,* 204 P.3d at 551 (citation omitted). Reliance on the EIF both ''frustrates'' ICWA's purpose to ''curtail state authorities from making child custody determinations based on misconceptions of Indian family life,'' *id.* (citation omitted), and encroaches on the power of Tribes to define their own rules of membership.

As noted by a commenter, the court that first created the EIF exception has

since rescinded it. *In re S.M.H.,* 103 P.3d 976 (Kan. Ct. App. 2005). Only a handful of courts continue to recognize the exception (including only one of six appellate districts in California, Alabama, Indiana, Kentucky, Louisiana, Nevada, Missouri, Tennessee).[7] In contrast, a swelling chorus of other States have affirmatively rejected the EIF exception (including Alaska, Arizona, Colorado, Idaho, Illinois, Iowa, Michigan, Montana, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Virginia and Utah).[8]

Those courts that have rejected the EIF exception are correct. As explained above, ICWA applies to any child-custody proceeding involving an Indian child. And where Congress intended a categorical exemption, it provided one expressly. Congress thus excepted from the definition of a ''child-custody proceeding'' ''an award, in a divorce proceeding, of custody to one of the parents'' and also a ''placement'' resulting from a juvenile delinquency proceeding. 25 U.S.C. 1903(1). It provided no such exception for cases that, in a State court's view, do not involve an ''existing Indian family.'' In addition, the Supreme Court did not adopt the EIF exception, even though some parties urged the Court to adopt it in the *Adoptive Couple* case. *See Adoptive Couple* v. *Baby Girl,* 133 S. Ct. at 2552.

Congress did not intend to limit ICWA's applicability to those Tribal citizens actively involved in Indian culture. Contrary to the commenters' assertions, Congress was concerned with children whose families lived far from Indian country, and might only maintain sporadic contact with the Tribe. For example, Congress expressly distinguished between children domiciled on-reservation and off-reservation for the purposes of jurisdiction, and applied the vast majority of ICWA provisions to off-reservation Indian children. For these reasons, the final rule continues to clarify that there is no EIF exception to the application of ICWA.

The final rule no longer uses the nomenclature of the exception, and instead focuses on the substance, rather than the label, of the exception. Thus, the final rule imposes a mandatory prohibition on consideration of certain listed factors, because they are not relevant to the inquiry of whether the statute applies. If a child-custody proceeding concerns a child who meets the statutory definition of ''Indian child,'' then the court may not determine that ICWA does not apply to the case based on factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her Indian parents, whether the parent ever had custody of the child, or the Indian child's blood quantum.

One of the factors that the rule prohibits a court from considering in determining whether ICWA will apply to a proceeding is ''the Indian child's blood quantum.'' FR § 23.103(c). That factor is intended to make clear that, in a case involving a child who meets the statutory definition of an Indian child, a court may not then go on to determine that ICWA should not apply to that proceeding because the child has a certain blood quantum. That factor is, however, not intended to prohibit a court from examining a child's blood quantum for the limited purpose of determining whether the child meets the statutory definition of ''Indian child,'' if a Tribe does not respond to requests for verification of a child's citizenship or eligibility for citizenship. In that limited circumstance, a State court may review whether the child is eligible under a Tribe's citizenship criteria. Likewise, in that limited instance, and if the Tribe's criteria necessitates examining blood quantum to determine citizenship or eligibility, then the State court may consider blood quantum for the purpose of making a determination as to whether the child is eligible for citizenship and therefore an ''Indian child'' under the statute. If the Tribe responds to requests for verification of the child's citizenship or eligibility for citizenship, the court must accept the Tribe's verification and may not substitute its own determination regarding a child's citizenship in a Tribe, a child's eligibility for citizenship in a Tribe, or a parent's citizenship in a Tribe.

4. Other Applicability Provisions

Comment: Several commenters recommended adding that ICWA applies to any domestic-violence proceeding in which the Court restricts a parent's access to the Indian child.

Response: The final rule does not add the suggested language because a restriction of parental access to the child under these circumstances may not meet the definition of a ''child-custody proceeding'' under the Act.

Comment: One commenter suggested clarifying that ''foster care'' includes any placement that may use Title IV–E funding, since there are various definitions of foster care.

Response: The final rule's definition of ''foster-care placement'' mirrors that of the ICWA and generally includes placements that use Title IV–E funding where parental rights have not been terminated.

Comment: One commenter requested clarification here, in addition to in the definition of ''Indian child,'' that once ICWA applies, it applies throughout the duration of the case, regardless of whether the child turns 18.

Response: The final rule adds clarification to the applicability section that ICWA will not cease to apply simply because the child turns 18. *See* FR § 23.103(d).

Comment: One commenter questioned the provision stating that ICWA does not apply to Tribal court proceedings.

Response: Tribes may have their own laws similar to ICWA, but the Federal ICWA provides standards applicable only to State-court proceedings (except for provisions regarding transfer of jurisdiction to Tribal court or Tribal intervention).

D. Inquiry and Verification

The applicability of ICWA to a child-custody proceeding turns on the threshold question of whether the child in the case is an Indian child. It is, therefore, critically important that there be an inquiry into that threshold issue as soon as possible. If this inquiry is not timely, a child-custody proceeding may not comply with ICWA and thus may deny IWCA protections to Indian children and their families. The failure to timely determine if ICWA applies also can generate unnecessary delays, as the court and the parties may need to redo certain processes or findings under the correct standard. This is inefficient for courts and parties, and can create

[7] *See, e.g., In re Alexandria Y.,* 53 Cal. Rptr. 2d 679 (Cal. Ct. App. 1996) (4th Dist.); *Rye* v. *Weasel,* 934 S.W.2d 257 (Ky. 1996); *Hampton* v. *J.A.L.,* 27–869 (La. App. 2 Cir. 7/6/95); 658 So. 2d 331; *C.E.H.* v. *L.M.W.,* 837 S.W.2d 947 (Mo. Ct. App. 1992); *In re Morgan,* No. 02A01–9608–CH–00206, 1997 WL 716880 (Tenn. Ct. App. Nov. 19, 1997); *S.A.* v. *E.J.P.,* 571 So. 2d 1187 (Ala. Civ. App. 1990); *In re Adoption of T.R.M.,* 525 N.E.2d 298, 303 (Ind. 1988); *In re N.J.,* 221 P.3d 1255 (Nev. 2009).

[8] *See, e.g., In re Alexandria P.,* 176 Cal. Rptr. 3d 468, 484–86 (Cal. Ct. App. 2014); *J.W.* v. *R.J.,* 951 P.2d 1206 (Alaska 1998); *Michael J., Jr.* v. *Michael J., Sr.,* 7 P.3d 960 (Ariz. Ct. App. 2000); *In re N.B.,* No. 06CA1325 (Colo. Ct. App. Sept. 6, 2007); *In re Baby Boy Doe,* 849 P.2d 925 (Idaho 1993); *In re S.S.,* 657 N.E.2d 935 (Ill. 1995); *In re R.E.K.F.,* 698 N.W.2d 147 (Iowa 2005); *In re Elliott,* 554 N.W.2d 32 (Mich. Ct. App. 1996); *In re Riffle,* 922 P.2d 510 (Mont. 1996); *In re Child of Indian Heritage,* 543 A.2d 925 (N.J. 1988); *In re Baby Boy C.,* 805 N.Y.S.2d 313 (N.Y. App. Div. 2005); *In re A.D.L.,* 612 S.E.2d 639 (N.C. Ct. App. 2005); *In re A.B.,* 663 N.W.2d 625 (N.D. 2003); *In re Baby Boy L.,* 103 P.3d 1099 (Okla. 2004); *Quinn* v. *Walters,* 881 P.2d 795 (Or. Ct. App. 1994); *In re Baade,* 462 N.W.2d 485 (S.D. 1990); *In re W.D.H., III,* 43 S.W.3d 30 (Tex. App. 2001); *In re D.A.C.,* 933 P.2d 993 (Utah Ct. App. 1997); *Thompson* v. *Fairfax County Dep't of Family Servs.,* 747 S.E.2d 838 (Va. Ct. App. 2013).

delays and instability in placements for the Indian child.

The final rule, therefore, requires courts to inquire into whether a child is an Indian child at the commencement of a proceeding. The court is to ask each participant in the proceeding, including attorneys, whether they know or have reason to know that the child is an Indian child. Such participants could also include the State agency, parents, the custodian, relatives or trial witnesses, depending on who is involved in the case. Further, recognizing that facts change during the course of a child-custody proceeding, courts are to instruct the participants to inform the court if they subsequently learn information that provides reason to know the child is an Indian child. Thus, if the State subsequently discovers that the child is an Indian child, for example, or if a parent enrolls the child in an Indian Tribe, they will need to inform the court so that the proceeding can move forward in compliance with the requirements of ICWA.

ICWA's notice provisions are triggered if a court ''has reason to know'' that a child is an Indian child. 25 U.S.C. 1912(a). The final rule, therefore, uses the statutory language ''reason to know,'' rather than ''reason to believe,'' as was used in the proposed rule. This is to be more consistent with the statutory text and to be clear that the rule does not set a different standard for triggering notice than what is provided for in ICWA. The final rule does, however, provide specific guidance regarding what constitutes ''reason to know'' that a child is an Indian child. The court would have reason to know that a child was an Indian child if, for example, it was informed that the child lives on a reservation or has been a ward of a Tribal court.

If the court has reason to know that a child is an Indian child, then the court is to treat the child as an Indian child unless and until it determines that the child is not an Indian child. This requirement ensures that ICWA's requirements are followed from the early stages of a case. It is also intended to avoid the delays and duplication that would result if a court moved forward with a child-custody proceeding (where there is reason to know the child is an Indian child) without applying ICWA, only to get late confirmation that a child is, in fact, an Indian child. For example, it makes sense to place a child that the court has reason to know is an Indian child in a placement that complies with ICWA's placement preferences from the start of a proceeding, rather than having to consider a change a placement later in the proceeding once the court confirms that the child actually is an Indian child. Notably, the early application of ICWA's requirements—which are designed to keep children, when possible, with their parents, family, or Tribal community—should benefit children regardless of whether it turns out that they are Indian children.

The determination of whether a child is an Indian child turns on Tribal citizenship or eligibility for citizenship. The final rule recognizes that these determinations are ones that Tribes make in their sovereign capacity and requires courts to defer to those determinations. The best source for a court to use to conclude that a child or parent is a citizen of a Tribe (or that a child is eligible for citizenship) is a contemporaneous communication from the Tribe documenting the determination. Thus, if the court has reason to know that a child is a member of a Tribe, it should confirm that due diligence was used to identify and work with the Tribe to verify whether the child is a citizen (or a biological parent is a citizen and the child is eligible for citizenship).

The final rule does, however, allow a court to rely on facts or documentation indicating a Tribal determination such as Tribal enrollment documentation. This provision was added to the final rule in response to comments noting that sometimes Tribes are slow to respond to inquiries seeking verification of Tribal citizenship. It also reflects the fact that it may be unnecessary to obtain verification from a Tribe, if sufficient documentation is already available to demonstrate that the Tribe has concluded that a parent or child is a citizen of the Tribe or the child is eligible for citizenship.

The proposed rule included a suggested requirement that State agencies provide courts with genograms and other specifically-listed information in order to inform the court about whether a child is an Indian child. The final rule does not include that suggestion, as the Department has determined that suggestions on how agencies may conduct inquiries are more appropriate for guidance than regulation.

The final rule also includes provisions that are designed to assist courts and others in contacting Tribes to obtain verification of citizenship or eligibility of citizenship. In addition, BIA is available to assist in contacting Tribes and is taking steps to facilitate the ease of contact. For example, BIA has compiled a list of designated Tribal ICWA officials and is working to make that list more user-friendly.

1. How To Contact a Tribe

Comment: One commenter stated that the information in PR § 23.104 (now located in FR § 23.105) on how to contact a Tribe is helpful to assist in compliance. Several Tribal commenters recounted their experiences in having notices sent to various addresses other than the designated Tribal agent address listed in the **Federal Register**. A few commenters requested that BIA do more to keep the list of designated ICWA agents up-to-date.

A State commenter requested revisions to clarify that BIA publishes the ''official'' list of contacts in the **Federal Register**, and to require BIA to make the list available on its Web site with updates provided by Tribes between official **Federal Register** publications. A few commenters requested making the list easier to use, by including historical Tribal affiliations to facilitate notification of the correct Tribe or by grouping by Tribal heritage (*e.g.,* Chumash, Pomo) in addition to their specific band.

Response: In conjunction with this final rule, BIA is working to make its list of designated ICWA officials more user-friendly and maintaining an updated list on its Web site.

Comment: One commenter suggested that States be required to maintain a list of the ICWA contacts for Tribes in their State.

Response: The Department encourages States to maintain a list of designated ICWA officials of Tribes in their States, but the final rule does not require that they do so.

Comment: One commenter stated that the court should call Tribes for court hearings.

Response: The final rule does not require this.

Comment: One commenter recommended changing the rule to read you ''should'' seek BIA assistance in contacting the Tribe if you do not have accurate contact information or the Tribe fails to respond, rather than ''may,'' to avoid providing too much leeway.

Response: The final rule adopts this suggestion and changes the language to ''should.'' *See* FR § 23.105(c).

2. Inquiry

Comment: Many commenters stated that the provisions requiring early identification of Indian children will be particularly helpful. These commenters stated that children and families are too often denied ICWA protections because a court or agency did not ask whether the child was Indian. These commenters stated that a failure to ask whether a

child is an Indian child risks the Indian children not being identified at all, creates a risk of insufficient efforts to reunify the family, delay, or repetition in court proceedings, and increases the risk of placement instability. They noted that early identification is a best practice that will promote placement stability for children.

Commenters also supported the requirement that the courts ask every party, on the record, whether there is reason to believe the child is an Indian child. Commenters relayed their experiences with child-welfare agencies inadvertently failing to apply ICWA. A commenter noted that there is a tendency for those who are geographically proximate to Tribal lands to make greater efforts to comply with ICWA despite the fact that 78 percent of Native Americans do not live on Tribal lands. The National Council of Juvenile and Family Court Judges noted that they have long recommended this practice to judges because failing to make the necessary inquiries and notify the necessary parties, etc., can result in the case having to start over from the beginning. Commenters noted the importance of this provision because all the rights and responsibilities of ICWA flow from the determination as to whether ICWA applies.

One commenter opposed the requirement to ask if every child is subject to ICWA as a ''callous and unwarranted intrusion.'' One commenter opposed asking whether the child is an ''Indian child'' in the context of adoption because it would make adoption problematic by allowing the Tribe to declare the child an ''Indian child.''

Response: The Department agrees with the comments that stress the importance of early inquiry into the applicability of ICWA. As discussed above, the rule requires such early inquiry. The final rule retains the requirement for State courts to ask in every proceeding whether the child is an ''Indian child'' because this inquiry is necessary to determine if ICWA applies. The inquiry is a limited, non-burdensome imposition on State courts that is designed to ensure that they abide by Federal law and appropriately address key questions that go to jurisdictional, procedural, and substantive requirements under ICWA. ICWA applies to children that meet the definition of an ''Indian child'' and imposes obligations on a court when it knows or has reason to know that a child is an Indian child. In order for a court to determine whether it has reason to know that a child is an Indian child, the court needs to inquire into the issue. Asking if every child is subject to ICWA ensures that ICWA is implemented early on where applicable and thereby avoids the problems and inefficiencies generated by late identification that ICWA is applicable to a particular case.

Comment: Several commenters stated that PR § 23.103(c) and § 23.107, which require agencies and courts to ask whether the child ''is or could be an Indian child'' or whether there is ''reason to believe that the child is an Indian child'' are overly broad and apply when the child *could become* an Indian child. These commenters stated that determining whether ICWA applies and requiring notices to Tribes is expensive, time consuming, and causes undue delay, especially when a parent has only a vague notion of a distant Tribal ancestor, and when the Tribe does not require the parent to be a citizen for the child to be eligible for citizenship. Another commenter stated that the rule should impose a greater burden on State agencies to determine whether a child is eligible for Tribal citizenship. Other commenters noted the discrepancy between the phrases ''reason to believe'' and the statutory phrase ''reason to know.''

Response: The inquiry into whether a child is an ''Indian child'' under ICWA is focused on only two circumstances: (1) Whether the child is a citizen of a Tribe; or (2) whether the child's parent is a citizen of the Tribe and the child is also eligible for citizenship. For clarity, the terminology ''could be an Indian child'' is deleted from the final rule and the final rule changes the language in § 23.107(a) to reflect the statutory language as to whether there is knowledge or a ''reason to know'' the child is an ''Indian child.'' As discussed above, the final rule also provides clear guidance regarding when a court has ''reason to know'' the child is an ''Indian child.''

Comment: Several commenters discussed the terminology in PR § 23.107 regarding inquiry into whether the child ''is an Indian child'' or there is ''reason to believe'' the child is an Indian child. A few commenters suggested changing the requirement to ask whether the child ''is an Indian child'' to a requirement to ask whether the child ''may be an Indian child.'' Alternatively, one commenter stated that the agency or court should be required to ask if the child ''is an Indian child,'' not if they have a ''reason to believe'' the child is Indian—because the child may be Indian even if there is no apparent ''reason to believe.''

Response: As stated in the previous response, the final rule changes the § 23.107(a) language to reflect the statutory language as to whether there is knowledge or a ''reason to know'' the child is an ''Indian child.''

Comment: A few commenters stated that the regulations should be clear about whom, at a minimum, agencies should ask about the child's ancestry (*e.g.,* parents, custodians, other relatives that have a close relationship with the child), what should be asked (any potential Indian heritage that could indicate citizenship or eligibility) and when the questions should be asked (at a minimum, the onset of each new proceeding). Likewise, commenters asserted that State courts need specificity as to what will satisfy the investigation requirements.

A few commenters stated their support for requiring certification on the record of whether the child is an Indian child, to hold those responsible for the inquiry accountable. A commenter stated support of genograms and ancestry charts as supporting social work practice and skills. The National Council of Juvenile and Family Court Judges stated that the ICWA checklists it provides to judges and others also recommend family charts or genograms be created to facilitate Tribal citizenship identification as a best practice. A few commenters suggested making it mandatory for State courts to require agencies to provide the information, while others opposed the requirement as putting an undue burden on courts and agencies because the cost and time to investigate and prepare a history where there is no firm evidence of Indian heritage will waste scarce resources.

Several commenters opposed requiring genograms or ancestry charts as a burden on courts, agencies, and biological parents for voluntary adoptions. Commenters stated that parents rarely have more than basic information even about their own parents and said that requiring such information will discourage adoption. A few commenters stated that the rule imposes unfunded mandates by requiring States to create genealogies for all children. A State agency commented that the rule will create significant additional workload for it, State attorneys and courts without providing increased funding, all while facing record-high numbers of reports, investigations and children in out-of-home placement. Other commenters stated that the logistics and standards imposed on State courts are unworkable, labor-intensive, and extremely costly. Commenters also offered additional suggestions for information courts may wish to consider requiring agencies to provide in support

of certification regarding whether there is information suggesting the child is an Indian child.

Response: The final rule directly addresses courts only, as discussed above. It requires the court to ask all participants in the case whether there is reason to know the child is an Indian child on the record. It does not, however, require the agency to provide genograms or other information that was listed in the proposed rule, as the Department has determined that suggestions on how agencies may conduct inquiries are more appropriate for guidance than regulation.

Comment: A few commenters suggested requiring the inquiry to be made, not only at each child-custody proceeding, but also ''at subsequent hearings'' because children may become enrolled during this time.

Response: The final rule does not require an inquiry at each hearing. Instead, it requires that the State court should instruct parties to inform it if they later discover information that provides reason to know the child is an Indian child. *See* FR § 23.107(a). This instruction reflects that ICWA requirements apply throughout a child-custody proceeding, if a child is an Indian child. Thus, the instruction insures that if parties find out that there is reason to know the child is an Indian child, the court will be informed and can then conduct the requisite inquiry and provide the appropriate ICWA protections. And, if a new child-custody proceeding is initiated for the same child, the court should again inquire into whether there is reason to know that the child is an Indian child.

Comment: A few commenters suggested a requirement to proactively discover whether there is a ''reason to believe'' the child is an ''Indian child'' because parties could do nothing to discover and then truthfully certify they have no reason to believe.

Response: The final rule retains the provision at § 23.107 requiring State courts to ask participants in the proceeding if they know or have reason to know that the child is an ''Indian child.'' States or courts may choose to require additional investigation into whether there is a reason to know the child is an Indian child, and may choose to explain the importance of answering questions regarding whether the child is an Indian child.

Comment: A few commenters stated that the term ''active efforts'' in PR § 23.107(b) should be replaced with ''actively sought'' or ''due diligence'' to avoid confusion with use of the phrase ''active efforts'' in the statute.

Response: The final rule replaces the term ''active efforts'' with ''due diligence'' in the context of identifying the Tribes of which the child may be a citizen because ''due diligence'' is a common term in child-welfare cases with which practitioners are already familiar. *See* FR § 23.107(b); *see e.g.,* 42 U.S.C. 671(a)(29) (specifying funding requirement that within 30 days after the removal of a child from the custody of the parent or parents of the child, the State shall exercise due diligence to identify and provide notice to the following relatives: All adult grandparents, all parents of a sibling of the child, where such parent has legal custody of such sibling, and other adult relatives of the child (including any other adult relatives suggested by the parents)).

Comment: A few commenters supported PR § 23.107(b) requiring certification on the record regarding whether the child is an Indian child and recommended adding a requirement that the certification include information documenting diligent search efforts or ''good faith effort'' to obtain information and all findings of the search. These commenters also recommended providing copies of the certifications and documents to the Tribe.

Response: The rule requires that, if the court has reason to know the child is an Indian child but does not have sufficient evidence to determine that the child is or is not an ''Indian child,'' the court must confirm that the agency or other party worked with Tribes to verify the child's citizenship; the court will necessarily require some evidence in the record to make that confirmation. *See* FR § 23.107(b).

Comment: A few commenters stated that the requirement in PR § 23.107(b) to work with ''all Tribes'' in which the child may be a citizen is overly burdensome.

Response: The final rule requires State courts to confirm that the agency used due diligence to work with all Tribes for which there is reason to know the child may be a citizen. The requirement does not mean an agency must work with all federally recognized Tribes because the reason to know will indicate a certain Tribe or group of Tribes with which the child may have political affiliations. It is necessary to work with all of the Tribes of which there is reason to know the child may be a citizen to identify the ''Indian child's Tribe'' as defined in the statute and comply with statutory requirements for notice and jurisdiction.

Comment: One commenter stated that the provision in PR § 23.107(c)(4), stating that there is a reason to know the child is an Indian child if the child or parents are domiciled in a predominantly Indian community, confuses Tribal enrollment with race.

Response: The final rule no longer uses the standard ''predominantly Indian community,'' as that phrase was overbroad. Instead, the regulation states that a court has reason to know that a child is an Indian child if 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. The regulation does not presume that the child is an Indian child if that provision is triggered; rather, such domicile or residence is a factor that requires further investigation because it gives the court ''reason to know'' that the child is an Indian child.

If a child or the child's parents reside on a Tribe's reservation, it is reasonable to contact that Tribe to find out if the child is a citizen (or the child's parent is a citizen and the child is eligible). In addition to reservations, the provision highlights Alaska Native Villages because Alaska is home to approximately half the federally recognized Indian Tribes, but there is only a single reservation. Thus it is similarly reasonable to contact the Tribe associated with the Alaska Native Village where the child or her parents reside.

Comment: A commenter suggested adding a new § 23.107(c)(6) to state ''[t]he child is or has been a ward of a Tribal court'' and a new § 23.107(c)(7) to state ''[e]ither parent or child possesses a Tribal membership card or certificate of Indian blood.''

Response: The final rule includes an identification card indicating citizenship in an Indian Tribe. *See* FR § 23.107(c)(5)–(6).

Comment: A commenter stated that it may be duplicative to require the court to ask whether a child is an Indian child if it is already stated on record.

Response: The inquiry may be appropriate even if it has already been established that the child is an ''Indian child'' to ensure that all Tribes through which the child meets the definition of ''Indian child'' have been identified.

3. Treating Child as an ''Indian Child'' Pending Verification

Comment: Several commenters stated their support for treating a child as an Indian child pending verification under PR § 23.103(d), noting that it is a best practice to allow time for notice to the Tribe and verification from the Tribe, keeps Indian children with their families and Tribes, and helps avoid

multiple placements. California Indian Legal Services noted that this approach is consistent with California law. A few commenters stated that ICWA has been viewed as the ''gold standard of child-welfare practice'' so there is no harm in temporarily applying ICWA standards to a child who may be Indian, even if it is ultimately determined that he or she is not. Commenters stated that this provision will help prevent the unpredictability that results where ICWA is not applied at the outset and it is determined later that ICWA applies.

Several commenters opposed the provision requiring treatment of a child as if ICWA applies. Some stated that it will result in overbroad application in violation of children's constitutional rights because, without confirmation of the political affiliation, it treats children as Indian children solely due to racial identification. A commenter noted that this requirement places a large burden on State agencies to provide active efforts for all possibly Indian children when Tribes may take months to respond to a request for verification. Another commenter stated that the provision removes any discretion from the court and eliminates its role as fact-finder because ''any reason'' is too broad and presumes the court is not capable of determining if the evidence is sufficient to show the child is an Indian child. One commenter suggested it will be difficult to explain to the child that he or she is being treated as an Indian child, especially when it is later discovered the child was not an Indian child.

Response: The final rule moves this provision to FR § 23.107(b) and clarifies that the trigger for treating the child as an ''Indian child'' is the reason to know that the child is an Indian child. This is not based on the race of the child, but rather indications that the child and her parent(s) may have a political affiliation with a Tribe. As discussed above, this requirement ensures that ICWA's requirements are followed from the early stages of a case and that harmful delays and duplication resulting from the potential late application of ICWA are avoided. If, based on feedback from the relevant Tribe(s) or other information, it turns out that the child is not an ''Indian child,'' then the State may proceed under its usual standards.

Comment: A few commenters suggested adding an end point to when the child should no longer be treated as an Indian child, to add clarity. A few commenters noted that Tribes often fail to respond to repeated inquiries as to whether children are Tribal citizens. One of these commenters stated that the rule should require Tribes to respond and another stated that imposing obligations on the Tribe would expand beyond the statute. A few commenters added that at some point, if the Tribe fails to respond, the court must be free to determine the child is not an Indian child.

Response: The rule requires that, if there is reason to know the child is an Indian child, the court is to 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.'' The end point would be the court's determination that the child is not an Indian child. State courts have discretion as to when and how to make this determination. If a Tribe fails to respond to multiple repeated requests for verification regarding whether a child is in fact a citizen (or a biological parent is a citizen and the child is eligible for citizenship), and the agency has repeatedly sought the assistance of BIA in contacting the Tribe, a court may make a determination regarding whether the child is an Indian child for purposes of the child-custody proceeding based on the information it has available. If new evidence later arises, the court will need to consider it and if he or she is an Indian child, ICWA applies. The Department encourages prompt responses by Tribes, and encourages courts and agencies to include enough information in the requests for verification to allow the Tribes to readily determine whether the child is a Tribal citizen (or whether the parent is a Tribal citizen and the child is eligible for citizenship).

Comment: One commenter stated that this provision requires proving a negative and that if a Tribe fails to respond to notice, continuing to treat the child as an Indian child overrules the Tribe's power to determine its own citizenship.

Response: As noted above, if a Tribe repeatedly fails to respond, a court may make a determination regarding whether the child is an Indian child based on the information it has available. Treating the child as an Indian child in the interim does not overrule the Tribe's power to determine its citizenship. The determination of whether a child is an Indian child is made only for purposes of the particular child-custody proceeding. In addition, the Tribe remains free to respond in the affirmative or negative as to whether the child is a citizen (and as to whether the parent is a citizen and the child is eligible for citizenship).

Comment: A commenter notes that under ICWA, the burden of proof is on the party asserting ICWA to provide evidence that the child is Indian.

Response: Under the statute, ICWA requirements apply when the court and agency know or have a reason to know the child involved in the Indian child-custody proceeding is an Indian child. The applicability of ICWA can affect a State court's jurisdiction as well as the applicable law. Even if a party fails to assert that ICWA may apply, the court has a duty to inquire as to ICWA's applicability to the proceeding.

4. Verification From the Tribe

Comment: Several commenters stated that requiring States to ''obtain verification'' in PR § 23.107(a) is unfair because it holds the States responsible even if the Tribe fails to respond. Several commenters stated that written verification from the Tribe should not be required and the parties should be free to produce, under rules of evidence, whatever verification is available to allow the judge to determine whether the evidence suffices. One commenter stated that the requirement is unfair to Tribes because it places the obligation on the Tribe to verify, and the Tribe may lack the resources to respond to all requests for verification. A few provided alternate suggestions including requiring States to ''solicit verification'' or ''seek verification.'' Another commenter suggested adding that written notice to a Tribe is not sufficient to meet the requirements, unless the notice results in verification.

Response: The final rule requires the State court to ensure the agency worked with the Tribe(s) to obtain verification, but does not require that ''the agency must obtain verification,'' as required by the proposed rule. *See* FR § 23.107(b). It is expected that the agency would work with the Tribe(s) that the court has reason to know is/are the Indian child's Tribe to obtain verification regarding whether the child is a citizen (or a biological parent is a citizen and the child is eligible for citizenship). The Department encourages agencies to contact Tribes informally, in addition to providing written notice, to seek such verification. While written verification from the Tribe(s) is an appropriate method for such verification, other methods may be appropriate, so the final rule does not specify that the verification needs to be in writing.

Comment: A commenter stated that appearance by the Tribe's representative at a hearing should constitute verification.

Response: A Tribal representative's testimony at a hearing regarding whether the child is a citizen (or a biological parent is a citizen and the child is eligible for citizenship) is an

appropriate method of verification by the Tribe.

Comment: A commenter suggested that § 23.107(a) should require that agencies provide certain information in the request for verification to allow Tribes to make a determination, including at least: (1) The name of the child, child's birthdate and birth place; (2) the names of the parents, their birthdates and birthplaces; and (3) the names of the child's grandparents, their birthdates and birthplaces, to the extent known or readily discoverable.

Response: The request for verification is a meaningful request only if it provides sufficient information to the Tribe to make the determination as to whether the child is a citizen (or the parent is a citizen and the child is eligible for citizenship). Providing as much information as possible facilitates earlier identification of an Indian child and helps prevents disruptions. FR § 23.111(d) includes categories of information that must be provided in the notice to a Tribe in involuntary foster-care placement or termination of parental rights proceedings. Such information may be helpful to provide for other types of proceedings to assist in verification of whether the child an Indian child.

Comment: A commenter stated that § 23.107 should be revised to state that it is never appropriate for a State court to determine the child is not Indian, if there is any reason to believe the child is Indian, without providing notice to the Tribe.

Response: The Department agrees. ICWA establishes that notice to the Tribe is required for involuntary child-custody proceedings when the court has reason to know that an Indian child is involved. *See* 25 U.S.C. 1912(a). This provision avoids a determination that a child for whom there is ''reason to know'' was an Indian child is not an ''Indian child'' without notice to the Tribe.

5. Tribe Makes the Determination as to Whether a Child is a Citizen of the Tribe

Comment: A few commenters opposed the provision at PR § 23.108 stating that the Tribe makes the determination as to whether the child is a citizen, pointing out that courts have held that the parent has the burden to prove the child is an Indian child and that if the parent fails to prove that, then the court is free to determine the child is not an Indian child.

Several commenters stated their support of the provision that the Tribe makes the determination as to citizenship. These commenters stated that the provision recognizes Tribes' exclusive authority, as sovereign governments, to determine their political membership. One commenter noted that the State has no authority to determine whether ICWA applies based on items such as whether a Tribal citizen votes or participates in Tribal activities or has a certain blood quantum, and that only the Tribe may decide who is a citizen. A commenter stated that the emphasis should be that if a Tribe determines a child is a citizen, that determination is conclusive and binding on the State and any other entity or person.

A few commenters stated that while they support the provision, there should be a mechanism for the State court to determine the child is an Indian child if the Tribe fails to respond. One commenter suggested adding at the end of PR § 23.108(d) ''provided that if the Tribe does not respond following a good faith effort to obtain verification, the court must still treat the child as an Indian child if it otherwise has reason to believe that the child may be an Indian child.'' Likewise, a commenter requested a reference to PR § 23.108 be added to PR § 23.107 so it would read ''unless and until it is determined pursuant to PR § 23.108 that the child is not a member. . .'' to make clear only the Tribe makes the determination.

Response: Tribes, as sovereign governments, have the exclusive authority to determine their political membership and their eligibility requirements. A Tribe is, therefore, the authoritative and best source of information regarding who is a citizen of that Tribe and who is eligible for citizenship of that Tribe. Thus, the rule defers to Tribes in making such determinations and makes clear that a court may not substitute its own determination for that of a Tribe regarding a child's citizenship or eligibility for citizenship in a Tribe.

While a Tribe is the authoritative and best source regarding Tribal citizenship information, the court must determine whether the child is an Indian child for purposes of the child-custody proceeding. That determination is intended to be based on the information provided by the Tribe, but may need to be based on other information if, for example, the Tribe(s) fail(s) to respond. For example, the final rule clarifies that a Tribal determination of citizenship or eligibility for citizenship may be reflected in a preexisting document issued by a Tribe, such as Tribal enrollment documentation.

Comment: A few commenters stated that allowing Tribes the sole authority to determine membership is unfair to those who willfully left behind Indian country. They stated that families, rather than Tribes, should have the final say on membership.

Response: Because ICWA only applies when the child is a member or when the child's parent is a member, the individual does, in fact, have the final say on membership, as Tribal membership can be renounced. *See, e.g., Means* v. *Navajo Nation,* 432 F.3d 924, 934 n. 68 (9th Cir. 2005) (''The authorities suggest that members of Indian tribes can renounce their membership.''); *Thompson* v. *County of Franklin,* 180 F.R.D. 216, 225 (N.D.N.Y. 1998) (giving effect to individual's unequivocal renunciation of Tribal membership); *see, e.g.,* Fort Peck Comprehensive Code of Justice Title 4, Enrollment, sec. 217A(b) (1989) (''Any adult member of the Assiniboine and/or Sioux Tribes may apply for relinquishment of their respective tribal enrollment, at any time.'').

Comment: A commenter stated that PR § 23.108 is too narrow because it fails to account for Tribes that make membership determinations based on biological grandparent membership.

Response: The final rule does not affect how Tribes determine citizenship, whether based on biological grandparent citizenship or otherwise. For the purposes of ICWA applicability, if a child is eligible for Tribal citizenship based on a grandparent's citizenship, that is not the end of the inquiry. The statute still requires that the child must either himself or herself be a citizen, or that child's parent must be a citizen, in order for the child to be an ''Indian child.''

Comment: One commenter requested clarification that BIA will no longer make any membership decisions in lieu of a Tribe.

Response: The rule does not provide for BIA to make determinations as to Tribal citizenship or eligibility for Tribal citizenships except as otherwise provided by Federal or Tribal Law. BIA can help route the notice to the right place. The existing regulation at § 23.11(b) and the final regulation at FR § 23.111(e) state that, if the identity or location of the parents, Indian custodians or Tribe cannot be determined, notice must be sent to the BIA regional office. This mirrors the statutory requirement. *See* 25 U.S.C. 1912. To ensure response at the regional level, the final rule requires that notice be sent to the Regional Director and deletes the provision at § 23.11(a) requiring a copy of each notice be sent to Secretary.

Comment: A few commenters suggested strengthening this section by changing ''may'' to ''shall'' to confirm

that only the Tribe may define its membership.

Response: The final rule adopts the substance of this suggestion by deleting ''may'' and instead providing that the Tribe ''determines.''

Comment: One commenter requested clarification that a child may be a member in a Tribe without necessarily being enrolled.

Response: Tribes determine their citizenship; neither the statute nor the rule address how a Tribe determines who its citizens are (by enrollment, or otherwise).

Comment: A commenter requested adding language stating that a Tribe that previously made a determination as to Tribal membership may revisit and/or correct that decision.

Response: The Tribe determines citizenship and may provide new evidence as to Tribal citizenship to the court.

Comment: One commenter stated there should be a presumed Tribe the same way there is a presumed parent because it often takes a Tribe years to recognize a child as eligible for enrollment.

Response: The rule does not include a provision establishing a presumed Tribe. ICWA establishes that a child is an ''Indian child'' if the child is enrolled, or if the parent is enrolled and the child is eligible for enrollment.

E. Jurisdiction: Requirement To Dismiss Action

With limited exceptions, ICWA provides for Tribal jurisdiction ''exclusive as to any State'' over child-custody proceedings involving an Indian child who resides or is domiciled within the reservation of such Tribe. 25 U.S.C. 1911(a). ICWA also provides for exclusive Tribal jurisdiction over an Indian child who is a ward of a Tribal court, notwithstanding the residence or domicile of the child. *Id.*

A court's subject-matter jurisdiction is essential to the exercise of judicial power, is not a subject of judicial discretion, and cannot be waived. *See, e.g., Arbaugh* v. *Y&H Corp.,* 546 U.S. 500 (2006). Thus, the final rule identifies the determinations that a State court must make to assess its jurisdiction. If the State court does not have jurisdiction, either because the Indian child is domiciled on a reservation, where the Tribe exercises exclusive jurisdiction over child-custody proceedings, or because the Indian child is a ward of a Tribal court, the final rule instructs the State court to notify the Tribal court of the pending dismissal, dismiss the State-court proceedings, and send all relevant information to the Tribal court. State and Tribal courts and State and Tribal child-welfare agencies are encouraged to work cooperatively to ensure that this process proceeds expeditiously and that the welfare of the Indian child is protected.

Comment: A commenter stated that the court should be required to ''immediately'' dismiss a proceeding under PR § 23.110 as soon as it determines it lacks jurisdiction. A few commenters requested additions to ensure that the State diligently contacts the Tribe and transfers the case in a timely manner.

Response: The final rule does not include a requirement to dismiss a case within a certain time frame because the timing may depend upon coordination with the Tribal court. *See* FR § 23.110. The final rule does add a requirement that the State must ''expeditiously'' notify the Tribe of a pending dismissal. The State court may also need to reach out to the Tribal court or Tribal child-welfare agency to determine whether jurisdiction over child-custody proceedings for that Tribe is otherwise vested in the State by existing Federal law. *See* 25 U.S.C. 1911(a).

Comment: A few commenters suggested revising PR § 23.110(b) to specify that the documentation the agency must submit includes ''all agency documentation as well as reporter information'' because a Tribal court to which a case is transferred is at a disadvantage without reporter information on key witnesses and other details.

Response: The final rule requires the court to transmit all information in its possession regarding the Indian child-custody proceeding to the Tribal court. Such information would include all the information within the court's possession regarding the Indian child-custody proceeding; the final rule adds examples for clarity. The final rule also changes ''all available information'' to ''all information'' regarding the proceeding. *See* FR § 23.110. In order to best protect the welfare of the child, State agencies may wish to share information that is not contained in the State court's records but that would assist the Tribe in understanding and meeting the Indian child's needs.

Comment: A few commenters suggested an amendment to clarify that the mandatory dismissal provisions do not apply if the State and Tribe have an agreement regarding jurisdiction because, in some cases, Tribes choose to refrain from asserting jurisdiction.

Response: The final rule adds a reference to § 1919 of the Act, which allows for Tribal-State agreements governing jurisdiction.

Comment: A commenter stated that PR § 23.110(b) would apparently preclude the State from providing safety investigative services it currently provides when a child is domiciled on reservation but located off reservation.

Response: The final rule addresses dismissals of State-court child-custody proceedings based on lack of jurisdiction. It does not affect State authority to provide safety investigative services when a child is domiciled on reservation but located off reservation.

Comment: A commenter suggested adding to PR § 23.110(c) that the State court must contact the Tribal court not only when the child has lived on a reservation, but also if the State court has reason to believe the child may be a ward of Tribal court.

Response: The final rule clarifies that the Tribe has jurisdiction, notwithstanding the Indian child's residence or domicile off reservation, if the child is a ward of the Tribal court. *See* FR § 23.110(b). The State court may need to contact the Tribal court to confirm the child's status as a ward of that court. In addition, the final rule identifies the child's status as a ward of a Tribal court as one of the ''reasons to know'' that the child is an Indian child, FR § 23.107(c)(5), a status which may trigger certain notice requirements. *See* FR § 23.111.

Comment: A few commenters suggested allowing an exemption for dismissal in emergency cases. These commenters stated that this exemption is necessary to ensure the safety of the child, so the State does not dismiss proceedings until the Tribe has asserted jurisdiction.

Response: FR § 23.110 includes the introductory provision ''subject to § 23.113 (emergency proceedings)'' to ensure that the child is not subjected to imminent physical damage or harm.

Comment: One commenter noted that if PR § 23.110(c) continues to require the State court to contact the Tribal court, then BIA should maintain a comprehensive list of Tribal courts and their contact information.

Response: If the State court does not have contact information for the Tribal court, the Tribe's designated ICWA agent may provide that information. The BIA publishes, on an annual basis, a list of contacts designated by each Tribe for receipt of ICWA notices in the **Federal Register** and makes the list available at *www.bia.gov*.

Comment: A commenter suggested BIA compile a list of which reservations are subject to a Tribe's exclusive jurisdiction for child-welfare

proceedings and make this information readily available to States, to allow them to determine whether the Tribe exercises exclusive jurisdiction over a particular reservation.

Response: Each Tribe's ICWA designated contact will have information on whether the Tribe exercises exclusive jurisdiction.

F. Notice

The notice provisions included in section 1912(a) are one of ICWA's core procedural requirements in involuntary child-custody proceedings for protecting the rights of children, parents, Indian custodians, and Tribes. Prompt notice is necessary to ensure that parents, Indian custodians, and Tribes have the opportunity to participate in the proceeding. Without notice of the proceeding, they will not be able to exercise other rights guaranteed by ICWA, such as the right to intervene in or seek transfer of the proceedings. In addition, notice may facilitate early actions that will minimize disruptions for the children and families through, for example, enabling placement of Indian children in preferred placement homes as early as possible. It will also allow for prompt provision of Tribal resources and early transfer to Tribal courts.

In order for the recipients of a notice to be able to exercise their rights in a timely manner, the notice needs to provide sufficient information about the child, the proceeding, and the recipient's rights in the proceeding. The final rule, therefore, specifies the information to be contained in the notice. Some of the information that is required to be provided, such as identifying and Tribal enrollment information, is necessary so that that Tribes can determine whether the child is a member of the Tribe or eligible for membership. Other information, such as a copy of the petition initiating the child-custody proceeding and a description of the potential legal consequences of the proceeding, is necessary to provide the recipient with sufficient information about the proceeding to understand the background and issues that may be addressed in the proceeding and the consequences that may flow from the proceeding. Finally, other information, such as descriptions of the intervention rights and timelines, is necessary to inform the recipient of the rights that are available to the recipient.

The final rule deletes the provision PR § 23.135(a)(3) requiring notice of a change in placement. The Department, however, recommends that information about such changes regularly be provided. The statute provides rights to parents, Indian custodians and Tribes (*e.g.,* right to intervene) and a change in circumstances resulting from a change in placement may prompt an individual or Tribe to invoke those rights, even though they did not do so before.

ICWA also provides for minimum notice periods that are designed to allow notice recipients time to evaluate the notice and prepare to participate in the proceeding. The final rule, therefore, reiterates the minimum time limits required by the Act. In many instances, however, more time may be available under State-court procedures or because of the circumstances of the particular case. The final rule, therefore, makes clear that additional time may be available.

1. Notice, Generally

Comment: Several commenters stated their support of the provision at PR § 23.111(a) clarifying what information must be included in notices and to whom notices must be sent. Several commenters noted that too often, appropriate parties are not notified of a child-custody proceeding in a timely manner. Several commenters noted the importance of rigorous notice requirements in involuntary proceedings as necessary to: Facilitate parents', Indian custodians', and Tribes' participation and make available Tribal resources; facilitate placement of Indian children in preferred placement homes as early as possible and minimize the possibility that children will face a disruption in the future; and allow Tribes the opportunity to fully participate in proceedings affecting their citizens, advocate for their citizens, and transfer to Tribal courts without delay. One commenter noted that Tribes have rights to transfer and intervene that they can exercise only if they have notice of a proceeding. One commenter stated that the costs of not providing notice are great, in terms of costs to rectify removal and costs to the child in terms of trauma and loss of language and culture.

Response: The Department agrees with these comments, and has crafted the final rule to ensure complete and accurate notices of involuntary proceedings are provided in a timely manner.

Comment: A few commenters also supported the requirement in PR § 23.111(g) for a translated version of the notice or having the notice read and explained in a language understandable to the parents. These commenters stated that many Alaska Natives have limited English proficiency and that parents are often not informed in plain language of the process or their rights under ICWA. A commenter suggested this section change ''should'' to ''shall'' to require the court/agency to contact the Tribe or BIA for assistance in locating a translator or interpreter.

Response: The final rule continues to allow for a translator or interpreter, by including the requirement to provide language-access services, as governed by Title VI of the Civil Rights Act and other Federal laws. *See also* 25 CFR 23.82 (assistance in identifying language interpreters).

Comment: A few commenters opposed notice requirements in the emergency context. The Washington Department of Social and Human Services, Children's Administration, and California Department of Social Services opposed notice requirements for emergency proceedings, noting that the timelines associated with notice are unreasonable in this context. In California, for example, if the child has been removed, the detention hearing must be held by the next judicial day after the petition is filed. Requiring ICWA notice, and having to wait 10 days after the receipt of the notice, would make compliance with the detention timeframe impossible.

Response: The commenters point out a potential issue with timing of emergency removals and the section 1912(a) requirements for notice. The final rule addresses this by requiring formal notice and applicable timelines to only those placements covered by section 1912(a) of the Act and do not apply to emergency proceedings. The rule indicates, however, that the petition for emergency removal or emergency placement should include statements of any efforts made to contact the Indian child's parents or Indian custodians and Tribe. *See* FR § 23.113(c)(3), (c)(8). As discussed below, section 1922 of the Act applies in limited circumstances, for short periods of time, to ensure that ICWA's procedural and substantive provisions do not prohibit a State from removing a child under State law on an emergency basis ''to prevent imminent physical damage or harm to the child.'' In such situations, notice should be provided as soon as possible.

Comment: A commenter noted that an issue that constantly causes delay is the Tribe failing to timely respond to notice because often there are processes that have to take place within the Tribe that prevent timely response, causing emotional and financial difficulty for all parties.

Response: Any processes that are internal to a Tribe and may delay a Tribe's response to notice are beyond the scope of this rule. In addition, the

final rule may ameliorate that problem by identifying information to be provided in the notice that may allow Tribes to more readily determine the child's status.

Comment: Several commenters had additional suggestions for improving the notice requirements. For example, one commenter suggested a consistent process and format to inform Tribes of ICWA cases. Several commenters suggested adding a deadline to provide notice, such as within 15 days of when a child is removed from the home. These commenters also suggested adding a requirement for the State to prove the Tribe received notice, noting that in Alaska the mail is not always reliable.

Response: The Department is considering whether to provide a sample notice as part of updated guidelines and also encourages States to implement a consistent process and format to inform Tribes of ICWA cases. With regard to a deadline to provide notice, the rule does not establish such a deadline because the rule provision incorporates those deadlines specified by statute. *See* FR § 23.112; 25 U.S.C. 1912(a).

Comment: A few commenters suggested the rule should require States to contact Tribes by phone and email, in addition to mail, and clarify when contact less formal than registered mail is acceptable.

Response: The statute and the final rule require notice by registered or certified mail, return receipt requested. (*See* section IV.F.2 of this preamble for response to comments on registered and certified mail.) The Department encourages States to act proactively in contacting Tribes by phone, email, and through other means, in addition to sending registered or certified mail.

Comment: A commenter suggested that the rule should require notice to the putative father, if a putative father other than the alleged father becomes known, to protect the putative father's rights.

Response: The statute and regulations require notice to the parents; a ''parent'' includes unwed fathers that have established or acknowledged paternity. If, at any point, it is discovered that someone is a ''parent,'' as that term is defined in the regulations, that parent is entitled to notice.

Comment: A commenter suggested incorporating Colorado's requirement for notice to be sent to the designated Tribal agent (listed in the **Federal Register**) or the highest Tribal official, or if neither can be determined, then to the highest Tribal court judge with a copy to the Tribe's social services department.

Response: The rule specifically addresses how to contact a Tribe at FR § 23.105, and clarifies that BIA publishes a list of Tribally designated ICWA agents who may receive notice.

Comment: A few commenters requested that BIA forward all notices it receives to the Tribe, to provide checks and balances to ensure the Tribe receives notice and because some States provide notice to BIA without contacting the Tribe.

Response: The party seeking placement is responsible for providing the Tribe with notice under the statute. *See* 25 U.S.C. 1912(a). BIA assists when there is difficulty identifying or locating a Tribe; however, it is the responsibility of the party seeking placement to send notice directly to the appropriate Tribe(s).

Comment: A few commenters suggested revising PR § 23.111(d) to provide that the court/agency must check the **Federal Register** contact information for the child's Tribe and send the notice to BIA only if unable to identify the Tribe.

Response: The final rule's directions for how to contact a Tribe includes checking the **Federal Register** contact information. *See* FR § 23.105.

Comment: A commenter stated that the number of notices required is excessive. Another commenter stated that it is unclear whether PR § 23.111(a) requires notice only once at the initiation of the proceeding, or whether it is required for each hearing within a proceeding. A few commenters suggested requiring registered mail only for the first notice because notice for each subsequent hearing or action and all the data elements is onerous and unnecessary if the Tribe is already noticed and involved in the proceedings. Similarly, another commenter suggested that there be an exception to notice requirements if the Tribe has actual notice of the hearing, so the State does not have to unnecessarily spend additional resources.

Response: Notice of an involuntary proceeding for foster-care placement or termination of parental rights is required by section 1912 of the Act. *See* FR § 23.111(a). Each proceeding may involve more than one court hearing, but only one notice meeting the registered (or certified) mail requirements of section 1912(a) is required for each proceeding (regardless of the number of court hearings within the proceeding). *See* Section IV.C.1 (''Child-custody proceeding'' Definition) of this preamble. Consistent with the statute, the final rule requires that notice be given for a termination-of-parental-rights proceeding, even if notice has previously been given for the child's foster-care proceeding. If a Tribe intervenes or otherwise participates in a proceeding, the Tribe should receive notice of hearings in the same manner as other parties.

Comment: A commenter requested clarification that any time an agency opens an investigation or the court orders the family to engage in services to keep the child in home as part of a diversion, differential, alternative response, or other program, that agencies and courts should follow the verification and notice provisions.

Response: The statute applies to Indian child-custody proceedings. The final rule does not address in-home services that do not meet the Act's definition for ''child-custody proceeding.''

2. Certified Mail v. Registered Mail

Comment: A few commenters supported requiring notice in PR § 23.111 by registered mail with return receipt requested. One commenter stated that this requirement is important because it establishes proof of notice. A few suggested this requirement replace the requirement for certified mail in § 23.11(a).

Several commenters opposed the requirement for registered mail with return receipt. These commenters noted issues with registered mail with return receipt requested that undermine ICWA compliance: Specifically, that registered mail with return receipt requested is approximately three times more costly, and that registered mail is less reliable as timely notification. One commenter noted that, in 1994, BIA considered requiring registered mail with return receipt requested but ultimately rejected it because it determined it undermined the purpose of ICWA notice. A few commenters also stated that registered mail requires the individual to pick up the mail from the postal service whereas certified mail is in-person delivery with a sign-off; and that registered mail can result in delays because only the person whose name exactly matches the addressee can pick up the mail, and if the person is not present the mail is sent back to the sender.

Response: The final rule requires either registered mail with return receipt requested or certified mail with return receipt requested. Both types of mail provide evidence of delivery with the return receipt. *See* FR § 23.111. As the commenters detail, there is no clear benefit of requiring registered mail over certified mail, because there is no practical difference between the two that impacts any of the interests that ICWA protects. Registered mail offers

the added feature of a chain of custody while in transit, but this chain of custody is not necessary to effectuate notice under ICWA and adds delay. In terms of cost and timeliness, certified mail provides benefits over registered mail in that certified mail is less expensive and enables notice more quickly.

Comment: Several commenters opposed the provision stating that personal service may not substitute for registered mail return receipt requested. These commenters stated that personal service is the best guarantee of receipt. Several also stated that actual notice should be a substitute for registered mail.

Response: If State law requires actual notice or personal service, that may be a higher standard for protection of the rights of the parent or Indian custodian of an Indian child than is provided for in ICWA. In that case, meeting that higher standard would be required. *See* 25 U.S.C. 1921.

Comment: One commenter suggested requiring that the postal receipt be filed with the court, to ensure that service is completed before any hearings are held.

Response: Maintaining documentation of notice is important; as courts have emphasized, the ''filing of proof of service in the trial court's file would be the most efficient way of meeting [the] burden of proof'' in proving notice. *See In re E.S.,* 964 P.2d 404, 411 (Wash. Ct. App. 1998). The rule requires the court to ensure this documentation is in the record. *See* FR § 23.111(a)(2).

3. Contents of Notice

Comment: Several commenters stated that the notice must contain the names and birthdates of the child's parents for the notice to be useful for the Tribe to determine whether the child is a member or if the parent is a member and the child is eligible for membership. A commenter stated that notices seldom include the father's name but it is necessary to determine if the child is a member. A few of these stated that the rule should also require including the names and birthdates and birthplaces of the child's grandparents to the extent known or readily discoverable. Another commenter suggested the rule require including maiden names or prior names or aliases. Several of these commenters noted that the more information that is provided to Tribes, the more easily the responding Tribes can verify membership or eligibility for membership.

Response: The final rule includes the requirement for the parents' names (including any known maiden or former names or aliases), birthplaces, and birthdates and as much information as is known regarding the child's other direct lineal ancestors. *See* FR § 23.111(d)(2). This information was required under the current § 23.11(d)(3), which the new rule is replacing.

Comment: A few commenters stated that the rule should provide consequences if the notice fails to include the necessary information, such as invalidating State actions or providing a basis for dismissal.

Response: The rule recognizes the importance of providing meaningful notice to meet the goals of the statute. The statute provides that certain parties may seek to invalidate actions based on ICWA violations, including notice violations. *See* 25 U.S.C. 1914; FR § 23.137. In addition, State courts may also make additional determinations imposing consequences for failure to provide meaningful notice.

Comment: One commenter stated that it is problematic for § 23.111 to require a copy of the petition be provided with the notice because it contains confidential information about the children and parents and the notice may be sent to Tribes that ultimately have no affiliation.

Response: The final rule continues to require a copy of the petition, as the petition contains important information about the proceeding and the child and parties involved. This requirement was required under the former rule at 25 CFR 23.11(d)(4), which this rule is replacing. While it is true that a petition may contain confidential information, providing a copy of the petition with notice to Tribes is a government-to-government exchange of information necessary for the government agencies' performance of duties. Tribes are often treated like Federal agencies for the purposes of exchange of confidential information in performance of governmental duties. *See, e.g.,* Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. 3205 (2012); Family Rights and Education Protection Act, 20 U.S.C. 1232(g) (2012). The substance of the petition is necessary to provide sufficient information to allow the parents, Indian custodian and Tribes to effectively participate in the hearing.

Comment: A few commenters supported PR § 23.111(c)'s requirement for the notice to contain a statement that counsel will be appointed to represent an indigent parent or Indian custodian, but opposed the qualification ''where authorized by State law.'' These commenters stated that the statute does not include the qualification ''where authorized by State law.''

Response: The statute provides indigent parents/Indian custodians the right to counsel. *See* 25 U.S.C. 1912(b). The final rule restates this right, and deletes the provision ''where authorized by State law'' because the statute establishes that the right exists even if State law does not provide for such court-appointed counsel. *See* FR § 23.111(d).

Comment: One commenter stated that where a State appoints counsel because the parents or Indian custodians cannot afford one, at PR § 23.111(c)(4)(iv), that the counsel must represent the party for the entirety of the case to ensure parents' rights are addressed consistently throughout the case rather than appointing different representatives at each stage.

Response: While it is a recommended practice to appoint the same counsel for the entirety of the case (throughout all proceedings), the final rule does not require a single counsel for the duration of a case.

4. Notice of Change in Status

Comment: A State agency commented that requiring notice of a change in placement, as under PR § 23.135, will create additional workload because the notice has to include information about the right to petition for return of the child, which contemplates that the notice must be in writing. This commenter stated that the section should be amended to allow for notice by whatever means is customary to the Tribe that is actively participating and to recognize that confidential information cannot be shared.

Response: The final rule deletes the provision PR § 23.135(a)(3) requiring notice of a change in placement. The Department, however, recommends that information about such changes regularly be provided. The statute provides rights to parents, Indian custodians and Tribes (*e.g.,* right to intervene) and a change in circumstances resulting from a change in placement may prompt an individual or Tribe to invoke those rights, even though they did not do so before.

Comment: A commenter opposed the requirement in PR § 23.135 to provide notice to biological parents whenever the child's adoption is vacated or set aside or the adoptive parents voluntarily consent to termination of parental rights. According to the commenter, this provision violates confidentiality because, at that point, the biological parent has no right to notification about the child.

Response: The final rule continues to use ''biological parent'' with regard to notice that a final decree of adoption of

an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child because the statute provides the biological parent or prior Indian custodian certain rights if the adoption decree is vacated or set aside. *See* 25 U.S.C. 1916(a); FR § 23.139.

Comment: A Tribal commenter requested adding a requirement for the State to notify the Tribe if the child is placed in an approved adoptive placement or with a placement that intends to adopt the child.

Response: The statute requires notice of involuntary proceedings for foster-care placement or termination of parental rights. *See* 25 U.S.C. 1912(a). There is no statutory authority to require notice if a foster family forms an intention to adopt that Indian child or is generally designated an ''approved adoptive placement'' in addition to being a foster placement. It is a best practice for the State agency to inform the Tribe if a child's permanency plan or a concurrent plan changes, such as from foster care to adoption.

Comment: A commenter requested deletion of the provision at PR § 23.135(c) allowing a parent or Indian custodian to waive the right to notice of a change in an adopted child's status because parents may sign without a full understanding of the legal right they are waiving, especially if the waiver is presented with other documents. Another commenter supported the provision but suggested adding safeguards because a waiver by vulnerable parents with issues that have given rise to an involuntary proceeding is particularly suspect, and parents or Indian custodians in other cases may have been pressured to waive notice. This commenter suggested that any waiver should be explicitly confirmed before the judge with the consequences explained as part of the section 1913 process, as well as the parent's right to withdraw the waiver and how that can be done. Commenters also stated the court should be required to maintain this information in a database and inform waiving parents that they can obtain that information at any time, notwithstanding the waiver, merely by contacting the court through a clearly defined and simple process that does not require legal counsel.

Response: The statute does not specify that parents or Indian custodians may waive their right to notice if an adoption fails, but there is no prohibition on parents or Indian custodians waiving the right to future notice. Given that parents and Indian custodians may choose to waive their right to notice of failed adoptions, the rule addresses this circumstance to provide safeguards on any such waiver and ensure the right to revoke the waiver. The final rule adds several of the suggested safeguards to ensure ICWA's intent is met. The final rule does not add a requirement for the court to maintain information on the waiver in its database, but does provide that the waiver may be revoked at any time by filing a notice of revocation. *See* FR § 23.139.

Comment: A few commenters stated that the provision in PR § 23.135(c) allowing notice to be waived should not apply to foster-care placement changes where parental rights have not been terminated.

Response: FR § 23.139 limits waiver of notice to two situations: where adoption of an Indian child is vacated or set aside and where the adoptive parents voluntarily terminate their parental rights. In those cases, the biological parent or prior Indian custodian may waive notice of these actions. Neither of those two situations involves foster-care placements.

Comment: A commenter suggested PR § 23.135(c) should clarify that only ''completed proceedings'' will not be affected by a revocation of a waiver of right to notice.

Response: The final rule specifies that a waiver of right to notice will not affect completed proceedings. *See* FR § 23.139(c). This clarifies that notice of proceedings that are in progress when the waiver is executed and filed may be affected.

5. Notice to More Than One Tribe

Comment: A commenter stated that PR § 23.109(b) should be mandatory, such that if there is only one Tribe in which the child is a member or eligible for membership, that Tribe must be designated as the child's Tribe.

Response: The final rule includes this suggested change. *See* FR § 23.109(a).

Comment: A commenter stated that PR § 23.109(d), allowing one Tribe to authorize another to represent it, should require that the authorization be documented by filing the authorization in court to establish that the Tribe was properly notified.

Response: Nothing in the statute either allows or prohibits one Tribe from authorizing another to represent it. The final rule therefore deletes the provision.

Comment: Several commenters stated that all Tribes should be encouraged to participate in Indian custody proceedings where the child is a member of, or eligible for membership in, more than one Tribe. These Tribes point out that the child and family will benefit from the involvement of all the Tribes and will provide more Tribal resources to increase the likelihood of preferred placement.

Response: The statute establishes one Tribe as the ''Indian child's Tribe.'' *See* 25 U.S.C. 1903(5). As a best practice, other Tribes that are interested in the proceeding may coordinate with the Tribe designated as the ''Indian child's Tribe'' or with State agencies to ensure involvement and provide Tribal resources to increase the likelihood of a preferred placement.

Comment: A few commented on who makes the determination as to the designation of the Tribe. Several commenters opposed having the State select the Tribe with which the child has more significant contacts. Others recommended clarifying that the court, rather than the agency, makes the determination as to which Tribe should be designated as the child's Tribe.

Response: The statute establishes that the Indian child's Tribe is the Tribe with which the Indian child has more significant contacts. *See* 25 U.S.C. 1903(5). The final rule clarifies that the court must first provide the opportunity for the Tribes to make that determination, but that if the Tribes are unable to agree, the State court must designate, for the purposes of ICWA, which is the child's Tribe for this limited purpose. *See* FR § 23.109(c). In situations where the Tribes are unable to agree, it is a best practice to notify the Tribes and conduct a hearing regarding designation of the Indian child's Tribe.

Comment: A few commenters stated that the preference of the parents should be determinative, rather than the court's determination.

Response: The Act provides that the child's Tribe is the Tribe with which the Indian child has the more significant contacts. *See* 25 U.S.C. 1903(5). The rule provides that the State court may consider the parent's preferences for which Tribe should be designated the Indian child's Tribe as a factor in determining with which Tribe the child is more significant contacts. *See* FR § 23.109(c).

Comment: Several commented on the factors for determining with which Tribe the child has more significant contacts and suggested the list at PR § 23.109(c)(1) should be combined with the list at PR § 23.109(c)(2)(ii). Another commenter suggested adding examples of ''more significant contacts'' for determining which Tribe is the child's Tribe, to include ''relative or extended family contacts, kinship contacts, trips home for cultural events, funerals, or similar events.''

Response: The final rule combines the two proposed lists to establish one list of factors indicative of significant contacts because the court is making the same determination on ''more significant contacts'' in both provisions of the proposed rule. The proposed lists varied slightly from each other, so the final list reconciles them in two ways: first, by including the preferences of parents, rather than both parents and extended family members who may become placements, because that would require speculation about prospective placements that is not directly relevant to the question of which Tribe the child has more significant contacts; and second, by deleting ''availability of placements'' as a factor, for the reason discussed below. *See* FR § 23.109(c).

Comment: A few commented on inclusion of the availability of placements in the list of factors. One stated that inclusion of this factor is wise as long as courts do not question the suitability of placements. Another stated that it should not be included as a factor because it has nothing to do with the contact the child has had with the Tribe.

Response: The final rule deletes this factor because it is not relevant to the question of with which Tribe the child has more significant contacts.

Comment: One commenter opposed the requirement to notify ''all Tribes'' that a determination of the child's Tribe has been made because it would require another round of notices to Tribes that already determined the child is not theirs and another Tribe would be involved.

Response: The final rule does not include the proposed requirement to notify all Tribes of a determination of the child's Tribe.

6. Notice for Each Proceeding

Comment: A commenter stated that the notice should list the date, time, and location of the hearing, the issue to be heard, and the consequences of any requested ruling.

Response: The final rule lists required information in the notice, including the date, time, and location of the hearing if the hearing has been scheduled at the time notice is sent. The final rule requires the notice to include contact information for the court to ensure the recipient may contact the court for information on any hearings and requires the notice to state the potential legal consequences of the proceeding. *See* § 23.111(d)(6)(vii)–(viii).

Comment: A commenter requested clarification that PR § 23.111(h) does not allow parties to waive timely notice.

Response: The statute provides that no placement shall occur if the requirements for notice, including the timing of the notice, are not met. *See* 25 U.S.C. 1912(a). These statutory provisions are implemented at FR § 23.112(a).

7. Notice in Interstate Placements

Comment: A few commenters stated their support of PR § 23.111(i), which requires both the originating and receiving States to provide notice if a child is transferred interstate. Some of these commenters referred to the facts underlying the *Adoptive Couple* v. *Baby Girl* case and asserted that this provision would help prevent a similar situation.

A few commenters opposed this provision. Most of these commenters suggested the sending State should be responsible for providing notice because the receiving State would not be aware of the placement and have no court case or opportunity to provide notice. Another stated that notice should be required only in the State where the court proceeding is pending. One stated that this requirement will result in duplicative notices and cause potential confusion. A few commenters stated that this requirement would strain already overburdened resources.

Response: The final rule deletes this provision, as this subject is not directly addressed in the statute. However, BIA encourages such notification as a recommended practice.

8. Notice in Voluntary Proceedings

Comments regarding notice in voluntary proceedings are addressed in Section IV.L.2 of this preamble, below.

G. Active Efforts

ICWA requires that any party seeking to effect a foster-care placement of, or termination of parental rights to, an Indian child must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. 25 U.S.C. 1912(d). This is one of the key provisions in ICWA designed to address Congress' finding that the removal of many Indian children was unwarranted. 25 U.S.C. 1901(4). The active-efforts requirement helps protect against these 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.

The active-efforts requirement embodies the best practice for all child-welfare proceedings, not just those involving an Indian child. Natural parents possess a ''fundamental liberty interest'' in the care, custody, and management of their child, and this interest ''does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.'' *Santosky* v. *Kramer,* 455 U.S. 745, 753 (1982). And until a parent has been proven to be unfit, the child shares with the parent ''a vital interest in preventing erroneous termination of their natural relationship.'' *Id.* at 760. For proceedings involving an Indian child, the active-efforts requirement helps protect these interests.

The Department finds compelling the views of child-welfare specialists who opine that ''the cornerstone of an effective child-welfare system is the presumption that children are best served by supporting and encouraging their relationship with fit birth parents who are interested in raising them and are able to do so safely.'' *See, e.g.,* Comments of Casey Family Programs, et al., at 1 (comments submitted on behalf of a group of national organizations, associations, and professors); *see also* Brief of Casey Family Programs, et al., *Adoptive Couple* v. *Baby Girl,* at 7. These specialists note that ''[a]mong the most important components of a sound child-welfare system is the requirement for agencies and others responsible for children's well-being to be vigilant in striving to keep children in their families; to remove them only when necessary to protect them from serious harm; and to work diligently to assist families with overcoming obstacles to children's safe return promptly.'' Comments of Casey Family Programs, et al., at 3; *see also* National Council of Juvenile and Family Court Judges, *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* 5 (2000). Congress has recognized this principle in other contexts as well. *See* 42 U.S.C. 671 (requiring State plan for foster care and adoption assistance to provide that reasonable efforts will be made to prevent or eliminate the need for removal of the child from his home and to make it possible for the child to return to his home.)

The active-efforts requirement in ICWA reflects Congress' recognition of the particular history of the treatment of Indian children and families, and the need to establish a Federal standard for efforts to maintain Indian families. After extensive hearings in the 1970s, Congress recognized that the social conditions, including poverty, facing many Tribes and Indian people—some brought about or exacerbated by Federal policies—were often cited as a reason for the removal of children by State and

private agencies. H.R. Rep. No. 95–1386, at 12. Congress found that ''agencies of government often fail to recognize immediate, practical means to reduce the incidence of neglect or separation.'' *Id.* ICWA's active-efforts requirement is one critical tool to ensure that State actors identify these ''means to reduce the incidence of neglect or separation,'' and provide necessary services to parents of Indian children.

Congress also found that ''our national attitudes as reflected in long-established Federal policy and from arbitrary acts of Government'' had helped produce ''cultural disorientation, a [ ] sense of powerlessness, [ ]loss of self-esteem'' that affected the ability of some Indian parents to effectively care for their children. *Id.* The active-efforts requirement is designed to address this problem where possible, by requiring appropriate services be provided to parents to help them attain the necessary parenting skills or fitness.

Congress also found that States cited alcohol abuse as a frequent justification for removing Indian children from their parents, but failed to accurately assess whether the parent's alcohol use caused actual physical or emotional harm. *Id.* at 10. Congress found that different standards for alcohol use were applied in Indian versus non-Indian homes. *Id.* The active-efforts requirement helps ensure that alcohol, drug, or other rehabilitative services are provided to an Indian child's parent where appropriate, to avoid unnecessary removals or termination of parental rights.

Congress was also clear that it did not feel existing State laws were adequately protective. The House Report accompanying ICWA stated that ''[t]he committee is advised that most State laws require public or private agencies involved in child placements to resort to remedial measures prior to initiating placement or termination proceedings, but that these services are rarely provided. This subsection imposes a Federal requirement in that regard with respect to Indian children and families.'' H.R. Rep. No. 95–1386, at 22.

The Department recognizes that both laws and child-welfare practices in many States may have changed since the passage of ICWA. However, ICWA's active-efforts requirement continues to provide a critical protection against the removal of an Indian child from a fit and loving parent.

The final rule removes PR 23.106 to better reflect 25 U.S.C. 1912(d)'s focus on State court actions and predicate findings.

1. Applicability of Active Efforts

Comment: A few commenters pointed out that the Act requires ''active efforts'' only to provide remedial services and rehabilitative programs (*see* 25 U.S.C. 1912), while the proposed rule would require active efforts to prevent removal (PR § 23.106), to work with Tribes to verify Tribal membership (PR § 23.107(b)(2)), to assist parents in obtaining the return of their children following emergency removal (PR § 23.113(f)(9)), to avoid removal (PR § 23.120(a)), and to find placements (PR § 23.131(c)(4)).

Response: To avoid confusion, the final rule uses the term ''active efforts'' only in conjunction with the requirements in 25 U.S.C. 1912. The final rule deletes the provisions at PR § 23.106 to better reflect 25 U.S.C. 1912(d)'s focus on State-court actions. In FR § 23.107, the final rule changes the terminology with regard to working with Tribes to verify citizenship, to now require ''diligence'' in working with Tribes to verify a child's Tribal citizenship. The Department agrees with the commenter that this is not clearly within section 1912(d). The term ''active efforts'' has also been removed from what was PR 23.131(c)(4) (regarding placement preferences) to avoid confusion; FR § 23.132(c)(5) now requires that a ''diligent search'' be conducted to find suitable placements meeting the preference criteria before a court may find good cause to deviate from the statutory preferences.

Comment: A commenter suggested addressing whether there is an exception to requiring active efforts when there is ''shocking'' or ''heinous'' physical or sexual abuse or when active efforts were previously provided to the family and the same conditions exist.

Response: The ''active efforts'' requirement is a vital part of ICWA's statutory scheme, and the statute does not contain any exceptions. The final rule's definition of ''active efforts,'' however, specifies that what constitutes sufficient active efforts may be based on the facts and circumstances of a particular case. This may include, for example, consideration of whether circumstances exist that other Federal laws have recognized as excusing the mandatory requirement for reasonable efforts to preserve and reunify families. *See e.g.,* 42 U.S.C. 671(a)(15)(D) (reasonable efforts not required where a court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances, or committed murder or other specified felonies). Of course, even in the case where one parent has severely abused a child, the court should consider whether active efforts could permit reunification of the Indian child with a non-abusive parent.

a. Active Efforts To Verify Child's Tribe

Comment: Two commenters supported the proposed requirement at PR § 23.107(b)(2) for active efforts to determine a child's Tribal membership, as one stated that State workers frequently rely on whether the child ''does or does not look Indian.'' Several commenters suggested using a term other than ''active efforts'' because Congress's use of the term applied only to providing remedial services and rehabilitative programs. One commenter suggested instead using ''due diligence'' or ''continuing efforts.''

Response: As mentioned above, the final rule uses the term ''diligent'' rather than ''active efforts'' for verification of Tribal citizenship. *See* FR § 23.107(b)(1).

b. Active Efforts To Avoid Breakup in Emergency Proceedings

Comment: One commenter stated that the requirement for active efforts to begin immediately, even in an emergency, is supported by Oklahoma case law.

Response: The Act does not explicitly apply the active-efforts requirement to emergency proceedings. For this reason, the final rule does not require active efforts prior to an emergency removal or emergency placement.

However, the statute requires a showing of active efforts prior to a foster-care placement. *See* 25 U.S.C. 1912(d). In many cases, this means that active efforts must commence at the earliest stages of a proceeding.

c. Active Efforts To Avoid the Need To Remove the Child

Comment: A few commenters supported the provisions in PR § 23.120 clarifying the requirement for active efforts to avoid the need to remove the Indian child. A few commenters opposed requiring State authorities to demonstrate that active efforts were provided as a precondition for commencing a proceeding because it could subject Indian children to continued harm. A commenter stated that there may be situations where a child is removed for emergency safety reasons (*e.g.,* placed in police protective custody or hospital hold) and the agency may not have the opportunity to make any efforts to prevent removal.

Response: Nothing in the final rule prevents the removal of a child to prevent imminent physical damage or harm. These removals are addressed by the emergency proceeding provisions of

the statute and final rule, as well as State law. The statute requires, however, that active efforts must be demonstrated prior to a foster-care placement or termination of parental rights. *See* 25 U.S.C. 1912(d). The ultimate goal is to prevent the long-term breakup of the Indian child's family.

Comment: A few commenters stated that the active-efforts requirement is inapplicable if there is no existing Indian family to break up, citing *Adoptive Couple* v. *Baby Girl.* Another commenter suggested addressing the holding in *Adoptive Couple* v. *Baby Girl* by adding ''except in the case of a private adoption where the father abandoned the child (having knowledge of the pregnancy) and never had previous legal or physical custody.''

Response: As stated earlier in this preamble, there is not an ''existing Indian family'' exception to ICWA. Under the facts of *Adoptive Couple* v. *Baby Girl,* the Court held that the requirements in 25 U.S.C. 1912(d) did not apply to a parent that abandoned the child prior to birth and never had legal or physical custody of the child. *See Adoptive Couple,* 133 S. Ct. at 2562–63.

Comment: A few commenters stated that PR § 23.120(a) implies that active efforts are required only to the point a proceeding commences, and requested clarification that the requirement continues during the entirety of the proceeding.

Response: The final rule revises this provision to clarify that the court will review whether active efforts have been made, and that those efforts were unsuccessful, whenever a foster-care placement or termination of parental rights occurs. The court should not rely on past findings regarding the sufficiency of active efforts, but rather should routinely ask as part of a foster-care or termination-of-parental-rights proceeding whether circumstances have changed and whether additional active efforts have been or should be provided.

Comment: A commenter suggested clarifying in PR § 23.120(a) that the active-efforts requirements apply to parents of an Indian child, not simply to Indian parents.

Response: ICWA applies when an Indian child is the subject of a child-custody proceeding, and the active-efforts requirement of 25 U.S.C. 1912(d) applies to the foster-care placement or termination of parental rights to an Indian child. The child's family is an ''Indian family'' because the child meets the definition of an ''Indian child.'' As such, active efforts are required to prevent the breakup of the Indian child's family, regardless of whether individual members of the family are themselves Indian.

Comment: A commenter stated that the requirement in PR § 23.120(b) to use the available resources of the extended family, the child's Indian Tribe, Indian social service agencies and individual Indian caregivers should not be mandatory. This commenter stated that practically, it may not be possible to use the available resources listed.

Response: The final rule removes this provision from § 23.120(b) because the concept is already included in the definition of ''active efforts,'' which provides that these resources should be used ''to the maximum extent possible'' (as the proposed rule did at PR § 23.120(b)). *See* FR § 23.2.

d. Active Efforts To Establish Paternity

Comment: Several commenters suggested adding efforts to establish paternity as an example of active efforts. These commenters asserted that when the father is a Tribal citizen, such acknowledgment or establishment is critical to determining whether the Act applies and is necessary to prevent the breakup of the Indian family.

Response: The rule does not require active efforts to establish paternity because the statute uses the term ''active efforts'' only with regard to providing remedial services and rehabilitative programs to prevent the breakup of the Indian family. *See* 25 U.S.C. 1912(d).

e. Active Efforts To Apply for Tribal Membership

Comment: Two commenters suggested including efforts to apply for Tribal membership for the child as an example of active efforts because the child may obtain Tribal benefits and enrollment may be more difficult if family reunification ultimately fails.

Response: The rule does not include a requirement to conduct active efforts to apply for Tribal citizenship for the child. The Act requires active efforts to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family. This does not clearly encompass active efforts to obtain Tribal citizenship for the child. In any particular case, however, it may be appropriate to seek Tribal citizenship for the child, as this may make more services and programs available to the child. Securing Tribal citizenship may also have long-term benefits for an Indian child, including access to programs, services, benefits, cultural connections, and political rights in the Tribe. It may be appropriate, for example, to seek Tribal citizenship where it is apparent that the child or its biological parent would become enrolled in the Tribe during the course of the proceedings, thereby aiding in ICWA's efficient administration.

f. Active Efforts To Identify Preferred Placements

Comment: A few commenters suggested requiring active efforts to identify families that meet the placement preferences. One noted that California law requires this.

Response: The rule does not require active efforts to identify preferred placements because the statute uses the term ''active efforts'' only with regard to providing remedial services and rehabilitative programs to prevent the breakup of the Indian family. *See* 25 U.S.C. 1912(d). It is, however, a recommended practice and the Department encourages other States to follow California's leadership in this regard. As discussed further below at Section IV.M.5, the final rule permits a finding of ''good cause'' to depart from the placement preferences based on the unavailability of a suitable placement only where the court finds that a ''diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located.'' FR § 23.132(c)(5).

2. Timing of Active Efforts

a. Active Efforts Begin Immediately and During Investigation

Comment: Several commenters expressed their support of the proposed provision at PR § 23.106(a) stating that the requirement for active efforts begins the moment the possibility arises that a child may need to be removed, and as soon as an investigation is opened. A commenter stated that this requirement will help prevent removals and promptly reunify children if placements are needed. Another commenter stated that early, concentrated efforts on the part of professionals to achieve family preservation and permanency are part of what has led to declining foster care populations. A commenter suggested further defining when active efforts are required, because some counties defer the requirement until after detention and jurisdictional hearings, rather than when removal first occurs. Another commenter suggested clarifying that active efforts must be initiated at the ''crucial moment of considered intent to remove the child from the family.'' Another suggested that active efforts are required at the moment of the agency's first contact with the family.

A few commenters stated that BIA exceeds its authority in requiring an agency to conduct active efforts while investigating Indian status, because it is

not yet clear whether the Act applies. Another commenter suggested narrowing the trigger point for active efforts to be when at least two of the four types of placements described in the Act are planned. One of these commenters stated that the requirement to engage in active efforts immediately will unduly increase the burden on State agencies by requiring active efforts in the vast majority of referrals, and that this requirement is inconsistent with ICWA and case law.

Response: The final rule deletes the proposed provision, PR § 23.106, directed at agencies providing active efforts because 25 U.S.C. 1912(d) is directed at what State courts must find prior to making certain determinations in Indian child-custody proceedings. Nevertheless, the statute and final rule provide that the State court must conclude that active efforts were provided and were unsuccessful prior to ordering an involuntary foster-care placement or termination of parental rights. *See* 25 U.S.C. 1912(d); FR § 23.120. Thus, if a detention, jurisdiction, or disposition hearing in an involuntary child-custody proceeding includes a judicial determination that the Indian child must be placed in or remain in foster care, the court must first be satisfied that the active-efforts requirement has been met. In order to satisfy this requirement, active efforts should be provided at the earliest point possible.

Comment: A commenter suggested clarifying that active efforts should continue even after the return of a child to parental custody, if necessary to prevent the future breakup of the Indian family.

Response: If a child is returned to parental custody and there is no pending child-custody proceeding, then ICWA no longer applies. If a child-custody proceeding is ongoing, even after return of the child, then active efforts would be required before there may be a subsequent foster-care placement or termination of parental rights.

Comment: A few commenters suggested adding that active efforts are required in voluntary service agreements and differential/alternative response programs to prevent removal.

Response: Voluntary service agreements and differential/alternative response programs may help prevent removal of an Indian child; however, these are not ''child-custody proceedings'' within the scope of the Act.

b. Time Limits for Active Efforts

Comment: Several commenters recommended stating that there are no time limits on active efforts. A few commenters requested adding a timeline for active efforts; one of these suggested the timeline should establish that active efforts terminate at termination of parental rights and adoption.

Response: The final rule does not provide any time limits on active efforts. A State court must make a finding that active efforts were provided in order to make a foster-care placement or order termination of parental rights to an Indian child, so the active-efforts requirement must be satisfied as of each of those determinations. The requirement to conduct active efforts necessarily ends at termination of parental rights because, at that point, there is no service or program that would prevent the breakup of the Indian family.

3. Documentation of Active Efforts

Comment: Several commenters supported the proposed requirement that State courts document that the agency used active efforts. Several also requested clarifying that documentation of active efforts must be made part of the court record.

Response: The final rule continues to provide that documentation of active efforts must be part of the court record. *See* FR § 23.120(b). The active-efforts requirement is a key protection provided by ICWA, and it is important that compliance with the requirement is documented in the court record. 25 U.S.C. 1914 permits an Indian child, parent, Indian custodian, or Tribe to petition a court of competent jurisdiction to invalidate a foster-care placement or termination of parental rights upon a showing that the action violated section 1912 of the statute. The parties to the proceeding also have appeal rights under State law. In order to effectively exercise these rights, there must be a record of the basis for the court's decision with regard to active efforts and other ICWA requirements.

Comment: Some commenters suggested adding a requirement that agencies' documentation of the active efforts be provided to the Tribe and all parties involved as well.

Response: The final rule requires that active efforts be documented in detail in the record, which the parties to the case should have access to. *See* FR §§ 23.120(b), 23.134.

Comment: Commenters also suggested requiring the court to address active efforts at each hearing.

Response: The final rule reflects that the court must conclude that active efforts were made prior to ordering foster-care placement or termination of parental rights, but does not require such a finding at each hearing. *See* FR § 23.120. It is recommended practice for a court to inquire about active efforts at every court hearing and actively monitor the agency's progress towards complying with the active efforts requirement. This will help avoid unnecessary delays in achieving reunification with the parent, or other permanency for the child.

4. Other Suggested Edits for Active Efforts

Comment: A few commenters suggested adding a requirement that State courts consult with Tribes about appropriate active efforts and actual performance of active efforts.

Response: The definition of ''active efforts'' includes working in partnership with the Indian child's Tribe to the maximum extent possible. *See* FR § 23.2.

Comment: A commenter recommended establishing that the standard of proof to make a finding of ''active efforts'' is the same standard of proof for the underlying proceeding (*e.g.,* clear and convincing evidence for foster-care proceedings and beyond a reasonable doubt for termination-of-parental-rights proceedings).

Response: The Department declines to establish a uniform standard of proof on this issue in the final rule, but will continue to evaluate this issue for consideration in any future rulemakings.

H. Emergency Proceedings

The provisions concerning jurisdiction over Indian child-custody proceedings are ''[a]t the heart of the ICWA,'' with the statute providing that Tribes have exclusive jurisdiction over some child-custody proceedings and presumptive jurisdiction over others. *Holyfield,* 490 U.S. at 36. Recognizing, however, that a Tribe may not always be able to take swift action to exercise its jurisdiction, Congress authorized States to take temporary emergency action. Specifically, section 1922 of ICWA was designed to ''permit, under applicable State law, the emergency removal of an Indian child from his parent or Indian custodian or emergency placement of such child in order to prevent imminent physical harm to the child notwithstanding the provisions of'' ICWA. H.R. Rep. No. 95–1386, at 25; 25 U.S.C. 1922.

Congress, however, imposed strict limitations on this emergency authority, requiring that the emergency proceeding terminates as soon as it is no longer

required. ICWA requires that State officials ''insure'' that Indian children are returned home (or transferred to their Tribe's jurisdiction) as soon as the threat of imminent physical damage or harm has ended, or that State officials ''expeditiously'' initiate a child-custody proceeding subject to all ICWA protections. 25 U.S.C. 1922. Thus the rule emphasizes that an emergency proceeding pursuant to section 1922 needs to be as short as possible and includes provisions that are designed to achieve that result.

In addition to requiring that any emergency proceeding be as short as possible, the rule places a presumptive outer bound on the length of such emergency proceeding. The final rule provides that an emergency proceeding for an Indian child should not be continued for more than 30 days unless the court makes specific findings. These provisions are included because, unless there is some kind of time limit on the length of an emergency proceeding, the safeguards of the Act could be evaded by use of long-term emergency proceedings. An unbounded use of section 1922's emergency proceeding authority would thwart Congress's intent—reflected in section 1922's immediate termination provisions—to strictly constrain State emergency authority to the minimum time necessary to prevent imminent physical damage or harm to the Indian child.

The Department believes, based on its review of comments and its own understanding of emergency proceedings, that a presumptive 30-day limit on the use of the emergency proceeding authority in section 1922 is appropriate. Even if a safe return of the child to her parent or custodian is not possible in that time frame, it is unlikely that a court should need longer than 30 days to either transfer jurisdiction of the child's case to her Tribe or to require the initiation of a child-custody proceeding, with the attendant ICWA protections. A court should be able to accomplish one of those tasks within 30 days.

Should the court need the emergency proceeding of an Indian child to last longer than 30 days, however, it may extend the emergency proceeding if it makes specific findings. *See* FR § 23.113(e). The final rule tailors those findings more closely to the statutory requirements of section 1922 than did the draft rule. A court may extend an emergency proceeding only if it makes the following determinations: (1) The child still faces imminent physical damage or harm if returned to the parent or Indian custodian, (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 an ICWA child-custody proceeding. *Id.* Allowing a court to extend an emergency proceeding if it makes those findings provides appropriate flexibility for a court that finds itself facing what the Department expects should be unusual circumstances.

A number of commenters expressed concerns regarding the requirement that the emergency removal or placement must terminate when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child. These comments assume that the statutory mandate requiring the termination of the emergency proceeding means that the actual placement of the child must change. That is not necessarily the case. If an Indian child can be safely returned to a parent, the statute requires this (as do many State laws). In this circumstance, the State agency may still initiate a child-custody proceeding, if circumstances warrant. But, if the child cannot be safely returned to the parents or custodian, the child must either be transferred to the jurisdiction of the appropriate Indian Tribe, or the State must initiate a child-custody proceeding. Under this scenario, the child may end up staying in the same placement, but such placement will not be under the emergency proceeding provisions authorized by section 1922. Instead, that placement would need to be pursuant to Tribal law (if the child is transferred to the jurisdiction of the Tribe) or comply with the relevant ICWA statutory and rule provisions for a child-custody proceeding (if the State retains jurisdiction).

1. Standard of Evidence for Emergency Proceedings

See also comments and responses above regarding the definition of ''imminent physical damage or harm.''

Comment: Several commenters opposed the proposed regulation's standard that emergency removal is necessary to prevent ''imminent physical damage or harm'' and a few commenters suggested alternative standards for when emergency removal is appropriate (*e.g.,* the best interests of the child or ''substantial and immediate danger or threat of such danger.'')

Response: The Act addresses emergency proceedings at section 1922, establishing that requirements of the Act may not be construed to interfere with any emergency proceeding under State law to prevent ''imminent physical damage or harm'' to the Indian child. The regulations incorporate this statutory standard for emergency proceedings at FR § 23.113. There is no statutory authority for establishing a different standard.

Comment: One commenter suggested defining the term ''emergency'' or better specifying what ''imminent physical damage and harm'' is, to better clarify whether, for example, a child may be removed, under an emergency removal, from a parent who fails to get the child to school.

Response: The final rule relies on the statutory phrase ''imminent physical damage or harm'' and does not provide a further definition, as discussed above. The statutory phrase, however, is clear and the commenter's example of failure to get the child to school, standing alone, would not qualify as ''imminent physical damage or harm'' justifying an emergency proceeding (and attendant delay of compliance with ICWA section 1912).

Comment: A few commenters noted that each State may have a different or broader basis for emergency removal.

Response: As discussed above, the Department believes that section 1922's use of ''imminent physical damage or harm'' is in accord with the emergency-removal provisions of most States' laws. The Department recognizes, however, that a State may have a different or broader basis for immediate removals and placements. Regardless of how the State defines emergency removals and the triggers for emergency removals, ICWA requires that an emergency proceeding terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

States must comply with ICWA's limitations on such removals and placements. Upon removing an Indian child, the State must either determine that there is a risk of ''imminent physical damage or harm'' to the child and follow the requirements for an emergency proceeding, or it must immediately terminate the emergency proceeding and initiate a child-custody proceeding and, if appropriate, return the child to her parent(s) or Tribe.

Comment: Several commenters also asserted that, to the extent ICWA's basis for emergency removal is narrower for Indian children, the rule places them at a greater risk of injury or death than non-Indian children.

Response: ICWA's standard of ''imminent physical damage or harm'' is focused on the health, safety, and welfare of the child, such that Indian children will not be placed at a greater risk than non-Indian children. As discussed above, the ICWA standard is similar to that of many States.

Comment: A few commented on the provision allowing continuation of emergency custody beyond 30 days in ''extraordinary circumstances.'' One commenter stated that the circumstances need to be better defined to prevent the exception from swallowing the rule.

Response: The final rule implements the statutory mandate that an emergency proceeding involve only the temporary suspensions of full ICWA compliance, and that the agency must initiate a child-custody proceeding that complies with all the notice, timing, hearing, and other requirements of ICWA as soon as possible, if the child is not returned to his Tribe. The final rule deletes the provision in the proposal allowing for ''extraordinary circumstances'' to justify continued emergency proceedings because the Act is clear that the emergency proceeding must terminate immediately when no longer necessary to prevent imminent physical damage or harm to the child. There is a continuing obligation to determine whether the imminent physical damage or harm is no longer present. As discussed above, the final rule includes a presumptive 30-day limit on an emergency proceeding, but allows a court in very limited circumstances to extend that period by making certain findings. *See* FR § 23.113(d).

Comment: Several commenters pointed out that some State agencies, as a practice, continue emergency placements for indeterminate times without ICWA compliance, and that the emergency placements ultimately became long-term placements.

Response: The final rule addresses this issue by implementing the statutory intention for emergency proceedings to be of limited duration. *See* FR § 23.113.

Comment: One commenter suggested changing the language ''removal or placement'' with ''emergency removal or emergency placement'' to clarify that this section applies only in the emergency removal context.

Response: The final rule adds this clarification. *See* FR § 23.113.

2. Placement Preferences in Emergency Proceedings

Comment: A few commenters suggested the rule should explicitly state that placement preferences apply to emergency placements as a type of foster-care placement ''whenever practical and appropriate'' or ''whenever possible.'' One commenter stated that they have often seen situations where an agency removes an Indian child as an emergency removal when there was no emergency or the emergency subsided, places the child in a non-Indian home, and then takes months to even notify the family of the custody. This commenter stated that placing the child directly into the home of a preferred placement allows for an unbroken connection to the Tribe and family.

Response: The Act does not explicitly require that emergency placements comply with the placement preferences, so the rule does not include this suggestion. As a recommended practice, however, States should make emergency placements of Indian children in accordance with the placement preferences whenever possible and as soon as possible. This will help prevent subsequent disruptions if the child needs to be moved to a preferred placement once a child-custody proceeding is initiated.

3. 30-Day Limit on Temporary Custody

Comment: Several commenters supported the provision at FR § 23.113(f) prohibiting continuation of emergency removal or placement beyond 30 days without the initiation of a full ICWA-compliant child-custody proceeding, to clarify that emergency proceedings must terminate as soon as they are no longer necessary to prevent imminent physical damage or harm to the child. The National Council of Juvenile and Family Court Judges stated that this provision, and shortening the time period for temporary custody without a hearing from 90 to 30 days, align with key principles of avoiding unnecessary separation of children and families and are best practices.

A few commenters opposed making the 30-day provision a mandate. One commenter stated that agencies may avoid emergency removals or remove children earlier than appropriate to avoid the detailed steps to necessary satisfy this section, resulting in Indian children being less protected from harm.

A few commenters stated that a shorter time should be included in the rule. One commenter noted that, often, returning a child to a parent within 72 hours will not result in imminent physical damage or harm. Another commenter suggested that State law should govern the timing of the initial evidentiary hearing, provided it is no longer than 72 hours after removal (and then that the removal may not last beyond 30 days without a section 1912(e)-compliant foster care hearing). Commenters noted that allowing for longer periods of removal will make return to parental custody increasingly more difficult due to a combination of agency practice and consequential trauma to the parents from separation. One commenter also suggested adding a 45-day presumptive deadline by which an adjudicatory hearing must be held, to ensure the parent receives a hearing within a meaningful time.

Response: The basis for the presumptive 30-day outer limit for an emergency proceeding is discussed above. The rule's emergency proceedings provisions are designed to ensure that such removals/placements be as short as possible and that the Indian children be returned home (or transferred to their Tribe's jurisdiction) as soon as the threat of imminent physical damage or harm has ended, or that State officials ''expeditiously'' initiate a child-custody proceeding subject to all ICWA protections.

The concerns that the 30-day limit is too short are addressed through adjusting the rule's language regarding the circumstances under which the time period may be extended, as discussed above. *See* FR § 23.113(d). Notably, in light of the comments received, these changes include deleting the requirement for obtaining a qualified expert witness by that time.

The rule does not specify that a hearing should be held within 72 hours of removal. While providing a hearing within 1–3 days of removal may be required to comply with State law or to provide the parents or custodian with constitutionally required due process, the provision of such a hearing is not an ICWA-specific requirement, so it is not required by the rule.

Comment: Two commenters stated there are difficulties in obtaining qualified expert witness testimony in a timely fashion and that the timeframe would be increasingly difficult if the Tribe were out of State, the Tribe were unable or unwilling to provide an expert, or the exact Tribe is unknown. Another commenter noted that Tribes have up to 30 days to respond to notice, making it nearly impossible to secure expert witness testimony in that time. A commenter also stated that New Mexico allows for adjudication of an abuse/neglect petition to occur within 60 days but the proposed rule's requirements for clear and convincing evidence at an earlier stage (emergency stage) would cause more than one full evidentiary hearing on whether the parent's custody is likely to result in imminent physical damage or harm.

Response: The final rule deletes from the emergency proceeding requirements certain requirements that apply to child-custody proceedings (*e.g.,* requirement for a qualified expert witness and clear and convincing evidence) because section 1922 of ICWA does not impose such requirements on emergency proceedings and, as the commenters

noted, compliance with these requirements may not be practically possible.

4. Emergency Proceedings—Timing of Notice and Requirements for Evidence

Comment: Several commenters opposed the proposed rule's requirements for notice and time limits to apply to emergency hearings (known in various States as 72-hour hearings, detention hearings, shelter care hearings, and other terms). These commenters stated that it is not possible to comply with the time limits (*e.g.,* waiting until 10 days after each parent, the Indian custodian, and Tribe have received notice before beginning the proceeding) and comply with State law requiring a hearing shortly following emergency removal. A State commenter stated that once a child is removed on an emergency basis, a petition must be filed within 48 hours, and the petition is the commencement of the proceeding, then a hearing must be held the next judicial day to determine if it is a dependency action, then a jurisdiction hearing is held within 21 days, at which time the petition is confirmed. The proposed rule's statement that a proceeding may not begin means the petition may not be filed (again, resulting in either a delayed return to parents or no initial removal to the detriment of the child). Commenters suggested adding to the end of PR § 23.111(h) and at the beginning of PR § 23.112 exceptions for emergency removals and emergency placements.

Response: The final rule does not require that the section 1912(a) notice provisions and waiting periods for notices apply to emergency proceedings. These requirements are not imposed by section 1922. The final rule does, however, indicate that agencies should report to the court on their efforts to contact the parents, custodian, and Tribe for emergency proceedings. FR § 23.113(c).

Comment: Several commenters stated that, where it is impossible to notify the Tribe and give adequate time to intervene or transfer, the decision should not be binding on the party that did not receive notice.

Response: To the extent the commenters are concerned that emergency placements may become permanent placements, the final rule confirms that emergency proceedings must terminate as soon as the emergency ends and, at that point, either the child must be returned to the parent, custodian, or Tribe or the State must initiate a child-custody proceeding following ICWA's requirements, including notice requirements. *See* FR §§ 23.110, 23.113.

Comment: A State commenter stated that it is unclear what is meant by ''substantive proceedings, rulings or decisions on the merits'' and how it relates to emergency removals (shelter care hearings). Another State commenter requested clarification that ''on the merits'' means this section does not apply to emergency removals.

Response: The final rule deletes the phrase ''substantive proceedings, rulings, or decisions on the merits'' from what was PR § 23.111(h) and clarifies that the section 1912(a) notice provisions and waiting periods for notices do not apply to emergency proceedings.

5. Mandatory Dismissal of Emergency Proceedings

Comment: A few commenters stated that PR § 23.110 and PR § 23.113 conflict in that PR § 23.110 says that a State court must dismiss the proceeding if it determines it lacks jurisdiction, and PR § 23.113 says States must transfer the proceeding. A commenter stated that the wording of PR § 23.110(a) creates a safety issue because it implies that transferring to Tribal court is not an option and would result in cases being dismissed where children were at imminent risk of harm.

Response: The mandatory dismissal provisions in § 23.110 apply ''subject to'' § 23.113 (emergency proceedings). Section 1922 of the Act allows removal and placement under State law to prevent imminent physical damage or harm to the child. *See* FR § 23.110.

6. Emergency Proceedings Subsection-by-Subsection

Comment: With regard to PR § 23.113(a)(1), a commenter stated that because the terms ''proper'' and ''continues to be necessary'' are subjective and open to culturally biased interpretation, the investigation should include input from a qualified expert witness, Tribal representatives, and members of the child's extended family not connected with the emergency who have a relationship with the child.

Response: The final rule uses the term ''necessary'' because that is the term the statute uses. *See* 25 U.S.C. 1922. *See* FR § 23.113(b)(1).

Comment: With regard to PR § 23.113(a)(2), a few commenters suggested ''promptly hold a hearing'' needs a more definitive timeframe. One of these commenters suggested replacing ''promptly hold a hearing'' with ''promptly, but in no case beyond 72 hours, hold a hearing.''

Response: The final rule continues to use the term ''promptly,'' recognizing that different States may have different timeframes for being able to hold such a hearing. *See* FR § 23.113(b)(2).

Comment: A commenter suggested clarifying in PR § 23.113(a)(2) and (a)(3) that if the agency determines the emergency has ended, it should promptly return the child without the need for a hearing. A hearing should be required only when a court order entered in connection with the emergency removal must be vacated or dismissed.

Response: State procedures determine whether a hearing is required.

Comment: A commenter asked whether the notice requirements in PR § 23.113(b)(5), to ''take all practical steps to notify'' are intended to be so radically different from the notice requirements for foster care, which requires 10 days advance notice. A few commenters suggested more definition of ''practical steps'' is needed. One of these commenters suggested adding notice via personal service, email, telephone, registered mail, and fax. A few commenters suggested that notice by registered mail should be required in addition to taking all practical steps to notify the parents or Indian custodian and Tribe.

Response: Notice by registered or certified mail is not required by ICWA for emergency proceedings because section 1922 does not require such notice and because of the short timeframe in which emergency proceedings are conducted to secure the safety of the child (although there may be relevant State or due process requirements). In order to protect the parents', Indian custodians', and Tribes' rights in these situations, however, it is a recommended practice for the agency to take all practical steps to contact them. This likely includes contact by telephone or in person and may include email or other written forms of contact.

Comment: A commenter suggested specifying that notice of an emergency removal and emergency placement must fully inform the parents and the Tribe promptly of the timing of the emergency hearing and basis for the removal, including copies of the petition, affidavit and any evidence in support of the emergency removal, the parents and Indian custodian be advised of the full scope of their rights at the hearing, including the right to be present, to contest the allegations, to testify, and to call witnesses and introduce evidence, cross-examine adverse witnesses, and to have counsel appointed.

Response: These requirements are not specified by section 1922 and so are not

included in the rule (although there may be relevant State and due process requirements). Any emergency proceeding pursuant to section 1922, however, is required to be as short as possible, after which the child is to be returned to the parent, custodian, or Tribe or a child-custody proceeding with all the attendant ICWA protections is to be initiated.

Comment: A few commenters pointed out that PR § 23.113(c) is missing.

Response: The final rule addresses this omission.

Comment: One commenter noted that the requirements in PR § 23.113(d)(7) and (d)(9) (requiring the affidavit to include the circumstances leading to the emergency removal and active efforts taken) and PR § 23.113(f) (requiring custody to continue beyond 30 days only if certain circumstances exist) mirror requirements of the Oklahoma ICWA and are the ''gold standard'' resulting in faster identification of Indian children, streamlined Tribal involvement, faster placements in preferred homes, and less time out of home.

A commenter stated concern that a failure to include any of the required elements in the affidavit may result in denial of the petition, even if the child is in imminent danger.

One commenter stated that the information required by PR § 23.113(d) to be included in the affidavit is already included in the State's dependency petitions, and requested adding that such information is required only if the petition does not already include the information.

Response: The final rule states that either the petition or accompanying documents (which may include an affidavit) should include a statement of the imminent physical damage or harm expected and any evidence that the removal or emergency custody continues to be necessary to prevent such imminent physical damage or harm to the child (which was listed in proposed 23.113(d)(10)). *See* FR § 23.113(d). This information is appropriate under ICWA section 1922. The final rule separately lists additional information (which was listed in PR §§ 23.113(c)(1)–(10)), that should be included in the petition or accompanying documents. Inclusion of these items is a recommended practice and, as a commenter noted, the ''gold standard'' for ICWA implementation.

Comment: A commenter suggested incorporating some of the requirements of the Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA) section 209 regarding determination of a child's residence or domicile, where the child has been living for the past 5 years, and prior court proceedings.

Response: This rule addresses implementation of ICWA and does not address implementation of UCCJEA, so it does not include such requirements.

Comment: A commenter suggested adding a requirement in PR § 23.113(d)(3) that the petition include efforts to locate extended family members.

Response: The final rule does not add the requested requirement because it is not required by the statute; however, it is a recommended practice to make efforts to locate extended family members as soon as possible.

Comment: A commenter suggested amending PR § 23.113(d)(3) to require the petition to include a statement that if the domicile or residence of the parents or Indian custodian is unknown, that a detailed description of the efforts to identify them, including notice to the Tribal social services agency, submission of an affidavit of service by publication, and other avenues such as the Tribal enrollment office or posting on the Tribal bulletin board or newsletter, for parents who are hard to locate.

Response: The final rule states that the petition or accompanying documents should include a description of the steps taken to locate and contact the child's parents, custodians and Tribe about any emergency proceeding, but does not specify the detail suggested by the commenter.

Comment: A commenter expressed concern that requiring a factual determination on the need for continued removal at every hearing may result in fewer protections for parents because a full evidentiary hearing for the emergency hearings would give States cause to extend the deadline for the first hearing. For this reason, the commenter suggested deleting PR § 23.113(e).

Response: Because of the statutory requirement to ''insure'' that emergency proceedings terminate ''immediately'' when the emergency has ended, the State court (and agency) have a continuing obligation under section 1922 to evaluate whether the emergency situation has ended. The court therefore needs to revisit that issue at each opportunity. The Department does not agree that this will result in fewer protections for parents because an assessment of the need for continued removal will occur at each hearing, meaning the parent has the opportunity for return of the child at each hearing.

Comment: A few commenters suggested rewording PR § 23.113(g) to provide that the placement must terminate as soon as the Tribal court issues an order for the placement to terminate, instead of when the Tribe exercises jurisdiction. The commenters stated that this would better allow the Tribe the opportunity to decide whether the placement should continue.

Response: A State court may terminate an emergency proceeding by transferring the child to the jurisdiction of the appropriate Indian Tribe. *See* 25 U.S.C. 1922; FR § 23.113(b)(4)(ii). The child may stay in a particular placement if the Tribe chooses to keep that placement upon exercising jurisdiction.

Comment: A commenter suggested the placement terminate as soon as the emergency no longer exists or a solid safety plan is in place, in which case dismissal may be appropriate at an early stage.

Response: A safety plan may be a solution to mitigate the situation that gave rise to the need for emergency removal and placement and allow the State to terminate the emergency proceeding. If the State court finds that the implementation of a safety plan means that emergency removal or placement is no longer necessary to prevent imminent physical damage or harm, the child should be returned to the parent or custodian. The State may still choose to initiate a child-custody proceeding, or may transfer the case to the jurisdiction of the Tribe.

Comment: A commenter stated that requiring termination of the emergency removal as soon as the imminent physical damage or harm no longer exists is unworkable in Montana because Montana requires parents to work on treatment plan tasks and make progress before the State will return the children. The commenter stated that the proposed rule provision subverts that Montana process and allows for unlimited challenge to the State's out-of-home placement.

Response: Under the statute, the emergency removal and placement must end when no longer necessary to prevent imminent physical damage or harm to the child. If the court finds that the parent must make progress on specified case plan items in order to prevent imminent physical damage or harm to the child, that is permissible under ICWA. The State agency may also promptly initiate a child-custody proceeding with all the attendant ICWA protections.

Comment: A few State commenters stated that requiring an agency to expeditiously ''initiate a child-custody proceeding subject to the provisions of ICWA'' as one of the options following termination of emergency removal is confusing because the emergency

removal petition is considered an initiation of a child-custody proceeding. Other commenters stated that the ICWA proceeding should be initiated at the same time as the emergency proceeding, because emergency proceedings are generally only subject to State law.

Response: The statute treats emergency proceedings, at section 1922, differently from other child-custody proceedings. The final rule clarifies ''emergency proceedings'' to be emergency removals and emergency placements, which are proceedings distinct from ''child-custody proceedings'' under the statute. While States use different terminology (*e.g.,* preliminary protective hearing, shelter hearing) for emergency hearings, the regulatory definition of emergency proceedings is intended to cover such proceedings as may be necessary to prevent imminent physical damage or harm to the child. The emergency proceedings should be as short as possible and may end with the initiation of a child-custody proceeding subject to the provisions of ICWA (*e.g.,* the notice required by § 23.111, time limits required by § 23.112).

Comment: One commenter stated that the provision at PR § 23.113(h) requiring a child to be returned to a parent within one business day may not be possible in parts of Alaska in which villages can be weathered out for days.

Response: The statute provides that emergency removal and placement must end when no longer necessary to prevent imminent physical damage and harm. We understand that it may not be possible to return a child within one business day.

7. Emergency Proceedings—Miscellaneous

Comment: A few commenters suggested replacing the term ''emergency physical custody'' with ''emergency placement'' for consistency.

Response: The final rule incorporates this suggestion.

I. Improper Removal

FR § 23.114 implements section 1920 of the statute. It requires that, where a court determines that a child has been improperly removed from custody of the parent or Indian custodian or has been improperly retained in the custody of a petitioner in a child-custody proceeding, the court should return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger. 25 U.S.C. 1920.

Comment: A commenter stated that PR § 23.114(b) should refer to the standard in ICWA section 1920 (''substantial and immediate danger or threat of danger'') specific to improper removals rather than the standard in 25 U.S.C. 1922 (''imminent physical damage or harm'') specific to emergency removals. A commenter requested adding ''Indian'' before ''custodian.''

Response: The final rule incorporates these suggested changes to more closely reflect the statutory language. *See* FR § 23.114(b).

Comment: A few State commenters stated that the proposed rule's provisions on improper removal exceed ICWA and are beyond BIA's authority. One stated there is no standard for when a person can request a stay and demand an additional hearing to determine if removal was improper, and the other stated that requiring an immediate stay creates a substantive requirement that may unreasonably preclude the State protective services from securing an order of protection from the court.

Response: The final rule replaces the requirement for the State court to stay the proceedings with a requirement that the State court expeditiously make the determination as to whether the removal was improper. *See* FR § 23.114(a).

Comment: A commenter suggested rewording this section to require the court to terminate the proceeding and return the child if any party asserts improper removal or the court has reason to believe the removal was improper due to expert testimony not having been presented at the time of removal.

Response: The final rule does not incorporate this suggestion because the statute does not require expert testimony at the time of removal.

J. Transfer to Tribal Court

25 U.S.C. 1911(b) provides for the transfer of any State court proceeding for the foster-care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's Tribe. This provision recognizes that Indian Tribes maintain concurrent jurisdiction over child-welfare matters involving Tribal children, even off of the reservation. In enacting ICWA, Congress recognized that child-custody matters involving Tribal children are ''essential tribal relation[s],'' *see Williams* v. *Lee,* 358 U.S. 217 (1959), that fall squarely within a Tribe's right to govern itself. H.R. Rep. No. 95–1386, at 14–15. Congress also recognized that State courts were often not well-informed about Indian culture, and may not correctly assess the standards of child abuse and neglect in this context. *Id.* at 11. Tribal-court jurisdiction remedies this problem.

Tribal courts are also well-equipped to handle child-welfare proceedings, including those involving non-member parents. Congress has repeatedly sought to strengthen Tribal courts, and has recognized that Tribal justice systems are an essential part of Tribal governments. 25 U.S.C. 3601(5), 3651(5); *see also* S. Rep. No. 103–88, at 8 (1993) (noting that 25 U.S.C. 3601(6) ''emphasize[s] that tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals''); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450, 450a (providing funding and assistance for Tribal government institutions, including courts); Indian Tribal Justice Act of 1993, 25 U.S.C. 3601 *et seq.* (establishing the Office of Tribal Justice Support within the Bureau of Indian Affairs and authorizing up to $50 million annually to assist Tribal courts).

The final rule reflects 25 U.S.C. 1911(b)'s requirement that a child-custody proceeding be transferred to Tribal court upon petition of either parent or the Indian custodian or the Indian child's Tribe, except in three circumstances: (1) where either parent objects; (2) where the Tribal court declines the transfer; or (3) where there is good cause to the contrary. The first two exceptions are fairly straightforward. The third exception is not defined in the statute, and in the Department's experience, has in the past been used to deny transfer for reasons that frustrate the purposes of ICWA. The legislative history indicates that this provision is intended to permit a State court to apply a modified doctrine of *forum non conveniens,* in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the Tribe are fully protected. *See* H.R. Rep. No. 95–1386, at 21. The Department finds that this indicates that Congress intended for the transfer requirement and its exceptions to permit State courts to exercise case-by-case discretion regarding the ''good cause'' finding, but that this discretion should be limited and animated by the Federal policy to protect the rights of the Indian child, parents, and Tribe, which can often best be accomplished in Tribal court. Exceptions cannot be construed in a manner that would swallow the rule.

Accordingly, the final rule does not mandate or instruct State courts as to how they must conduct the good-cause analysis. Rather, the final rule provides certain procedural protections, and also

identifies a limited number of considerations that should not be part of the good-cause analysis because there is evidence Congress did not wish them to be considered, or they have been shown to frustrate the application of 25 U.S.C. 1911(b) and the purposes of ICWA, or would otherwise work a fundamental unfairness. FR § 23.118. Specifically:

- The final rule prohibits a finding of good cause based on the advanced stage of the proceeding, if the parent, Indian custodian, or Indian child's Tribe did not receive notice of the proceeding until an advanced stage. This protects the rights of the parents and Tribe to seek transfer where ICWA's notice provisions were not complied with, and thus will help to promote compliance with these provisions. It also ensures that parties are not unfairly advantaged or disadvantaged by noncompliance with the statute.
- The final rule prohibits a finding of good cause based on whether there have been prior proceedings involving the child for which no petition to transfer was filed. ICWA clearly distinguishes between foster-care and termination-of-parental-rights proceedings, and these proceedings have significantly different implications for the Indian child's parents and Tribe. There may be compelling reasons to not seek transfer for a foster-care proceeding, but those reasons may not be present for a termination-of-parental-rights proceeding.
- The final rule prohibits a finding of good cause based on predictions of whether the transfer could result in a change in the placement of the child; this has been altered slightly from the proposed rule, which could be read to assume that a State court could know or predict which placement a Tribal court might consider or ultimately order. As an initial matter, these predictions are often incorrect. Like State courts, Tribal courts and agencies seek to protect the welfare of the Indian child, and would consider whether the current placement best meets that goal. Further, the transfer inquiry should not focus on predictions or speculation regarding how the other tribunal might rule regarding placement or any other matter. ICWA recognizes that Tribal courts are presumptively well-positioned to adjudicate child-custody matters involving Tribal children. Tribal courts will evaluate each case on an individualized basis to determine whether a change in placement is in the interests of the child, and if so, how to effect the change in placement with the minimum disruption to the child.
- The final rule prohibits a finding of good cause based on the Indian child's perceived cultural connections with the Tribe or reservation. Congress enacted ICWA in express recognition of the fact that State courts and agencies were generally ill-equipped to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. 25 U.S.C. 1901(5). It would be inconsistent with congressional intent to permit State courts to evaluate the sufficiency of an Indian child's cultural connections with a Tribe or reservation in evaluating a motion to transfer.
- The final rule prohibits consideration of any perceived inadequacy of judicial systems. This is consistent with ICWA's strong recognition of the competency of Tribal fora to address child-custody matters involving Tribal children. It is also consistent with section 1911(d)'s requirement that States afford full faith and credit to public acts, records, and judicial proceedings of Tribes to the same extent as any other entity.
- The final rule prohibits consideration of the perceived socioeconomic conditions within a Tribe or reservation. In enacting ICWA, Congress found that misplaced concerns about low incomes, substandard housing, and similar factors on reservations resulted in the unwarranted removal of Indian children from their families and Tribes. *E.g.,* H.R. Rep. at 12. Congress also found that States ''have often failed to recognize the essential Tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.'' *See* 25 U.S.C. 1901(5). These factors can introduce bias into decision-making and should not come into play in considering whether transfer is appropriate.

State courts retain the ability to determine ''good cause'' based on the specific facts of a particular case, so long as they do not base their good cause finding on one or more of these prohibited considerations.

1. Petitions for Transfer of Proceeding

Comment: Several commenters stated that the proposed rule's provisions on transfer exceed statutory authority by allowing a transfer to Tribal court in any child-custody proceeding, whereas ICWA section 1911(b) explicitly addresses transfer only for foster-care placement and termination-of-parental-rights proceedings. Another commenter claimed there is authority to extend the transfer provisions to preadoptive and adoptive proceedings because such proceedings may occur as part of termination-of-parental-rights proceedings, transfer may be appropriate to provide a higher standard of protection of the rights of the parent or Indian custodian under ICWA section 1921, and ICWA section 1919 allows States and Tribes to enter into agreements to transfer jurisdiction of any child-custody proceeding on a case-by-case basis. Another commenter asserted that ICWA section 1911 applies to both involuntary and voluntary proceedings, and that, in any case, the biological parent can veto a transfer so that he or she is not forced into a forum foreign to him or her.

Response: Like the statute, the final rule addresses transfer of foster-care-placement and termination-of-parental-rights proceedings. *See* FR § 23.115; 25 U.S.C. 1911(b). And, like the statute, the final rule's provisions addressing transfer apply to both involuntary and voluntary foster-care and termination-of-parental-rights proceedings. This includes termination-of-parental-rights proceedings that may be handled concurrently with adoption proceedings. Parties may request transfer of preadoptive and adoptive placement proceedings, but the standards for addressing such motions are not dictated by ICWA or these regulations. Tribes possess inherent jurisdiction over domestic relations, including the welfare of child citizens of the Tribe, even beyond that authority confirmed in ICWA. *See, e.g., Holyfield,* 490 U.S. at 42 (1989) (''Tribal jurisdiction over Indian child-custody proceedings is not a novelty of the ICWA.''); *Fisher* v. *Dist. Court,* 424 U.S. 382, 389 (1976) (pre-ICWA case recognizing that a Tribal court had exclusive jurisdiction over an adoption proceeding involving Tribal members residing on the reservation). Thus, it may be appropriate to transfer preadoptive and adoptive proceedings involving children residing outside of a reservation to Tribal jurisdiction in particular circumstances.

Comment: Several commenters supported the provision at PR § 23.115 allowing for motions to transfer to be made orally, stating that oral motions are already allowed by court rules and that by explicitly allowing for oral motions in the rule removes a hurdle to making a motion, particularly for parties not represented by counsel.

Response: The final rule retains the provision allowing for the petition to transfer to be made orally because nothing in the Act indicates that a written document would be required. FR § 23.115(a). For the purposes of this rule, an oral petition would be

considered ''filed'' when made on the record.

Comment: One commenter requested specific language to clarify that parents may request transfer to a Tribal court even if the parents live off reservation.

Response: Nothing in the statute or rule limits the right to request transfer to parents who live on reservation. As confirmed by ICWA, Tribes retain authority over the welfare of Tribal children, even when they reside outside of a reservation.

Comment: A few commenters stated their support of the provision providing that transfer can be requested at any stage. A few commenters opposed this provision, stating that a time limit should be imposed. Commenters had various suggestions for time limits to impose on requests for transfer, ranging from, for example, within 30 days of notification to the parents, Indian custodians, and Tribe, to within 6 months of such notification. One commenter suggested a time limit that would allow transfer until the order for foster-care placement or termination of parent rights has been entered. Commenters in support of imposing time limits on transfer stated that:

- Congress implied there is a time limit because, while ICWA section 1911 addresses both transfer and intervention, it allows only for intervention ''at any point in a proceeding;''
- ICWA does not allow for transfer after termination of parental rights, so time limits should prevent transfer of an appeal of a foster-care order or termination-of-parental-rights order;
- When jurisdiction is transferred to a Tribe, the Tribe often changes the child's placement. If a child was in the previous placement for a long time and has developed attachments to that placement, this can disrupt those attachments;
- The Supreme Court warned in *Adoptive Couple* v. *Baby Girl* that parties should not be able to play the ''ICWA trump card at the eleventh hour;''
- Allowing transfer at any time rewards ''deadbeat'' parents who request transfer after a child has been in a placement for an extended period of time, causing extreme trauma for the child for no reason.

Response: The final rule does not establish a deadline or time limit for requesting transfer. It provides that the right to request a transfer is available at any stage in each proceeding. This adheres most closely to the statute, which does not establish any time limits for seeking transfer. Further, the statute indicates Congress's understanding that Tribes would have presumptive jurisdiction over Indian children domiciled outside of a reservation. *See* 25 U.S.C. 1911(b) (the State court shall transfer such proceeding to the jurisdiction of the Tribe unless certain conditions are present); *Holyfield,* 490 U.S. at 49. Establishing time limits for seeking transfer would be contrary to this intent.

The Department's conclusion is also consistent with the general approach that courts take to deciding transfer motions. For example, motions to change venue pursuant to 28 U.S.C. 1404 (the modern version of forum non conveniens where the alternative forum is within the territory of the United States) may be granted at any time during the pendency of the case. *See, e.g., Chrysler Credit Corp.* v. *Country Chrysler, Inc.,* 928 F.2d 1509, 1516 (10th Cir. 1991); *see also* H.R. Rep. No. 95–1386, at 21 (describing ICWA's transfer provision as a ''modified doctrine of *forum non conveniens''*). The mere passage of time is not alone a sufficient reason to deny a motion to transfer pursuant to 28 U.S.C. 1404; nor is it for 25 U.S.C. 1911(b).

The Department is cognizant that child-custody matters involve children, for whom there may be special considerations related to the passage of time and the need to minimize disruptions of placements. As discussed elsewhere, the Department disagrees that transfer to Tribal jurisdiction will necessarily entail unwarranted disruption of an Indian child's placement in any particular case. Tribes seek to protect the welfare of the children in their jurisdiction, which may mean in any particular case that a current placement will be temporarily or permanently maintained. Under any circumstances, the Department finds that the strong Federal policy in support of Tribal jurisdiction over Tribal children weighs strongly in favor of no time limits for motions to transfer.

There are also compelling practical reasons for the Department's decision. Although a commenter expressed concern about parents strategically waiting to seek transfer to Tribal court, evidence suggests that opponents of transfer can also behave strategically to thwart transfer. *See, e.g. In the Interest of Tavian B.,* 874 N.W.2d 456, 460 (Neb. 2016) (noting that State dismissed its motion to terminate parental rights to avoid transfer, leaving an Indian child suspended in uncertainty).

And, the Department is aware of child-custody proceedings in which the Tribe intervenes, but does not immediately move to transfer the case because maintaining State-court jurisdiction appears to hold out the most promise for reunification of the family. This may be for any number of reasons, including geographic considerations, or because the State is able to provide specialized services to the parents or child that the Tribe cannot. *See, e.g., In re Interest of Zylena R.,* 825 N.W.2d 173, 183 (Neb. 2013) (discussing that ''a Tribe may have no reason to seek transfer of a foster placement proceeding'' but ''once the goal becomes termination of parental rights, a Tribe has a strong cultural interest in seeking transfer of that proceeding to tribal court.''). A parent may defer moving to transfer a case for similar reasons. The Tribe or parent rationally decides that seeking transfer of a foster-care proceeding would not support the goal of reunification of the Indian child with her parent(s). But once the State abandons this goal, and seeks to terminate parental rights, the Tribe's or parent's calculus might reasonably change. If time limits were imposed for moving to transfer, Tribes might be forced to seek transfer early in a foster-care proceeding, even if that outcome does not facilitate reunification. The Department believes that this would undermine the goals and intent of ICWA, and not produce the best outcomes for Indian children.

For these reasons, the final rule provides that a request for transfer may be made at any stage within each proceeding. *See* FR § 23.115(b). A request for transfer may be denied for ''good cause,'' however, which is discussed elsewhere.

Comment: Several commenters stated that the provision at PR § 23.115(b) providing the right to transfer with ''each proceeding'' is unclear as to whether it means each child-custody proceeding or each hearing. One commenter supported just stating ''any stage of the proceeding'' as in PR § 23.115(c) instead.

Response: The final rule clarifies in the definitions that, as relevant here, a ''proceeding'' is a foster-care-placement or termination-of-parental-rights proceeding, and that each proceeding may include several ''hearings,'' which are judicial sessions to determine issues of fact or of law. *See* FR § 23.2. The final rule permits a party to request transfer at any stage in each proceeding. *See, e.g., In re Interest of Zylena R.,* 825 N.W.2d at 182–84.

Comment: One commenter suggested deleting PR § 23.115(b) and (c) as superfluous.

Response: The final rule deletes proposed paragraph (b) because paragraph (a) already captures that the right to transfer arises with each

proceeding, and moves proposed paragraph (c) to final paragraph (b). The final paragraph (b) is necessary to emphasize that the request to transfer may be made at any stage. *See* FR § 23.115.

Comment: A commenter suggested revising PR § 23.115(a) to refer to ''jurisdiction of the Tribe'' rather than ''Tribal court'' because in some cases the Tribe may not have a Tribal court.

Response: The final rule incorporates this suggested revision because it more closely matches the statute. *See* FR § 23.115.

Comment: A commenter requested adding the guardian ad litem and child (at a minimum age) to those who may request transfer to Tribal court.

Response: The statute allows petition for transfer by the Indian child's parent, Indian custodian or Tribe only. The statute does not expressly provide for the child to request transfer. *See* 25 U.S.C. 1911(b). State courts, however, may permit motions to transfer from a guardian ad litem and child.

2. Criteria for Ruling on Transfer

Comment: One commenter noted the provision at PR § 23.116 appeared in the 1979 guidelines and is necessary where courts may otherwise deny transfer based on the judge's belief that transfer is not in the child's best interests. A few commenters suggested adding that Tribal jurisdiction is presumed in all ICWA cases because Tribes have concurrent and presumptive jurisdiction when an Indian child is domiciled outside of a reservation. A few commenters suggested stating that the best interests of the Indian child presumptively favor granting the petition for transfer to improve ICWA compliance.

Response: The final rule, like the proposed rule, states that State courts must grant a petition to transfer unless one or more of three criteria are met. This comports with the statute, which states that a State court ''shall transfer'' unless these specified conditions are present. The final rule does not add the suggested additions because they are not necessary to implement ICWA's transfer provision, which already requires transfer except in specified circumstances.

Comment: A few commenters suggested clarifying that a parent's objection to transfer must be in writing and the consequences of the objection must be explained to the parent, to ensure an informed decision.

Response: The final rule does not impose the suggested limitations on parental objections; however, State courts must document the objection. *See* FR § 23.117(a).

Comment: A few commenters suggested clarifying that a parent whose parental rights have been terminated may not object.

Response: If a parent's parental rights have been terminated and this determination is final, they would no longer be considered a ''parent'' with a right under these rules to object.

Comment: One Tribal commenter stated that the regulations fail to respond to the ambiguity in section 1911(b), which requires transfer ''absent objection by either parent'' but has been incorrectly interpreted to require transfer ''provided that a parent does not object.'' This commenter provided several reasons for why ICWA's language does not require a court to deny transfer if a parent objects and stated that the rule should clarify that the court still has the discretion to transfer even if a parent objects.

Response: The final rule mirrors the statute in requiring transfer in the absence of a parent's objection. The House Report states ''Either parent is given the right to veto such transfer.'' H.R. Rep. No. 95–1386, at 21.

Comment: A commenter suggested that the guardian ad litem (where both parents are unfit or unable to consider the welfare of the child) or child himself should have the ability to object to transfer. Another commenter stated that if the child is permitted to object, there should be a minimum age requirement.

Response: The statute specifically addresses objection by ''either parent'' only; however, nothing prohibits the State court from considering the objection of the guardian ad litem or child himself in determining whether there is good cause to deny transfer, pursuant to the criteria identified in FR § 23.118.

3. Good Cause To Deny Transfer

Comment: Several commenters opposed the proposed rule's approach of defining what factors courts may not consider in determining good cause to deny transfer (*see* PR § 23.117), saying it substitutes BIA's judgment for the courts' judgment, and denies courts the ability to consider every relevant aspect of an individual child's case. One commenter stated that it limits the ''good cause'' analysis to nothing more than a convenient forum analysis, and that it is beyond BIA's authority to limit the analysis in this way. Another commenter noted that the proposed rule could be interpreted to require a court to transfer to Tribal court every case involving young Indian children where parental rights were terminated.

Several commenters stated that limiting the discretion of State courts to deny transfer of a case to the Tribe was particularly helpful, and clarifies that Tribes have ''presumptive jurisdiction'' in child-welfare cases. Many commenters recounted their experiences with State courts inappropriately finding ''good cause'' to deny transfer based on the State court believing the Tribe will make a decision different from the one it would make, because of reliance on bonding with the foster parents, bias against Tribes and Tribal courts, or other reasons, and asked that the rule help prevent denials on this basis in the future. One commenter noted that State courts sometimes employ a ''best interests of the child'' analysis in determining whether to transfer jurisdiction, but stated that the question of whether to transfer is a jurisdictional one that should not implicate the best interests of the child, because ICWA recognizes that Tribal courts are fully competent to determine a child's best interests. A few commenters stated their support of the proposed rule's statement that the socioeconomic status of any placement relative to another should not be considered as a basis for good cause to deny transfer because such reasoning has been used in the past.

Response: The limits imposed by the final rule are consistent with the statutory language and congressional intent in enacting ICWA. Congress directed that State courts ''shall transfer'' proceedings to the jurisdiction of the Tribe unless specified conditions were met. This indicates that Congress intended transfer to be the general rule, not the exception. Congress also intended ICWA, and the transfer provision in particular, to protect the ''rights of the child as an Indian'' as well as the rights of the Indian parents or custodian and the Tribe. H.R. Rep. No. 95–1386, at 21. If the ''good cause'' provision is interpreted broadly, or in ways that could permit decision-making that assumes the inferiority of the Tribal forum, congressional intent would be undermined. In keeping with congressional intent, the Department has imposed certain limits on what the court may consider in determining ''good cause'' to promote consistency in application of the Act and effectuate the Act's purposes. These limits focus on those factors that there is evidence Congress did not wish to be considered, or that have been shown to frustrate the application of 25 U.S.C. 1911(b). State courts retain discretion to determine ''good cause,'' so long as they do not

base their good cause finding on one or more of these prohibited considerations.

Comment: A few commenters noted that the 1979 Guidelines identified what State courts could consider in determining whether good cause exists, whereas the regulations now identified what a State court may not consider, leaving open the question of what would qualify as good cause. Several commenters stated that the rule could be strengthened by providing a list of examples of what good cause to deny transfer may resemble. Commenters disagreed on whether the list of examples should be non-exhaustive (to allow for situations not contemplated in the examples) or exhaustive. A few commenters suggested that not stating what may constitute good cause may expand courts' ability to create good cause.

Response: The regulations take the approach of listing what courts must not consider, for the reasons listed above. *See* FR § 23.118. ICWA's legislative history indicates the good cause provision was intended to permit a State court to apply a modified (*i.e.,* limited, narrow) version of the *forum non conveniens* analysis. H.R. Rep. No. 95–1386, at 21. The Department believes that it is most consistent with congressional intent, and will best serve the purposes of ICWA, if State courts retain limited discretion to determine what constitutes good cause to deny transfer. Reliance on the factors identified in the rule, however, would be inconsistent with the purposes of ICWA, and thus is not permitted.

Comment: Several commenters opposed removing ''advanced stage'' as a ''good cause'' basis to deny transfer. Among the reasons commenters stated for this opposition were the following:

- The rule radically departs from the prior guidelines, which explicitly allowed consideration of whether the proceeding was at an advanced stage;
- State courts should be able to consider whether the proceeding is at an advanced stage for good policy reasons—to prevent forum shopping (*i.e.,* waiting until the ruling becomes clear and then, if it is unfavorable, seeking transfer) and to prevent harm to the child (from disruption in placement and delay in permanency);
- Timeliness is a proven weapon against disruption caused by negligence or obstructionist tactics;
- Not allowing consideration of whether the case is at an advanced stage violates the Indian child's right to permanency;
- The rule is inconsistent with ASFA-mandated permanency deadlines, which have been the basis of policy established by appellate courts in dozens of states to interpret ''good cause'' under advanced stage principles;
- State courts have overwhelmingly agreed good cause may exist if the proceeding is at an advanced stage, but merely disagreed regarding what is ''advanced stage,'' so the rule will increase litigation and delays in case resolution;
- It was not Congress's intent to authorize late transfers and congressional intent has not changed;
- Congress could have expressly allowed transfer at any point in the proceeding in section 1911(b), as it did for intervention in section 1911(c), but it did not;
- Late transfers are more disruptive than late interventions, because a transfer may require retrying the entire case whereas problems resulting from a late intervention are primarily those of the intervener;
- If courts are precluded from considering the ''advanced stage'' they should at least be able to consider as good cause any ''unjustifiable delay'' in requesting transfer; otherwise, the rule incentivizes delay until the outcome in the original proceeding becomes clear.

Several commenters supported restricting State courts from considering whether a case is at an ''advanced stage'' as a ''good cause'' basis to deny transfer. Among the reasons stated for this support were the following:

- ICWA does not specify any time limits on transferring to Tribal court;
- The 1979 Guidelines' provision allowing consideration of the ''advanced stage of the proceedings'' as good cause to deny transfer caused confusion among courts and resulted in disparate interpretations because there is no consistent understanding of ''advanced stage'' across the States (*e.g.,* one court held just over 2 months into a proceeding was ''advanced stage'');
- Each of the four ICWA-defined proceedings should be reviewed anew, so that a petition to transfer filed late in a foster-care proceeding would be considered early for an adoptive placement and State proceedings do not perfectly map to the ICWA-defined proceedings;
- There are a myriad of reasons a Tribe may wait to transfer a case to their own jurisdiction, including allowing sufficient time to do the work necessary to determine whether to transfer, or waiting until the termination of parental rights stage because the Tribe works with the State or monitors the case before that time to promote family reunification.

One commenter shared a story of a State court denying transfer on the basis that the case was at an advanced stage, even though the Tribe did not learn about the case until that stage.

Response: While the 1979 guidelines explicitly allowed consideration of whether the case was at an advanced stage as good cause to deny transfer, the final rule prohibits reliance on the advanced stage of the proceeding in circumstances where the Indian parent, custodian, or Tribe did not receive notice until the proceeding was at an advanced stage. The Department is including this requirement to address circumstances in which denying transfer is unfair, and undermines ICWA's goals. Specifically, as pointed out by a commenter, there have been situations where a parent, Indian custodian, or the child's Tribe did not receive timely notice, and then seeks to transfer the proceeding shortly after receiving notice, but the State court denies the petition to transfer based on the case being at an ''advanced stage.'' The final rule ensures that parents, custodians, and Tribes who were disadvantaged by noncompliance with ICWA's notice provisions may still have a meaningful opportunity to seek transfer. This provision should also serve as an incentive for States to provide the required notice promptly. *See* FR § 23.117(c).

While ICWA does not establish a time limit on the opportunity to transfer or expressly allow for transfer at any point in the proceeding, it does expressly allow for intervention at any point in the proceeding. One of the rights of an intervenor is to seek transfer of the proceeding. To effectuate rights to notice in section 1912(a) and rights to intervene in section 1911(c), State courts should allow a request for transfer within a reasonable time after intervention.

The final rule also clarifies that ''advanced stage'' refers to the proceeding, rather than the case as a whole. Each individual proceeding will culminate in an order, so ''advanced stage'' is a measurement of the stage within each proceeding. This allows Tribes to wait until the termination-of-parental-rights proceeding to request a transfer to Tribal court, because the parents, Indian custodian, and Tribe must receive notice of each proceeding. The Department recognizes that it is often at the termination-of-parental-rights stage that factors that may have dissuaded a Tribe from taking an active role in the case (such as the State's efforts to reunite a child with her nearby parent) change in ways that may warrant reconsidering transfer of the case. *See, e.g., Zylena R.,* 825 N.W.2d at 183 (Neb. 2013).

Comment: A State commenter stated that litigation over whether a State court may consider, in its good cause determination, whether the proceeding is at an ''advanced stage'' is causing delays, which are, in turn, delaying permanency for children and putting the State in a position of not being able to meet required permanency timelines.

Response: The final rule aims to reduce litigation over determinations as to whether a proceeding is at an ''advanced stage'' by establishing clearer standards for when this factor may not be considered. Expeditious transfer does not delay permanency for a child.

Comment: A few commenters opposed not including the child's contacts with the reservation as a basis for good cause to deny transfer, noting that the 1979 Guidelines included this factor and that transferring a child's case to a court with which the child has no connection does not serve the child well. Another commenter supported removing this provision noting that young children would not have evidence of involvement with a Tribe at that age anyway.

Response: As noted above, the final rule establishes that the court must not consider a child's cultural connections with the Tribe or reservation in determining whether there is good cause to deny transfer. State courts are ill-equipped to make this assessment, and young children are unlikely to have had the opportunity to develop such connections.

Comment: Several commenters opposed restricting State courts from considering whether there will be a change in placement, for the following reasons:

- Restricting courts from considering whether there will be a change in placement effectively restricts the court from considering the impact on the child of the transfer;
- Legally, it is impossible to separate jurisdiction and custody, because once jurisdiction is transferred to a Tribe, only the Tribe has jurisdiction over the child's custody;
- Transferring jurisdiction to a Tribe but retaining the child's placement raises legal and practical questions about whether the court has jurisdiction over caregivers, to monitor the care provided to the child, and to determine if the child is subject to new abuse or neglect;
- Many courts have held that the child's best interests may be considered in determining whether good cause to deny transfer exists;
- Not allowing the court to consider whether a transfer would result in a placement change violates the child's equal protection rights and is detrimental to the child;
- Best practices in child-welfare proceedings direct that children should have minimal changes in placement.

Response: The final rule provides that the State court must not consider, in its decision as to whether there is good cause to deny transfer to the Tribal court, whether the Tribal court could change the child's placement. This is an inappropriate consideration because it would presume a decision that the Tribal court has not yet made. *See* FR § 23.118(c)(3). A transfer to Tribal court does not automatically mean a change in placement; the Tribal court will consider each case on and individualized basis and determine what is best for that child. Some commenters erroneously assume that Tribal courts and social services agencies do not follow ''best practices in child-welfare proceedings'' regarding changes in a child's placement.

The Department also declines to accept the comments recommending that State courts be permitted to consider whether transfer could result in change of placement because the Department has concluded it is not appropriate to grant or deny transfer based on predictions of how a particular Tribal court might rule in the case. *See e.g., Piper Aircraft Co.* v. *Reyno,* 454 U.S. 235,261 (1981) (holding that the ''Court of Appeals erred in holding that the possibility of an unfavorable change in law bars dismissal on the ground of *forum non conveniens*'').

For similar reasons, the Department does not find the equal protection concerns raised by commenters compelling. The transfer decision should focus on which jurisdiction is best-positioned to make decisions in the child's custody proceeding. ICWA—and the Department's experience—establishes that Tribal courts are presumptively well-positioned to address the welfare of Tribal children. State courts retain limited discretion under the statute but the choice between two court systems does not raise equal protection concerns. *See, e.g. United States* v. *Antelope,* 430 U.S. 641 (1977).

Finally, the Department does not find these concerns compelling because even if a child-custody proceeding remains in State court, the State court must still follow ICWA's placement preferences (or find good cause to deviate from them). If there is an extended family or Tribal placement that the parties believe that the Tribal court is likely to consider and perhaps choose, the State court must consider that placement as well.

Comment: One commenter suggested prohibiting consideration of whether transfer ''could'' result in a change in placement, rather than ''would'' result because it can be the mere ''fear'' by a State-court judge of the potential change that leads to denial of transfer.

Response: The final rule incorporates this suggestion because the State court will not know whether, once the proceeding is transferred, the Tribal court would decide to change the placement.

Comment: A commenter noted that the issue in deciding whether there is good cause to deny transfer is not what is best for the child, but who should be making decisions about what is best for the child. This commenter notes that a presumption by State courts that the Tribe cannot or will not act in a child's best interest was one of the reasons ICWA was initially passed.

Response: The Department agrees that ruling on a transfer motion should not involve predicting how Tribal courts may rule in a particular case.

Comment: Several commenters stated their concern that the proposed rule removes from State-court judges the ability to consider the child's best interests in determining whether a case should be transferred. One commenter stated that this is an unwarranted expansion of Tribal authority over children not domiciled in reservations and has the potential to cause grave harm to children.

In contrast, several other commenters suggested the rule should explicitly prohibit State courts from applying the traditional ''best interests of the child'' analysis in determining whether there is good cause to deny transfer to the Tribe because: (1) This prohibition was included in the Guidelines; (2) ICWA establishes the placement preferences as being in the child's best interest; and (3) leaving best interests to be argued undermines ICWA's goal to overcome bias and determinations based on lack of knowledge of Tribes and Indian children. A few commenters stated that a best interests inquiry is inconsistent with the presumption of Tribal jurisdiction and recognition of Tribal courts as fully competent to protect an Indian child's welfare. Others stated that the regulations establish that transfer is presumptively in the child's best interests.

A commenter suggested inserting a ''best interests'' analysis that includes consideration of the child's strong interest in having a connection to the child's Tribe, learning the child's culture, being part of the Tribal community, and developing a positive Indian identity. This commenter also requested adding language from the 1979 Guidelines stating that certain

facts may indicate transfer is not in the best interests of the child (*e.g.,* if the child is part of a sibling group with non-Indian children).

Response: The final rule does not include a ''best interests'' consideration, but does provide other guidance. *See Zylena R.,* 825 N.W.2d at 183 (Neb. 2013) (best interests of child should not be a factor in determining whether there is good cause to deny a transfer motion); *In re A.B.,* 663 N.W.2d 625, 634 (N.D. 2003) (same, collecting cases). In general, the transfer determination should focus on what jurisdiction is best positioned to hear the case. The BIA guidelines also provide additional guidance regarding what factors are appropriate to consider in analyzing whether there is good cause to deny transfer.

Comment: A few commenters suggested the rule should establish a ''clear and convincing'' standard of evidence for a showing of good cause to deny transfer. The commenters stated that this standard would be appropriate to protect the Tribe's presumptive jurisdiction and promote consistency by preventing State courts from adopting a lesser standard. A few commenters stated that there should be no burden of proof specified for good cause to deny transfer.

Response: The statute does not establish the standard of evidence for the determination of whether there is good cause to transfer a proceeding to Tribal court. There is, however, a strong trend in State courts to apply a clear and convincing standard of evidence. *See, e.g., In re M.E.M.,* 635 P.2d 1313, 1317 (Mont. 1981); *In re Armell,* 550 N.E.2d 1060, 1064 (Ill. App. Ct. 1990); *In re S.W.,* 41 P.3d 1003, 1013 (Okla. Civ. App. 2002); *In re T.I.,* 707 N.W.2d 826, 833–34 (S.D. 2005); *Thompson* v. *Dep't. of Family Servs,* 747 S.E.2d 838 (2013); *People in Interest of J.L.P.,* 870 P.2d 1252 (Colo. 1994); *Matter of Adoption of T.R.M.,* 525 N.E.2d 298 (Ind. 1988); *In re A.P.,* 961 P.2d 706 (1998). The Department declines to establish a Federal standard of proof at this time, but notes the strong State court approach to this issue is compelling. States are already applying this standard and the Department will consider this issue for future action.

Comment: A few commenters suggested that the rule should allow only States, and not foster or putative adoptive parents, to advance a claim that there is good cause to deny transfer.

Response: Neither the statute nor the rule limit who may advance a claim that there is good cause to deny transfer. State laws or rules of practice may limit the rights of certain individuals to raise such an objection.

Comment: A few commenters suggested additional factors that a State court should not be permitted to consider, including the distance between the State court and any Tribal or BIA social service or judicial systems.

Response: The final rule does not add the suggested factor to the list of items a State court may not consider in determining good cause to deny transfer. If a State court considers distance to the Tribal court, it must also weigh any available accommodations that may address the potential hardships caused by the distance.

Comment: A commenter noted that some of PR § 23.117 reflects what is in current California law, particularly that a court may not consider the socioeconomic conditions and perceived inadequacy of Tribal systems, but asserts that PR § 23.117(c) and (d) would unduly restrict the State judge's discretion by not allowing the judge to consider exceptional circumstances relating to the Indian child's welfare.

Response: The regulation's limitations on what may be considered in the ''good cause'' determination do not limit State judges from considering some exceptional circumstance as the basis of good cause. However, the ''good cause'' determination whether to deny transfer to Tribal court should address which court will adjudicate the child-custody proceeding, not the anticipated outcome of that proceeding.

4. What Happens When Petition for Transfer Is Made

Comment: A few commenters noted that ICWA does not require the Tribe to affirmatively accept jurisdiction before transfer. One of these commenters suggested revising PR § 23.118(a) to mirror the statutory provision at section 1911(b) stating that the State court ''shall transfer . . . subject to declination by the tribal court.''

Response: The rule requires prompt notification to the Tribal court of the transfer petition, and permits a court to request a response regarding whether the Tribal court wishes to decline the transfer. FR § 23.116. As a practical matter, the State and Tribal courts must communicate regarding whether the Tribal court will accept jurisdiction in order to facilitate a smooth transfer and protect the Indian child and minimize disruption of services to the family. *See* FR § 23.119

Comment: A few commenters opposed the proposed provision allowing the Tribe 20 days to decide to accept transfer, noting that ICWA does not mandate a timeframe for Tribal response and that Tribal court scheduling may occur less frequently.

Response: The final rule deletes the proposed provision allowing the Tribe 20 days to decide to accept transfer, and instead specifies that the State court may request a timely response form the Tribe. The Tribe has a statutory right to decline (or accept) jurisdiction, without a statutorily mandated timeline. The Department, however, believes that Tribal courts will respond in a timely manner, recognizing the need for expediently addressing child-welfare issues.

Comment: A few commenters stated that the rule should require the State child-welfare agency to provide a copy of the agency file and additional listed information to the Tribe at no charge because such documentation is essential to appropriate care decisions and are often not provided to Tribes upon transfer. Another commenter stated that the rule should require the records to be sent to the Tribe at the time the Tribe is requested to make a decision to accept or decline a transfer, so it can make an informed decision.

Response: The final rule combines the provisions in the proposed rule regarding transmission of information from the State court to the Tribal court upon transfer, and provides that the State court should expeditiously provide to the Tribal court all records regarding the proceeding. *See* FR § 23.119. In addition, State agencies should share records with Tribal agencies as they would other governmental jurisdictions, presumably at no charge, under the ICWA provision requiring mutual full faith and credit be given to each jurisdiction's records. *See* 25 U.S.C. 1911(d).

Comment: A commenter stated that the rule should instruct the State court to follow procedures for transfer as dictated by the Tribe.

Response: Once the State court determines that it must transfer to Tribal court, the State court and Tribal court should communicate to agree to procedures for the transfer to ensure that the transfer of the proceeding minimizes disruptions to the child and to services provided to the family.

Comment: One Tribal commenter stated that the rule should require the State court to send notice of request to transfer to the designated ICWA office rather than the Tribal court because there may be multiple Tribal courts.

Response: As discussed above, if the State court does not have contact information for the Tribal court, it should contact the Tribe's ICWA officer.

K. Adjudication

1. Access to Reports and Records

ICWA and these rules require that access to certain records be provided to certain parties. For example, ICWA provides that each party to an ICWA foster-care-placement or termination-of-parental-rights proceeding has 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); FR § 23.134. In order to comport with due process requirements, the final rule also extends this right to parties to emergency proceedings. FR § 23.134. Tribes that are parties to such proceedings are entitled to receipt of the documents upon which a decision may be based. In addition, the notice provisions of FR § 23.111(d) require that Tribes be provided the document by which the child-custody proceeding was initiated (as well as other information), and FR § 23.141 requires that States make available to an Indian child's Tribe the placement records for that child's child-welfare proceedings.

Comment: A few commenters suggested clarifying that the child's Tribe has the right to timely receipt of documents filed with the court or upon which a decision may be based. One stated that such access is necessary for the Tribe to determine whether to intervene. Two Tribes stated that States refuse them access to information on the basis of confidentiality.

Response: States cannot refuse to provide an Indian child's Tribe with access to information about that child's proceedings. ICWA expressly provides for Tribal access to certain records, and makes no exception for confidentiality concerns (which presumably are present in all child-custody proceedings). Tribes are sovereign entities that have concurrent jurisdiction over child-custody proceedings, and they should have the ability to review documents relevant to those proceedings. Further, the Indian Child Protection and Family Violence Protection Act addresses this concern, providing that State agencies that investigate and treat incidents of child abuse should provide information and records to Tribal agencies that need to know the information in performance of their duties to the same extent they would provide the information and records to Federal agencies. 25 U.S.C. 3205. Therefore, confidentiality generally is not a valid basis to withhold information and records to the Indian child's Tribe. The rule does not incorporate this provision because it is not unique to ICWA implementation.

Comment: One commenter stated the rule should clarify that Tribes have a right to both discovery and disclosure of every document, and should not be required to pay for photocopying of documents that other parties receive.

Response: State agencies must share records with Tribal agencies that are parties to child-custody cases as they would other parties and governmental entities. The rule does not, however, address payment of such charges, as the issue is not addressed in the statute.

Comment: One commenter requested the rule require States to allow Tribes at least three business days to review records.

Response: The statute does not require States to provide Tribes with a certain time period for reviewing records, but all parties should be provided sufficient time to review the records to allow for meaningful participation in the proceeding.

Comment: One commenter opposed PR § 23.119(b) (the court's decisions must be based only upon documents in the record), because it suggests that agreed orders entered into between the parties could not be off the record or ex parte, despite local practice and State statutory authority, and could overload State courts by requiring all cases to be heard on the record.

Response: ICWA requires clear and convincing evidence for foster-care placements and evidence beyond a reasonable doubt for termination of parental rights, each of which would necessarily require documentation in the record. This does not foreclose agreed orders, but the court must still make the statutorily required findings.

2. Standard of Evidence for Foster-Care Placement and Termination

a. Standard of Evidence for Foster-Care Placement

Comment: Several commenters supported PR § 23.121(a), establishing the standard of evidence applicable to foster-care placement. A few commenters suggested strengthening PR § 23.121(a) and (b) by changing ''may not'' to ''must not'' or ''shall not'' to make it more clearly mandatory. One commenter stated that while ''may not'' is the phrase used by the statute, it does not depart from the intent of ICWA to use ''shall not.''

Response: The final rule changes ''may not'' to ''must not'' as requested to clarify that the standard of evidence is mandatory.

Comment: Several commenters pointed out that PR § 23.121(a), establishing that the court may not order foster-care placement unless continued custody is likely to result in serious physical damage or harm to the child uses the phrase ''serious physical damage or harm to the child'' while the statute, at section 1912(e), uses ''serious emotional or physical damage to the child.'' Commenters opposed the omission of ''emotional'' as beyond the authority granted by the statute. Some assumed this was an inadvertent omission, while others interpreted this as meaning that foster care may not be ordered even where parents are inflicting serious emotional harm on the Indian child.

Response: The proposed rule mistakenly omitted the term ''emotional'' in PR § 23.121(a) and instead used the term ''harm.'' The final rule more closely tracks the statutory language, using the phrase ''serious emotional or physical damage to the child.'' *See* FR § 23.121(a).

b. Standard of Evidence for Termination

One commenter suggested changing ''continued custody of the child by the parent or Indian custodian'' in PR § 23.121(b) to ''custody of the child by either parent or Indian custodian.''

Response: The final rule retains the proposed language stating ''continued custody of the child by the parent or Indian custodian'' because this is the statutory language. *See* 25 U.S.C. 1912(f), FR § 23.121(b).

c. Causal Relationship

Comment: One commenter noted that PR § 23.121(c) requires a showing of a relationship between particular conditions but it does not say in the second item how these conditions relate. The commenter suggested clarifying in both (c) and (d), that the actions are directly putting the children in danger. A commenter noted that the word ''between'' is confusing in PR § 23.121(c).

Response: The final rule addresses the commenters' concerns by revising the language to clarify that there must be a causal relationship between the particular conditions in the home and the risk of serious emotional or physical damage to the child. *See* FR § 23.121(c).

Comment: A commenter stated that the requirement for a causal relationship should apply to both clear and convincing evidence for foster-care placement and beyond a reasonable doubt for termination of parental rights because the statute establishes these evidentiary standards in mirroring provisions.

Response: The final rule requires the causal relationship for both clear and convincing evidence for foster-care placement and beyond a reasonable

doubt for termination of parental rights. *See* FR § 23.121(c).

Comment: A few commenters suggested that ''particular conditions in the home'' should be ''particular conditions in the home listed in the petition'' because the petition should include all the allegations.

Response: The final rule does not add that the conditions must be listed in the petition because evidentiary requirements that are not unique to ICWA govern what allegations must be included in the petition. *See* FR § 23.121(c).

Comment: A commenter suggested replacing ''conditions in the home'' with ''facts'' to prevent exclusion of facts such as a parent's propensity to abuse the child, as opposed to the living conditions.

Response: The final rule retains the phrase ''conditions in the home'' because this phrase generally indicates all conditions of the child's home life rather than just the physical location. This phrase was also used in the 1979 Guidelines. *See* FR § 23.121(c).

d. Single Factor

Comment: Several commenters expressed concern regarding PR § 23.121(d), which states that one of the listed factors may not, of itself, meet the burden of evidence. A few stated that the proposed rule presumes States routinely remove children solely on the basis of poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior, when in fact they do not. One commenter expressed concern that PR § 23.121(d) is dangerous, because one could argue that where both parents are abusing and producing drugs, the evidence shows only the existence of inadequate housing and substance abuse, which cannot meet the burden of evidence. Another commenter noted that substance abuse is a significant contributing factor to child abuse and neglect, and asserted that excluding substance abuse from evidence fails to protect the child. Another commenter stated that Congress never suggested alcohol or substance abuse that harms Indian children was not a sufficient reason for removing Indian children. A commenter stated that not allowing a judge to consider substance abuse or nonconforming social behavior takes away the court's power to protect Indian children.

Response: The final rule does not prohibit State courts from considering the factors. Instead, the final rule prohibits relying on any one of these factors, absent the causal connection identified in FR § 23.121(c), as the sole basis for determining that clear and convincing evidence or evidence beyond a reasonable doubt support a conclusion that continued custody is likely to result in serious emotional or physical damage to the child. *See* FR § 23.121(d). The intention behind this provision is to address the types of situations identified in the statute's legislative history where States remove Indian children at higher rates than they remove non-Indian children based on subjective assessments of these factors. To address the commenters' concerns that this provision may prevent State courts from protecting Indian children, the final rule addresses this comment by stating that a court may not consider any one of these factors unless there is a causal relationship between the factor and the damage to the child. In other words, if one of these factors is causing the likelihood of serious emotional or physical harm to the Indian child, the court may rely on the factor.

Comment: One commenter suggested defining or giving examples of ''nonconforming social behavior'' in the provision stating that evidence of nonconforming behavior by itself is not evidence that continued custody is likely to result in serious emotional or physical damage to the child.

Response: The final rule does not define the term, but the Department notes that ''nonconforming social behavior'' includes behaviors that do not comply with society's norms, such as dressing in a manner that others perceive as strange, an unusual or disruptive manner of speech, or discomfort in or avoidance of social situations. *See* FR § 23.121(d).

Comment: A commenter stated that the list of factors in PR § 23.121(d) should not be sufficient for evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child, in addition to not being sufficient for clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child.

Response: The final rule adds ''beyond a reasonable doubt'' as requested. *See* FR § 23.121(d).

3. Qualified Expert Witness

The Act requires the testimony of qualified expert witnesses for foster-care placement and for adoptive placements. 25 U.S.C. 1912(e), (f). The final rule provides the Department's interpretation of this requirement. *See* FR § 23.122.

The legislative history of the qualified expert witness provisions emphasizes that the qualified expert witness should have particular expertise. Congress noted that ''[t]he phrase 'qualified expert witnesses' is meant to apply to expertise beyond the normal social worker qualifications.'' H.R Rep. No. 95–1386, at 22. In addition, a prior version of the legislation called for testimony by ''qualified professional witnesses'' or a ''qualified physician.'' *See* S. Rep. No. 95–597, at 21.

The final rule requires that the qualified expert witness must be qualified to testify regarding whether 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. FR § 23.122(a). This requirement flows from the language of the statute requiring a determination, supported by 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), (f).

In addition, the qualified expert witness should have specific knowledge of the prevailing social and cultural standards of the Indian child's Tribe. FR § 23.122(a). In passing ICWA, Congress wanted to make sure that Indian child-welfare determinations are not based on ''a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family.'' *Holyfield,* 490 U.S. at 36 (citing H.R. Rep. No. 95–1386, at 24). Congress recognized that States have failed to recognize the essential Tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. *See* 25 U.S.C. 1901(5). Accordingly, expert testimony presented to State courts should reflect and be informed by those cultural and social standards. This ensures that relevant cultural information is provided to the court and that the expert testimony is contextualized within the Tribe's social and cultural standards. Thus, the Department believes that the question of whether 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 is one that should be examined in the context of the prevailing cultural and social standards of the Indian child's Tribe.

The final rule does not, however, strictly limit who may serve as a qualified expert witness to only those individuals who have particular Tribal social and cultural knowledge. FR § 23.122(a). The Department recognizes that there may be certain circumstances where a qualified expert witness need not have specific knowledge of the

prevailing social and cultural standards of the Indian child's Tribe in order to meet the statutory standard. For example, a leading expert on issues regarding sexual abuse of children may not need to know about specific Tribal social and cultural standards in order to testify as a qualified expert witness regarding whether return of a child to a parent who has a history of sexually abusing the child is likely to result in serious emotional or physical damage to the child. Thus, while a qualified expert witness should normally be required to have knowledge of Tribal social and cultural standards, that may not be necessary if such knowledge is plainly irrelevant to the particular circumstances at issue in the proceeding. A more stringent standard may, of course, be set by State law.

Comment: Several commenters supported the proposed rule's requirement in PR § 23.122 for the qualified expert witness to have knowledge of the prevailing social and cultural standards and childrearing practices within the child's Tribe and prioritizing use of experts who are members of the child's Tribe and recognized by the Tribal community as knowledgeable in Tribal customs. A few commenters stated that this ensures cultural information is provided to the court and avoids increasing use of non-Indian professionals without experience or knowledge in Indian families. A few commenters noted that expert witness testimony has been provided by those without any knowledge of Indian family customs or based on information gleaned from the Tribe's Web site; these commenters supported the proposed rule for addressing this issue. A commenter supported the definition of qualified expert witness in PR § 23.122 as consistent with the way the term has been defined in various State statutes implementing ICWA, in various Tribal-State agreements, and in accordance with ICWA's intent.

Several other commenters stated that the proposed provisions addressing who may serve as a qualified expert witness are beyond the Department's authority. Other commenters stated that the Department is within its purview to define who may be considered as a qualified expert witness in ICWA cases because the statute requires qualified expert witnesses but does not define the term.

Several commenters objected to PR § 23.122, stating that it commandeers State courts by telling them who may serve as expert witnesses and that, instead, State-court judges should determine what expert testimony is credible and reliable based on rules of evidence. A few other commenters stated that the rule conflicts with established rules of evidence because questions of bias and prejudice go to the weight, not the admissibility, of evidence. These commenters note that concerns as to bias and prejudice can be addressed through impeachment in cross-examination.

Response: The Act is ambiguous regarding who is a ''qualified expert witnesses.'' Thus, as discussed above, the final rule provides the Department's interpretation of this requirement. *See* FR § 23.122. Providing State courts with this regulatory language will promote uniformity of the application of ICWA.

As discussed above, the Department emphasizes that qualified expert witnesses must have particular relevant expertise and should have knowledge of the prevailing social and cultural standards of the Indian child's Tribe. These are not issues of bias or prejudice; rather, they are issues of the knowledge that the expert should have in order to offer her testimony. The final rule still provides State courts with discretion to determine what qualifications are necessary in any particular case.

Comment: A few commenters noted that ICWA does not require the qualified expert witness have specific knowledge of the Tribe's culture or customs. A commenter stated that Congress said the phrase was meant to apply to expertise beyond ''normal social worker qualifications'' but did not impose additional requirements for knowledge of the Tribe's culture and customs. This commenter also noted that numerous courts have ruled that, if cultural bias is not implicated in the testimony or proceeding, then the expert witness is not required to have experience with or knowledge of the Indian culture. A few commenters pointed to case law holding that specialized knowledge of Indian culture is not necessary for a person to be qualified as an expert in an ICWA case, and State law controls who is recognized as an expert.

A few commenters pointed out the purpose of the requirement for qualified expert witness testimony and stated that Congress intended to prevent removal of Indian children due to cultural misunderstandings, poverty, or different standards of living. Another stated that Congress was trying to address social workers improperly basing findings of neglect and abandonment on factors such as the care of Indian children by extended family members, Indian parents' permissive discipline, and unequal considerations of alcohol abuse.

Response: As discussed above, the final rule states that a qualified expert witness should have an understanding of the child's Tribe's cultural and social standards. However, the final rule still provides State courts with discretion to determine what qualifications are necessary in any particular case. State law may also provide standards for qualified expert witnesses that are more protective of the rights of the Indian child and parents.

Comment: One commenter noted that the requirement for specific knowledge of the Tribe applies even if the child has never been involved in the Tribe's customs or culture. A commenter asserted it would be unfair to a child that has no connection to the Tribe's customs or culture to require a Tribal expert witness. One commenter stated that it does not take an expert with specific knowledge of Indian culture to provide helpful information to the court, so long as the expert has substantial education and experience and testifies on matters not implicating cultural bias. This commenter stated that the requirement for an expert with special knowledge of Indian life is unreasonable when an agency seeks action on any ground not pertaining to the child's heritage. A few commenters pointed to case law holding that when cultural bias is not clearly implicated, the qualified expert witness need not have specialized knowledge of Indian culture.

Response: As discussed above, the final rule states that a qualified expert witness should have an understanding of the child's Tribe's cultural and social standards. The child's involvement with Tribal customs and culture is not relevant to an inquiry that focuses on the ability of the parent to maintain custody of their child.

There may be limited circumstances where this knowledge is plainly irrelevant to the question whether 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, and the final rule allows for this. The Department disagrees, however, with the commenters' suggestion that State courts or agencies are well-positioned to assess when cultural biases or lack of knowledge is, or is not, implicated. ICWA was enacted in recognition of the fact that the opposite is generally true. Indeed, as other commenters have pointed out, some theories, such as certain bonding and attachment theories, presented by experts in foster-care, termination-of-parental-rights, and adoption proceedings are based on Western or Euro-American cultural norms and may have little application outside that context. *See, e.g.,*

Comments of Casey Family Programs, at pp 13–17.

Comment: Several commenters opposed restricting expert testimony since it could prevent courts from receiving relevant information. Commenters also stated that limitations on expert evidence would cause harm and prevent positive outcomes for many children. A commenter noted that the proposed rule's requirements improperly allow the Tribe to dictate who the State can call as an expert witness in their own case-in-chief. This commenter stated that the Tribe as a party may call their own witnesses and cross-examine the State's expert and should have the responsibility to present evidence. A few commenters noted that the regulations do not limit the number of expert witnesses at a hearing but ensures the court has all the information it needs to make culturally informed decisions. These commenters state that the proposed rule requires the State to find someone who agrees with the foster-care placement or termination of parental rights after reviewing the case from the perspective of the child's culture and community, to ensure that the cultural norms of the child's Tribe are considered. Other commenters stated that the proposed rule restricts testimony from psychological experts in trauma, attachment, developmental psychology, etc., unless they also have knowledge of the specific Tribe's customs. Several commenters requested clarification that these requirements do not preclude State courts from hearing testimony from other expert witnesses in addition to the expert on the Tribe's culture and customs as they pertain to childrearing. A few commenters noted that a primary policy underlying ICWA was to protect the best interest of Indian children, but the proposed rule provides no qualification for experts who can speak to the best interests of the child. These commenters state that any such expert should be given priority regardless of whether the expert is from a Tribe.

Response: The rule does not restrict expert testimony. The court may accept expert testimony from any number of witnesses, including from multiple qualified expert witnesses. The statute requires, however, that the proposed foster-care placement or termination of parental rights be supported by the testimony of qualified expert witnesses.

Comment: Several commenters noted the difficulty in obtaining expert witnesses with specific knowledge of the Tribe's culture and customs who are willing to testify. One noted that, in California, due to the historical relocation policies, finding an expert can be a challenge. These commenters were concerned that the difficulties in securing qualified expert witnesses could delay permanency decisions. Suggested solutions to this issue included:

- Allowing regional experts (particularly in Alaska, where it may not be possible to find experts in each unique village or Tribe that can be available at hundreds of hearings held each year);
- Providing guidance for finding witnesses from out-of-State Tribes;
- Applying expert witness requirements only when the child is domiciled on or residing on the reservation because otherwise it is difficult to locate an impartial qualified expert witness with specific knowledge of the Tribe's culture and customs;
- Requiring Tribes to respond to requests to provide an expert, or to relieve the agency of the obligation to identify a Tribal expert if the Tribe fails to respond;
- Requiring BIA provide a list of qualified expert witnesses.

Response: The Department encourages States to work with Tribes to obtain a qualified expert witness. In some instances, it may be appropriate to accept an expert with knowledge of the customs and standards of closely related Tribes. Parties may also contact the BIA for assistance. *See* 25 CFR 23.81.

Comment: A commenter noted that the evidentiary issue before the court is whether the child is at risk of serious emotional or physical damage, and that the new definition does not require the expert witness to have any knowledge, education, or qualification on that issue. This commenter noted that knowledge of the Tribe's culture and customs can inform an expert's opinion but that is secondary to the expert's ability to address the main issue.

Response: The final rule states that the testimony of at least one qualified expert witness must address the issue of whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Comment: A few commenters supported the preference list of qualified expert witnesses. A few commenters suggested redrafting PR § 23.122(b) to clarify that the presumption is in descending order, to read ''The [qualified expert witness] shall be determined in the following order of preference.'' One commenter stated that the preference order is important because in some counties, the State worker is accepted as an expert witness to circumvent the Tribe's opinion, if it is known that the Tribe has an opposing opinion.

A few commenters opposed listing a member of the child's Tribe recognized as knowledgeable in Tribal customs or childrearing as the first preference because choosing a layperson over a professional would be choosing that Tribe's cultural opinion over an educated person who can provide evidence-based testimony.

A few commenters opposed the priority given to professionals with substantial experience and education in his or her specialty being below the priority of Tribal members of the child's or another Tribe, and laypersons with knowledge of the Tribe's cultural and childrearing practices. These commenters stated that the priorities essentially eliminate the input of licensed child-welfare experts, and could jeopardize the safety and wellbeing of the children.

One commenter stated that the fourth preference should be removed because a non-Native anthropologist will likely not understand the culture and traditions of Tribes. This commenter recommends instead adding language similar to three, saying that a layperson who is recognized by the child's Tribe in having substantial experience.

A commenter opposed ranking at all because the trier of fact should determine what weight to give to testimony, and by ranking, it implies the higher ranked expert would be more reliable or credible.

Response: The final rule does not include a preference list of qualified expert witnesses. Instead it requires that the qualified expert witnesses be able 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 that the qualified expert witnesses should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. The final rule also allows a Tribe to designate a person as being qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe.

Comment: A few commenters expressed concern that a witness in the proposed order of preference would be biased, because a member of the Tribe would not oppose the Tribe's position.

Response: The final rule does not require that the qualified expert witness be a citizen of the Tribe. The witness should be able to demonstrate knowledge of the prevailing social and cultural standards of the Indian child's Tribe or be designated by a Tribe as

having such knowledge. *See* FR § 23.122(a), (b).

Comment: One commenter suggested considering Native elders knowledgeable about ICWA and the family's heritage, etc., as qualified expert witnesses.

Response: Any potential qualified expert witness, including Native elders, would need to meet the requirements of FR § 23.122 to testify on whether continued custody is likely to result in serious emotional or physical damage to the child. The court may allow experts to testify for other purposes as well.

Comment: Several commenters suggested further improving the regulation by providing that the Tribe will designate and authorize the expert witness. Several other commenters requested clarification that, while the Tribe may assist in locating an expert, it is under no obligation to do and that the Tribe's failure to do so does not absolve the State of its obligation. A few other commenters requested requiring the State to seek assistance from the Tribe or the BIA agency if the Tribe is unable to be contacted. Another commenter noted that the Tribe is often the State's opposing party, so it shouldn't be required to seek assistance from the Tribe.

Response: The final rule provides that the court or any party may request the assistance of the Indian child's Tribe or the BIA agency serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses. This is not required.

Comment: Several commenters requested a new provision prohibiting the qualified expert witness from being employed by the State agency due to a concern about the potential that the State worker may have a bias, and noting that the original intent of the requirement for a qualified expert witness was to combat such bias. Others requested the prohibition be extended to private agencies and Federal agencies. These commenters stated that it is a conflict of interest, or at least the appearance of impropriety, for the agency seeking placement to claim to be an expert in whether the child should be placed.

Response: The final rule adds a provision prohibiting the social worker that is regularly assigned to the child from serving as the qualified expert witness, to help to address concerns regarding bias or conflicts. In addition, this provision reflects the congressional direction that ''[t]he phrase 'qualified expert witnesses' is meant to apply to expertise beyond the normal social worker qualifications.'' H.R. Rep. No. 95–1386, at 22.

Comment: One commenter noted that because the standard of evidence for foster-care placement and termination of parental rights hinges on harm to the child, the qualified expert should be someone familiar with the child, not just the Tribe. A commenter suggested requiring the qualified expert witness to make contact with the parents and make an effort to view interactions between the parents and child, and attempt to meet with extended family members involved in the child's life. Otherwise, the expert will rely on one-sided State reports.

Response: The commenter's suggestions are recommended practices.

L. Voluntary Proceedings

Certain ICWA requirements apply to voluntary proceedings. The statute defines ''child-custody proceeding'' broadly to include foster-care, preadoptive, and adoptive placements, without regard to whether those placements are made with or without the consent of the parent(s). 25 U.S.C. 1903(1). Similarly, termination-of-parental-rights proceedings fall within the statutory definition whether or not the termination is voluntary or involuntary. *Id.*

The statute does not condition Tribal court jurisdiction over Indian child-custody proceedings on whether that proceeding is voluntary or involuntary. Rather, exclusive Tribal jurisdiction is recognized over any child-custody proceeding involving an Indian child who resides or is domiciled within the reservation of the Tribe under 25 U.S.C. 1911(a). *See also generally Holyfield.* Transfer and intervention rights apply in any State court proceeding for the foster-care placement of, or termination of parental rights to, an Indian child. 25 U.S.C. 1911(b), (c). Similarly, section 1915 of the statute provides placement preferences that apply in any adoptive placement of an Indian child under State law, without specifying whether that adoption is the result of a voluntary or involuntary termination of parental rights. And, section 1913 of the statute specifically addresses voluntary proceedings, and provides a number of significant protections to parents.

The Department is cognizant that voluntary proceedings require consideration of the interests of the Indian child's biological parents to direct the care, custody, and control of their child. *See, e.g., Troxel* v. *Granville,* 530 U.S. 57, 65 (2000). The rights of the child, including the rights of the child as an Indian, must also be considered. State and Tribal governments also have a sovereign interest in protecting the welfare of the child. And Congress has articulated a clear Federal interest in protecting Indian children and the survival of Tribes. State law varies in how these various interests are considered and protected.

ICWA balances these important and sometimes competing considerations. It recognizes that Tribes have exclusive jurisdiction over child-custody proceedings involving children domiciled on the reservation, and the right to seek transfer or intervene in foster-care or termination-of-parental rights proceedings involving off-reservation children. The final rule retains this balance, and makes clear that ICWA's placement preferences apply to voluntary placements, but also permits departure from those preferences based on various factors, including the request of one or both parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference. FR § 23.132(c). This balances the importance of the placement preferences with the rights of the parent.

For clarity, the final rule indicates in FR § 23.104 which provisions apply to voluntary proceedings. The final rule also provides specific standards for voluntary proceedings. In particular:

- Section 23.124(a) and (b) provide the minimum requirements for State courts to determine whether the child is an ''Indian child'' as defined by statute. If there is reason to believe that the child is an ''Indian child,'' but this cannot be confirmed based on the evidence before the State court, it must ensure that the party seeking placement sought verification of the Indian child's status with the Tribes of which the child might be a citizen. The determination of whether the child is an ''Indian child'' is a threshold inquiry; it affects the jurisdiction of the State court and what law applies to the matter before it. *See, e.g., In re A.G.,* 109 P.3d 756, 758 (Mont. 2005) (whether child is an ''Indian child'' is a ''threshold inquiry'' and must be definitively resolved before termination of parental rights). Section (a) mirrors the provision in the proposed rule; section (b) was added to clarify the obligation to confirm a child's status as an ''Indian child.''
- FR § 23.124(c) clarifies that the regulatory provisions addressing the application of the placement preferences apply with equal force to voluntary proceedings.
- The final rule does not include a provision requiring agencies and State courts to provide notice to the Indian Tribe of voluntary proceedings. As a practical matter, notice to the Tribe may be required in order to comply with

other provisions of the statute or regulation (*see, e.g.,* FR § 23.124(b)). In the Department's view, it is a best practice to provide such notice.

• FR § 23.125 details how consent must be obtained in a voluntary proceeding, and is designed to ensure that the procedural protections provided by ICWA are implemented in each case. The final rule makes some wording changes from the proposed rule, but is substantively similar.

• FR § 23.126 describes what information a consent document should contain. The final rule makes some wording changes from the proposed rule, but is substantively similar.

• FR § 23.127 describes how withdrawal of consent to a foster-care placement is achieved. It clarifies that the parent or Indian custodian may withdraw consent to foster-care placement at any time; requires the filing of an instrument under oath, and if consent is properly withdrawn, requires the immediate return of the child to the parent or custodian.

• FR § 23.128 addresses withdrawal of consent to termination of parental rights or adoption. The final rule includes termination of parental rights, to better match the statutory provision. *See* 25 U.S.C. 1913(c). The final rule, like the proposed rule, requires that a withdrawal of consent be filed in court or made by testifying in court, and that after withdrawal of consent is filed, the child must be returned to the parent or Indian custodian.

1. Applicability of ICWA to Voluntary Proceedings—In General

Comment: Several commenters noted and supported the applicability of ICWA to voluntary placements. A commenter stated that the proceedings identified in PR § 23.103(f) (voluntary proceedings in which the parent or Indian custodian may regain custody upon demand) are those that operate outside of the court and child-welfare systems, and that these are distinct from those described in PR § 23.103(g) (in which a parent consents to foster care or termination of parental rights).

Response: Certain provisions of the final rule are applicable to voluntary placements. To clarify which placements are outside of ICWA, the final rule defines ''upon demand'' to mean verbal demand without any required formalities or contingencies. Section 1913 of the statute (implemented by FR § 23.103(g)) requires formalities for consent and withdrawal of consent of a foster-care placement.

Comment: Several commenters supported PR § 23.103(g) stating that private adoption placements made voluntarily by parents are covered by ICWA. Among the reasons stated in support of this provision were:

• Private adoption placements contribute to the wholesale separation of Indian children from their families, culture and Tribes;

• Indian children are routinely adopted into non-Indian homes through private adoptions because adoption agencies control which homes the birth parents choose from;

• There are hundreds or thousands of Indian homes that would like to adopt Indian children;

• ICWA as a whole does not only pertain to involuntary proceedings.

One Tribe recounted a situation where the Tribe intervened in a voluntary adoption and the Tribal member changed her mind and placed the child with a placement that preserved the child's ties to family, culture, and community.

Response: The final rule clarifies which provisions are applicable to voluntary proceedings. *See e.g.,* FR § 23.104. It balances the interests of biological parents with the Federal policy promoting retention of Indian children within their extended family and Tribal community whenever possible.

Comment: A few commenters stated that the proposed rule treats the child as property of the Tribe, inviting Tribal interference with the parent's right to make decisions.

Response: The rule in no way treats the child as property of the Tribe. Tribes, like other governments, have a sovereign interest in the welfare of their citizens, and in particular, their children. The final rule balances this interest with a parent's interest in directing the care, custody, and control of their child.

2. Applicability of Notice Requirements to Voluntary Proceedings

Comment: Many commenters stated support for the provision of the proposed rule related to notice to Tribes in voluntary proceedings. These commenters noted that Tribes are *parens patriae* for their member children and that, when Tribes do not receive notice in voluntary proceedings they are effectively denied rights and protections granted by ICWA. Specifically, a Tribe must receive prior notice of a voluntary proceeding in order to avail itself of the following statutory rights and protections:

• The opportunity to verify a child is a member, and therefore subject to ICWA;

• The exercise of exclusive Tribal jurisdiction over Indian children who reside or are domiciled within the reservation or who are wards of Tribal court (25 U.S.C. 1911(a));

• The exercise of concurrent jurisdiction over Indian children by transferring the proceeding to Tribal court (25 U.S.C. 1911(b));

• Intervention in voluntary foster-care placement and termination-of-parental-rights proceedings (25 U.S.C. 1911(c));

• The opportunity to provide an interpreter to a parent or Indian custodian (25 U.S.C. 1913(a));

• Monitoring and compliance (filing a petition to invalidate proceedings) (25 U.S.C. 1914);

• Assistance in identifying placements and providing information on ''prevailing social and cultural standards'' in the Indian community (25 U.S.C. 1915(d));

• Facilitation of documentation of efforts to comply with the order of preference (25 U.S.C. 1915(e)).

A few commenters asserted that the proposed requirement for notice in voluntary proceedings addresses an ambiguity in the statute: The provision at section 1913 addressing consent for voluntary termination does not address how the provision interacts with other provisions of the Act. A few commenters stated that the proposal addresses Congress's concern about both State and private agency adoptions. These commenters assert that birth parents' rights are balanced against the government's interest in the child's safety.

One commenter noted that while the statute explicitly requires notice in involuntary proceedings, it does not preclude notice in voluntary proceedings. Other stated reasons for support of requiring notice in voluntary proceedings were:

• Voluntary adoptions are often used to skirt around ICWA;

• Including the Tribe in voluntary placements will help find suitable placements and lead to placement stability;

• Requiring notice in voluntary proceedings is consistent with several State laws, including California SB 678 and the Oklahoma Indian Child Welfare Act, and Tribal-State agreements, and that nationalization of the requirement ensures equal treatment on the issue across jurisdictions;

• Requiring notice allows the Tribe the opportunity to assist the mother with any situations leading her to feel that she cannot raise her child.

A few commenters suggested adding that the notice to Tribes of voluntary

proceedings is to permit the Tribe to determine whether the child involved is an Indian child.

Several other commenters opposed the proposed requirement for notice in voluntary proceedings, stating that it is contrary to the plain language of the statute because the notice provisions at section 1912 apply only to involuntary proceedings and the provisions specific to voluntary proceedings at section 1913 make no mention of notice. These commenters also pointed to case law concluding there is no Tribal right to notice in voluntary proceedings and past congressional attempts to amend ICWA to require this notice as proof that the Act currently does not require such notice.

Several commenters stated that requiring notice in voluntary proceedings violates an individual's rights to privacy and due process, and will result in children not being adopted because the birth parents will be forced into a choice of doing what they believe is best for the child or preserving their constitutionally protected privacy and anonymity. One commenter stated her belief that the birth parent's desire should be paramount. One commenter pointed to the Supreme Court's decision in *Whalen* v. *Roe,* 429 U.S. 589 (1977), as protecting parents' right to privacy.

A few commenters stated that the regulations should suggest, rather than mandate, notice in voluntary proceedings because the Act does not require notice but such notice may be advisable to protect the Tribe's right to intervene.

Response: The final rule has been changed from the proposed rule, and does not require in all cases that notice be provided to Tribes of voluntary proceedings. The final rule does require that the court make a determination of whether the child is an ''Indian child,'' because this is essential in order to assess the State court's jurisdiction and what law applies. An inquiry with one or more Tribes may be necessary in some cases to confirm a child's status as an ''Indian child.'' The final rule does not preclude State requirements for notice in voluntary proceedings in other circumstances. The Department recommends that Tribes be provided notice in voluntary proceedings.

Comment: Many commenters opposed the provisions at PR § 23.107(d) stating that a request for anonymity in voluntary proceedings does not relieve the obligation to obtain verification from the Tribe and provide notice. These commenters stated that requiring notice to Tribes in voluntary cases is contrary to the plain language of the statute, because the statute states the court or agency ''shall give weight'' to the parent's desire for anonymity and nothing in the statute requires notice to Tribes in voluntary proceedings. These commenters also stated that requiring verification and notice in voluntary proceedings even where the parent has expressed a desire for anonymity violates constitutional privacy rights and the non-discrimination provisions of the Multi-Ethnic Placement Act. A few commenters argued that it is good public policy to allow for anonymity without notice to the Tribe and others because removing the option for a ''quiet adoption'' will make other options, such as abortion or taking advantage of ''safe haven'' laws to anonymously abandon a child more desirable.

A few commenters supported this provision and requested adding that a request for anonymity does not relieve the obligation to comply with any other provision of ICWA as well. These commenters stated that Tribes can work within their Tribal systems to keep the information confidential and that these regulations are consistent with the approach taken in some States. One commenter stated that, without this provision, adoption attorneys and agencies that seek to place Indian children with non-Indian families need only tell the parents to request anonymity to enable placement without complying with ICWA. One commenter stated that the link between notice to the Tribe and harm to the parents is attenuated and that the alleged constitutional right to privacy would be an expansion of Supreme Court jurisprudence.

A few commenters specifically addressed PR § 23.107(d)'s requirement that the agency or court keep documents confidential and under seal. A State commenter requested explanation for how it could be possible to keep the documents confidential and under seal while still seeking verification and notice. A few other commenters requested a revision to state that the requirement to keep documents confidential and under seal may not allow the court to deny access to the documents by a Tribe or any party that needs them to fully present their position in the child-custody proceeding. One commenter noted that, just as no parent in a child-custody proceeding has an anonymity interest that supersedes a State's sovereign interest in protecting children, neither does a parent have an anonymity interest that supersedes a Tribe's sovereign interest in protecting children.

Response: As discussed above, the final rule requires notice to Tribes when necessary to determine a child's status as an ''Indian child.'' Tribes, like other governments, are equipped to keep such inquiries confidential, and the final rule requires this of Tribes. While this inquiry to the Tribe may require the State to share confidential information, this sharing is a government-to-government exchange of information necessary for the government agencies' performance of duties. Tribes are often treated like Federal agencies for the purposes of exchange of confidential information in performance of governmental duties. *See, e.g.,* Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. 3205; Family Rights and Education Protection Act, 20 U.S.C. 1232(g). The final rule balances the rights of the parents to confidentiality with the need to determine the Indian status of the child.

Comment: Several commenters noted that State ''safe haven'' laws, such as the law in Wisconsin and Minnesota, that allow parents to anonymously relinquish children, undermine ICWA and suggested addressing this issue in the regulations. Some commenters asserted that the Federal ICWA preempts State ''safe haven'' laws. Others suggested adding a requirement for representatives of safe haven facilities to ask the parents to provide information regarding Tribal affiliation and then inform any agency or court involved.

Response: The operation of State ''safe haven'' laws is beyond the scope of this rulemaking. Child-custody proceedings involving children relinquished under these laws must still comply with applicable requirements under ICWA and these regulations.

Comment: A few commenters requested clarification that Health Insurance Portability and Accountability Act of 1996 (HIPAA) only applies to medical information and does not apply to information on Tribal affiliation.

Response: These comments are beyond the scope of this rulemaking.

Comment: A few commenters stated that notice is necessary to address situations where the mother places a child voluntarily for adoption, but the proceeding is involuntary to the father.

Response: In situations where a mother voluntarily places an Indian child for adoption, but the proceeding is involuntary to the father, then the involuntary proceedings requirements under section 1912 of the Act apply (*e.g.,* notice, active efforts, evidence beyond a reasonable doubt including

the testimony of qualified expert witnesses).

Comment: A few commenters stated that the proposed language applying ICWA to voluntary placements may create barriers when parents agree to out-of-home placements to allow them to engage in informal supervision services that provide intensive support to families to prevent court intervention.

Response: If a parent agrees to out-of-home placement but may not regain custody of the child upon verbal request, the out-of-home placement is a child-custody proceeding, FR § 23.2, and ICWA requirements (for voluntary or involuntary proceedings, as the case may be) are applicable. ICWA establishes minimum Federal standards that require court involvement at certain points.

3. Applicability of Placement Preferences to Voluntary Proceedings

Comment: A few commenters stated their support of the proposed provision clarifying that placement preferences apply to voluntary proceedings. A commenter suggested revisions to clarify that the placement preferences apply to both involuntary and voluntary proceedings because otherwise, parents who proceed through attorneys rather than an ''agency'' may interpret the provision to apply only to involuntary proceedings.

Many commenters opposed this provision. Commenters in opposition to this provision state that the Tribe's rights should not ''trump'' the rights of the birth parents to choose what they believe to be the best adoptive placements for their children and what placement they as the parents believe is in the best interests of the child. Commenters stated that the proposed rule takes away parents' ability to make placement plans for their children. Several commenters asserted that birth parents may choose to perjure themselves to withhold information on Tribal membership, terminate a pregnancy, or may feel forced to parent the child themselves in an undesirable environment because they will not be able to choose the adoptive family, or may ultimately have the child taken away involuntarily. Some stated that this rule will prevent adoptive families from being open to adopting Indian children due to the fear that the Tribe could override the birth parents' choice and take the child away.

Response: The plain language of section 1915(a) of the Act requires that the placement preferences be applied ''in any adoptive placement,'' which includes both voluntary and involuntary adoptive placements, in the absence of good cause to the contrary. The regulation likewise requires that the preferences be applied in both voluntary and involuntary placements, but notes that a basis for good cause to deviate from the placement preferences may be the request of one or both of the parents, if they attest that they have reviewed the placement options that comply with the order of preference. The regulation therefore permits parents to choose a placement for their child that does not comply with the preferences. *See* FR § 23.132(c).

Comment: A few commenters stated that they intentionally chose to disassociate from the Tribe and therefore find it ''offensive'' that a Tribe could claim their child as a member. One commenter stated that Tribal members who choose not to live on a reservation should not be subject to their Tribal governments making choices for their children, such as where to place their infants for adoption.

Response: Parents who choose to dissociate from the Tribe by not enrolling or by disenrolling (and by not enrolling their child in the Tribe) are not subject to ICWA because the child will not qualify as an ''Indian child.'' If, however, the child is an ''Indian child,'' the Tribe has a legitimate and federally recognized interest in the welfare of that child and the maintenance of ties to the Tribe. The final rule balances this interest with the interests of parents in directing the care, custody, and control of their child.

Comment: A few commenters stated that looking at what is in the best interest of the child should come before everything else and nobody other than the parents should be able to determine what best interest means to them. These commenters stated that culture should be a consideration but the Tribe should not be able to interfere if the family chooses a non-preferred adoptive placement. Commenters also stated that birth mothers of Indian children should have the same rights as all other birth mothers under the Constitution to choose who will raise the child. A few commenters cited Supreme Court cases addressing constitutional rights with respect to family autonomy. *See, e.g., Troxel,* 530 U.S. at 66; *Santosky, supra.* A commenter cited to an Iowa Supreme Court decision stating that ICWA does not curtail a parent's right to choose the family she feels is best suited to raise her child. *In re the interest of N.N. E.,* 752 N.W.2d 1, 9 (Iowa 2008).

Response: While the placement preferences apply to voluntary placements, the final rule allows birth parents to choose families outside the preferences if they attest that they have reviewed the placement options that comply with the order of preference. *See* FR § 23.132(c)(1). This balances the interest of the parent with the other interests protected by ICWA.

Comment: One commenter raised that, in step-parent adoptions, an Indian family should not come before an Indian mother who wants her husband to adopt her Indian child.

Response: Adoptive placement with a step-parent would meet the placement preferences of the Act, because the first placement preference is a member of the child's extended family and step-parents are included in the definition of ''extended family member.'' *See* 25 U.S.C. 1903(2); 1915(a); FR §§ 23.2, 23.130(a)(1).

Comment: A few commenters opposed requiring a diligent search for placements in a voluntary adoption context because it conflicts with the parent's freedom to choose who will raise their children. One commenter stated that, by the time a parent goes to an adoption agency, the parent has already explored potentially placing within the family or community and has ruled it out.

Response: The final rule does not include the provision that the commenters identified.

Comment: One commenter stated that applying the placement preferences to voluntary adoptions will result in Indian children having a more difficult time being adopted if there are no available families within the placement preferences.

Response: The placement preferences for adoptions cover a wide range of individuals, including extended family, other citizens of the Indian child's Tribe, and other Tribal citizen families. Nevertheless, good cause may be found to deviate from the placement preferences based on the parent's request for placement with another family or lack of available placements that meet the preferences, among other reasons. *See* FR § 23.131.

4. Applicability of Other ICWA Provisions to Voluntary Proceedings

Comment: Several commenters stated there is no Tribal right to intervene in voluntary proceedings because section 1911(c) provides the right only in State court proceeding for the foster-care placement of, or termination of parental rights to, Indian child. Other commenters stated that there is a compelling governmental interest of Tribes that supports intervention of right, to protect its sovereign interest in Tribal children, and the welfare of Indian children is the same whether the proceeding is voluntary or involuntary.

Response: The commenters are correct that section 1911(c) refers to ''termination of parental rights'' but not ''adoptive placement''; however, nothing in the Act restricts the phrase ''termination of parental rights'' to involuntary proceedings. By its plain language, the statute permits Tribal intervention in a voluntary termination-of-parental-rights proceeding.

Comment: One commenter stated that active efforts are required in voluntary proceedings, and another stated they are not.

Response: The statutory provision requiring active efforts appears in the section of the Act that primarily addresses involuntary proceedings. *See* 25 U.S.C. 1912(d). The regulation therefore does not require a showing of active efforts to prevent the breakup of the Indian family in voluntary proceedings.

Comment: One commenter requested clarification as to whether the rule is saying the right in section 1912(b) to appointment of counsel in involuntary proceedings is also available in voluntary proceedings (because PR § 23.111(c)(4)(iv) and (v) and PR § 23.111(f) require the notice to include statements regarding the right to counsel).

Response: The statutory provision requiring the right to court-appointed counsel appears in the section of the Act that primarily addresses involuntary proceedings. *See* 25 U.S.C. 1912(b).

5. Applicability to Placements Where Return is ''Upon Demand''

A few commenters requested deletion or clarification of PR § 23.103(f) because of the risk that it will improperly exclude certain adoptive placements from ICWA. One commenter suggested as an alternative ''voluntary placements made without involvement of an agency or State court where the parent can regain custody of the child upon demand are not covered by ICWA.'' One commenter stated that if the State is involved, there is always the threat of involuntary removal if the parent does not ''agree'' to the placement, and that these placements should be subject to ICWA. This commenter suggested adding that every placement in which the State has a say should be treated as an ICWA placement.

Response: As mentioned above, the final rule defines ''upon demand'' to mean verbal demand without any required formalities or contingencies and adds to the definition of ''voluntary placement'' that the placement be without a threat of removal by a State agency. *See* FR § 23.2.

6. Consent in Voluntary Proceedings

Comment: A commenter suggested beginning PR § 23.124(a) with ''any voluntary consent to'' rather than ''a voluntary termination.''

Response: The final rule makes this editorial change for consistency. *See* FR § 23.125(a).

Comment: A commenter noted that PR § 23.124 is important because agencies and attorneys have used voluntary consent to essentially ''trick'' parents and extended family into permanently surrendering their custodial rights. The commenter notes that safeguards, including that the consent be recorded before a judge, are essential to protecting rights and eliminating the possibility of dispute over intent, preventing litigation, and avoiding emotional trauma. Another commenter stated that the rule should instead allow for consent to be entered before a notary public to save time and money.

Response: The regulation's requirement that consent be recorded before a judge repeats the statutory requirement. *See* 25 U.S.C. 1913(a), FR § 23.125.

Comment: One commenter suggested clarifying that the court of competent jurisdiction may not be the same court where the child-custody proceeding takes place.

Response: Neither the statute nor the regulations limit the location of the court of competent jurisdiction.

Comment: A commenter suggested the ''timing limitations'' and ''point at which such consent is irrevocable'' include cross-references to distinguish consent to foster-care placements (to which no time limitations apply) in PR § 23.126 and adoptions (to which there are time limitations—may be withdrawn at any time prior to the entry of the final decree of termination or adoption) in PR § 23.127.

Response: The final rule clarifies the applicable timeframes in FR §§ 23.127, 23.128.

Comment: A few commenters suggested adding a requirement that the court explain on the record the consequences of consent, right to withdraw consent, and procedure for withdrawing consent, and at what point the right to withdraw ends.

Response: FR § 23.125(b) & (c) requires this explanation on the record.

Comment: A commenter requested clarification that the right to withdraw consent cannot be waived.

Response: The right to withdraw consent is a statutory right. Congress did not include a procedure for waiving the right.

Comment: Several commenters stated it would be unclear what consent procedures to follow in a voluntary proceeding if a child is treated as an Indian child, and then the Tribe later determines the child is not eligible for membership. Under those circumstances, the court would have told the parent they have the right to withdraw consent at any time prior to termination of parental rights; whereas, the right to revoke consent under State law may be more limited.

Response: In the situation described by the commenter, if the State court determines that the child is not an Indian child, the State court would need to determine whether to allow the withdrawal under State law.

Comment: A commenter suggested adding that the written consent must be by both the mother and father. Another commenter suggested adding that a known biological parent must have the opportunity to consent or object where the other parent has voluntarily consented.

Response: An individual parent's consent is valid only as to himself or herself.

Comment: A commenter recommended revising ''need not be made in open court'' to clarify that the consent still must be recorded before a judge, but need not be recorded in a session open to the public.

Response: FR § 23.125(d) clarifies that the consent must be recorded before a judge, though it need not be recorded in a session open to the public.

Comment: A commenter stated that the provision that ''a consent given prior to or within 10 days after the birth is not valid'' infringes on a parent's right to arrange for adoption.

Response: The final rule retains this provision because it is statutory. *See* 25 U.S.C. 1913(a).

Comment: A commenter suggested allowing incarcerated parents that cannot leave prison to attend court for this purpose to consent without attending court to avoid undue delays in permanency for children.

Response: The final rule encourages the use of alternative methods of participation such as participation by telephone, videoconferencing or other methods. *See* FR § 23.133.

7. Consent Document Contents

Comment: Commenters suggested requiring additional information in the consent document (PR § 23.125), such as the name and address of the non-custodial parent, parents' Tribal enrollment numbers, the name and address of prospective adoptive or preadoptive parents, and details

regarding the right and timeframes for withdrawing consent.

Other commenters stated that the extent of information proposed is inappropriate, and suggested deleting:

- The address of the consenting parent because the information would already be in other files and could cause confidentiality concerns; and
- Identification and addresses of foster parents because of confidentiality.

Response: The final rule establishes that the written consent must include the name and birthdate of the Indian child, the name of the Indian child's Tribe, identifying Tribal enrollment number, if known, and the name of the consenting parent. It must also clearly set out any conditions to the consent. *See* FR § 23.126. A State may choose to include additional information.

Comment: A few commenters suggested adding a provision stating that any consent not executed as described is not binding.

Response: The final rule requires that any conditions be set out in the written consent, because section 1913(a) requires the consent to be in writing in order to be valid. *See* FR § 23.126(a).

8. Withdrawal of Consent

Comment: A few commenters suggested adding when consent to a termination of parental rights or adoption or consent to a foster-care placement may be withdrawn.

Response: The final rule addresses the deadline for withdrawing consent to the termination of parental rights and adoption, and adds that consent to a foster-care placement may be withdrawn ''at any time.'' *See* FR § 23.127, § 23.128.

Comment: A commenter requested clarification that the parent withdrawing the consent does not need to be the person who files the withdrawal in court because many parents may not have legal representation and may lack the sophistication to file papers with the court and the parent may not be informed as to which court the consent was filed in. This commenter stated that the parent should be allowed to file the withdrawal with current custodians, their attorney, or the agency that took the consent, or as a last resort with BIA.

Response: The final rule sets as a default standard that the parent or Indian custodian must file a written withdrawal of consent with the court, or testify before the court, but that State law may provide additional methods for withdrawing consent. *See* FR § 23.127, § 23.128. This is not intended to be an overly formalistic requirement. Parents involved in pending foster-care placement or termination-of-parental-rights proceedings can be reasonably expected to know that there are court proceedings concerning their child, and the final rule balances the need for a clear indication that the parent wants to withdraw consent with the parent's interest in easily withdrawing consent.

Comment: A few commenters opposed the requirements for withdrawal of consent to be filed. A commenter stated that ICWA's intent was to make it as easy as possible to withdraw consent in furtherance of having Indian children raised by their families, so they should be able to do so in any way where the intent to withdraw is clear. Another commenter stated that State law may permit revocation without filing an instrument in court, and that the requirement for filing may delay return of the child.

Response: The final rule continues to require a filing of the withdrawal with the court, but adds testimony before the court as an option to fulfill this requirement, because the formality roughly equal to that required for the original consent is appropriate and it is important that the court and other parties know when the parent seeks to withdraw consent. The final rule sets this standard as a default, but States may have additional methods for withdrawing consent that are more protective of a parent's rights that would then apply.

Comment: One commenter stated that the return of the child in PR § 23.126(b) should not be immediate but should be ''as soon as practicable'' as stated in PR § 23.127(b), because there are circumstances where immediate return is not practical. Another commenter noted that section 1913 of the Act does not specify when the child must be returned.

Response: The final rule accepts the suggested edit for return of a child ''as soon as practicable'' if a parent withdraws consent to foster-care placement, but the Department notes that in most cases the return should be nearly immediate because foster-care placement is necessarily intended to be temporary. The final rule retains the requirement for return of the child ''as soon as practicable'' when the parent withdraws consent to a termination or adoption. *See* FR §§ 23.127, 23.128.

Comment: A few commenters opposed the provision stating that consent to termination of parental rights or adoption may be withdrawn any time prior to the entry of the final decree of termination or final decree of adoption, ''whichever is later;'' rather than the statutory language, ''as the case may be.'' These commenters state that courts have uniformly interpreted section 1913(c) to cut off the right to withdraw consent upon entry of the final order terminating parental rights, even if an adoption decree has not been entered.

Other commenters supported the language ''whichever is later.'' One noted that a child has no legal parents after termination but before the final decree of adoption, so if the purpose of adoption is to provide the child with parents, then the biological parents or Indian custodian should be allowed to resume parental responsibilities up to the point of a finalized adoption. Another stated that this phrase addresses confusion caused by the statutory phrase ''as the case may be'' to construe the original intent of the provision that would establish a nationwide standard that does not limit a parent's right to end a possible adoption and secure return of the child.

Response: As a commenter noted, the statute uses the phrase ''as the case may be'' rather than specifying whichever is later. *See* 25 U.S.C. 1913(c). To better address the meaning of ''as the case may be,'' the final rule treats each proceeding separately, so that a parent may withdraw consent to a termination of parental rights any time before the final decree for that termination of parental rights is entered, and a parent may withdraw consent to an adoption any time before the final decree of adoption is entered.

Comment: A commenter stated that PR § 23.127(b) places the burden on the court to notify the placement of the withdrawal of consent, but in some cases the court may not know the contact information for the placement (*e.g.,* where consent was filed in a different court than the one with current jurisdiction and placement was arranged by private parties).

Response: The final rule (like the proposed rule) requires the court to contact the party by or through whom any preadoptive or adoptive placement has been arranged. In most cases this will be the agency, whether public or private. The agency is expected to have the contact information for the placement.

Comment: A commenter suggested using the word ''court'' instead of ''clerk of the court'' which may be too specific.

Response: The final rule uses ''court'' instead of ''clerk of the court.'' *See* FR § 23.128(d).

Comment: A commenter suggested adding a requirement that the court notify the consenting parent or Indian custodian of the entry of a final decree of adoption within 15 days so that they know there is no longer a right to withdraw the consent. This commenter

also suggested requiring the court to notify the consenting parent every 120 days following the consent, to keep them informed as to the progress of adoptive placement in case an adoption never occurs.

Response: The final rule does not incorporate these requirements, as the statute does not require such notice.

9. Confidentiality and Anonymity in Voluntary Proceedings

Comment: Many commenters opposed the proposed rule on the basis that it would violate the parents' right to privacy, confidentiality, and anonymity in choosing a placement. Among the problematic provisions these commenters pointed to were:

- PR § 23.123(a) requiring an inquiry be made into whether the child is an Indian child in voluntary proceedings, because this will result in the parents losing their privacy and confidentiality, particularly in small Tribal communities; and
- The requirement to inform members of the Indian child's extended family, in order to identify a placement.

These commenters noted that the 1979 guidelines stated that the Act gives confidentiality a ''much higher priority'' in voluntary proceedings, and that the Act directs State courts to respect parental requests for confidentiality in voluntary proceedings.

Response: The final rule requires, for the reasons already stated, that the State court determine whether the child is an ''Indian child'' which may, in some instances, require contacting the Tribe. The final rule does not mandate contacting extended family members to identify potential placements. The final rule also includes several protections to ensure confidentiality. Among these are the following:

- With regard to inquiry and verification, the final rule provides that, where a consenting parent requests anonymity, both the State court and Tribe must keep relevant documents and information confidential. *See* FR § 23.107(d).
- With regard to a parent or Indian custodian's consent to a placement or termination of parental rights, the final rule provides that, where confidentiality is requested or indicated, the parent or Indian custodian does not need to execute the consent in a session of court open to the public, as long as he or she executes the consent before a judge. *See* FR § 23.125(d).

M. Dispositions

In ICWA, Congress expressed a strong Federal policy in favor of keeping Indian children with their families and Tribes whenever possible. Section 1915, which lays out the placement preferences, constitutes the ''most important substantive requirement [that ICWA] imposed on state courts.'' *Holyfield,* 490 U.S. at 36. It establishes a series of preferred placements for foster care, preadoptive, and adoptive placements. It also allows the Indian child's Tribe to establish a different order of preference. The party urging that the ICWA preferences not be followed bears the burden of proving by clear and convincing evidence the existence of ''good cause'' to deviate from such a placement. 25 U.S.C. 1915(a), (b); FR § 23.132(b).

Congress established preferred placements in ICWA that it believed would help protect the needs and long-term welfare of Indian children and families, while providing the flexibility to ensure that the particular circumstances faced by individual Indian children can be addressed by courts. In §§ 23.129–23.132, the final rules provide guidance to States to ensure nationwide uniformity of the application of these placement preferences as well as the standards for finding good cause to deviate from them.

The preferences in ICWA and the final rule codify the best practice in child welfare of favoring extended family placements, including placement within a child's broader kinship community. If a child is removed from her parents, the first choice in child-welfare practice for an alternative placement—for all children, not just Indian children—is the child's extended family. *See* National Council of Juvenile and Family Court Judges, Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases 10–11 (2000) (''An appropriate relative who is willing to provide care is almost always a preferable caretaker to a non-relative.''); Child Welfare League of America, Standard of Excellence for Adoption Services 1.10 (2000) (2000) (''Adoption Standards'') (''The first option considered for children whose parents cannot care for them should be placement with extended family members . . .''); Child Welfare League of America, Standard of Excellence for Kinship Care Services 1.4 (2000) (''Kinship Care Standards'') (''Kinship care . . . should be the first option considered . . .''); Elaine Farmer & Sue Moyers, Kinship Care: Fostering Effective Family and Friends Placements (2008).

Placing children with their extended family benefits children. *See* Adoption Standards 8.24, 4.23 (kinship care ''maximizes a child's connection to his or her family''); Tiffany Conway & Rutledge Hutson, *Is Kinship Care Good for Kids?,* Center for Law and Social Policy 2 (Mar. 3, 2007) (''[T]he research tells us that many children who cannot live with their parents benefit from living with grandparents and other family members.'') (emphasis omitted). This is true for children who are placed in foster care as well as those who are adopted. *See* Kinship Care Standards, at 5 (noting beneficial outcomes of kinship care for foster care including children being less likely to experience multiple placements and more likely to be successfully reunified with their parents); Adoption Standards § 4.23; Marc A. Winokur, et al., *Matched Comparison of Children in Kinship Care and Foster Care on Child Welfare Outcomes,* 89 Families in Soc'y: J. Contemp. Soc. Sciences 338, 344–45 (2008) (reporting better outcomes for children in kinship care on several metrics). Congress recognized that this general child-welfare preference for placement with family is even more important for Indian families, as one of the driving concerns leading to the passage of ICWA ''was the failure of non-Indian child welfare workers to understand the role of the extended family in Indian society.'' *Holyfield,* 490 U.S. at 35 n.4.

Even if biological relatives are not available for placements, there are benefits to children from placements within their community, which Congress recognized by establishing placement preferences for Tribal members. 25 U.S.C. 1915(a), (b). Again, this is not just a principle of child-welfare practice for Indian children, but for all children. *See* Kinship Care Standards §§ 1.1, 2.8. But it has special force and effect for Indian children, since, as Congress recognized, there are harms to individual children and parents caused by disconnection with their Tribal communities and culture, and also harms to Tribes caused by the loss of their children.

Recognizing the benefits of placements with family and within communities, Congress has repeated its emphasis on such placements in subsequent statutes in the years since it passed ICWA. For example, in order to obtain Federal matching funds, a State must consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards, and must exercise ''due diligence'' to identify, locate, and notify relatives when children enter the foster care

system. 42 U.S.C. 671(a)(19), (29); see also *Miller* v. *Youakim,* 440 U.S. 125, 142 n.21 (1979) (noting ''Congress' determination that homes of parents and relatives provide the most suitable environment for children''). Congress has also required states receiving Federal funds to prioritize placement in close proximity to the parents' home, recognizing the importance of placement within the community. 42 U.S.C. 675(5)(A).

Congress, through ICWA's placement preferences, and the Department, through this regulation, continue to treat the physical, mental, and emotional needs of the Indian child as paramount. *See, e.g.,* FR § 23.132(c), (d). These physical, mental, and emotional needs include retaining contact, where possible, with the Indian child's extended family, community, and Tribe. If there are circumstances in which an individual child's extraordinary physical, mental, and emotional needs could not be met through a preferred placement, then good cause may exist to deviate from those preferences. *See* FR § 23.132(c)(4).

The Department received many comments regarding what may constitute ''good cause'' to deviate from the placement preferences and whether the final rule should set out such factors. By providing clear guidance on what constitutes ''good cause'' to deviate from the placement preferences, the final rule gives effect to the fact that Congress intended good cause to be a limited exception, rather than a broad category that could swallow the rule. The Department also recognizes that the question of what constitutes good cause is a frequently litigated area of ICWA, and this litigation can result in harmful delays in achieving permanency for children. For these reasons, the Department has determined that it is important to provide some parameters on what may be considered ''good cause'' in order to give effect to ICWA's placement preferences.

The final rule, therefore, lays out five factors upon which courts may base a determination of good cause to deviate from the placement preferences. These factors are discussed in more detail below in the response to comments, but include the request of the parents, the request of the child, sibling attachment, the extraordinary physical, mental, or emotional needs of the child, and the unavailability of a suitable preferred placement. FR § 23.132(c). It also makes clear that a court may not depart from the preferences based on the socioeconomic status of any placement relative to another placement or based on the ordinary bonding or attachment that results from time spent in a non-preferred placement that was made in violation of ICWA. FR § 23.132(d), (e).

The final rule also recognizes that there may be extraordinary circumstances where there is good cause to deviate from the placement preferences based on some reason outside of the five specifically-listed factors. Thus, the final rule says that good cause ''should'' be based on one of the five factors, but leaves open the possibility that a court may determine, given the particular facts of an individual case, that there is good cause to deviate from the placement preferences because of some other reason. While the rule provides this flexibility, courts should only avail themselves of it in extraordinary circumstances, as Congress intended the good cause exception to be narrow and limited in scope.

As requested by commenters, the rules governing placement preferences recognize the importance of maintaining biological sibling connections. The placement preferences allow biological siblings to remain together, even if only one is an ''Indian child'' under the Act, because FR § 23.131(a) provides that the child must be placed in the least restrictive setting that most approximates a family, allows his or her special needs to be met, and is in reasonable proximity to his or her home, extended family, and/or siblings. The sibling placement preference does not mean ICWA applies to a sibling who is not an ''Indian child'' but rather makes clear that good cause can appropriately be found to depart from ICWA's placement preferences where doing so allows the ''Indian child'' to remain with his or her sibling. Because keeping biological siblings together contributes toward a setting that approximates a family, the final rule explicitly adds ''sibling attachment'' as a consideration in choosing a setting that most approximates a family. *See* FR § 23.131(a)(1). If for some reason it is not possible to place the siblings together, then FR § 23.131(a)(3) mandates that the Indian child should be placed, if possible, in a setting that is within a reasonable proximity to the sibling. In addition, if the sibling is age 18 or older, that sibling would qualify as a preferred placement, as extended family.

A number of commenters praised or questioned the provisions at PR § 23.128(b) requiring, in certain circumstances, a search to identify placement options that would satisfy the placement preferences. The final rule has been modified to include a requirement that, in order to determine that there is good cause to deviate from the placement preferences based on unavailability of a suitable placement, the court must determine that a diligent search was conducted to find placements meeting the preference criteria. *See* FR § 23.132(c)(5). This provision is required because the Department understands ICWA to require proactive efforts to comply with the placement preferences and requires more than a simple back-end ranking of potential placements. It is also consistent with the Federal policy for all children—not just Indian children—that States are to exercise ''due diligence'' to identify, locate, and notify relatives when children enter the foster care system. 42 U.S.C. 671(a)(19), (29).

ICWA requires that there be efforts to identify and assist preferred placements. Section 1915(a) directs that, in any adoptive placement of an Indian child under State law, a preference ''shall'' be given to the Indian child's family and Tribe. 25 U.S.C. 1915(a) (1)–(2). This language creates an obligation on State agencies and courts to implement the policy outlined in the statute. ''Giv[ing]'' a ''preference'' means more than mere prioritization—it connotes the active bestowal of advantages on some over others. *See* Black's Law Dictionary 1369 (10th ed. 2014) (defining ''preference'' as the ''quality, state, or condition of treating some persons or things more advantageously than others'' and the ''favoring of one person or thing over another''). Thus, section 1915(a) requires affirmative steps to give preferred placements certain advantages and a full opportunity to participate in the child-custody determination.

This conclusion is supported by other provisions of section 1915, which work in concert with section 1915(a) to require that State agencies and courts make efforts to identify and assist extended family and Tribal members with preferred placements. Section 1915(e) requires that, for each placement, the State must maintain records evidencing the *efforts to comply* with the order of preference specified in section 1915. 25 U.S.C. 1915(e). To allow oversight of such efforts, Congress further required that those records be made available at any time upon the request of the Secretary or the Indian child's tribe. *Id.* Thus, reading Sections 1915(a) and 1915(e) together, it is clear that Congress demanded documentable ''efforts to comply'' with the ICWA placement preferences.

Courts have recognized that State efforts to identify and assist preferred placements are critical to the success of the statutory placement preferences. *See Native Village of Tununak* v. *State,*

Dep't of Health and Soc. Servs. (Tununak II), 334 P.3d 165, 177–78 (Alaska 2014) (noting that before a court in which an adoption proceeding is pending can even ''entertain[] argument that there is good cause to deviate from section 1915(a)'s preferred placements, it must searchingly inquire about the existence of, and [the State's] efforts to comply with achieving, suitable section 1915(a) preferred placements''); *In re T.S.W.,* 276 P.3d 133, 142–44 (Kan. 2012) (rejecting a lower court's determination that there was good cause to deviate from the placement preferences based, in part, on the adoption agency's failure to make adequate efforts to identify potential preferred placements); *In re D.W.,* 795 N.W.2d 39, 44–45 (S.D. 2011) (carefully examining the sufficiency of the steps that the State took to find a suitable preferred placement); *In re Jullian B.,* 82 Cal. App. 4th 1337, 1347 (Cal. Ct. App. 2000) (emphasizing that ICWA requires the State to ''search diligently for a placement which falls within the preferences of the act''); *Pit River Tribe* v. *Superior Court,* No. C067900, 2011 WL 4062512, at *10, *12 (Cal. Ct. App. Sept. 14, 2011).

Finally, the final rule provides that a court may not consider, as the sole basis for departing from the preferences, ordinary bonding or attachment that flows from time spent in a non-preferred placement that was made in violation of ICWA. In response to commenters' concerns, the final rule adjusts the proposed provision stating that ''ordinary bonding'' is not within the scope of extraordinary physical, mental, or emotional needs. PR § 23.131(c)(3). The proposed provision may have inappropriately limited court discretion in certain limited circumstances.

1. When Placement Preferences Apply

Comment: Several commenters supported proposed PR § 23.128, emphasizing the need to follow the Act's placement preferences, and noted that it addresses one of the biggest problems in the Act's implementation—the failure to place Indian children in the homes of extended family and Tribal members. One commenter pointed to the repeated failure in one State to investigate preferred placements and the practice of relying on bonding with non-preferred placements as good cause to depart from the placement preferences. Another commenter asserted that States are not pursuing placement preferences even when the Tribe identifies a family that meets the requirements. Several commenters provided reasons for why the placement preferences are so important, including to minimize trauma by placing the child somewhere within their realm of comfort and to promote the best interests of the child by keeping the child with her family or within her Tribal community and culture.

Several opposed PR § 23.128, saying it gives higher priority to the Tribe than to the family, and prevents the court from weighing relative interests. These commenters stated that placement preferences should be secondary to the individual child's needs and welfare.

Response: The Act requires that States apply a preference for the listed placement categories. 25 U.S.C. 1915. As discussed above, Congress established preferred placements in ICWA that it believed would help protect Indian children's needs and welfare, while providing the flexibility to ensure that particular circumstances faced by individual Indian children can be addressed by courts. In enacting ICWA, Congress also recognized that State and private agencies and State courts sometimes apply their own biases in assessing what placement best meets the individual Indian child's needs and long-term welfare. The final rule reflects the statutory mandate.

Comment: A few Tribal commenters suggested the rule allow for such different orders as established by Tribal law or Tribal-State agreements.

Response: FR § 23.129(a), FR § 23.130(b), and FR § 23.131(c) reflect the statutory requirement that a Tribe may establish a different order of preference by resolution. *See* 25 U.S.C. 1915(c). The Department recognizes that an order of preference established as part of a Tribal-State agreement would constitute an order of preference established by ''resolution,'' 25 U.S.C. 1915(c), particularly as the statute specifically authorizes Tribal-State agreements respecting care and custody of Indian children. 25 U.S.C. 1919.

Comment: A commenter stated that PR § 23.128(a) omits language from section 1915(c) of the Act that the Tribe's order of preference should be followed only ''so long as the placement is the least restrictive setting appropriate to the particular needs of the child.'' According to this commenter, that omitted language is what makes clear that the best interest of the child must be considered and provides a basis for not following the placement preference order.

Response: FR § 23.131 adds the statutory language providing that the placement must be the least restrictive setting that most approximates a family, taking into consideration sibling attachment, allows the Indian child's special needs, if any, to be met, and is in reasonable proximity to his or her home, extended family, and/or siblings. The Department disagrees, however, that this language provides a basis for not following the preference order in the ordinary case.

Comment: A commenter opposed the language in PR § 23.128(a) stating that the placement preferences always apply without a cross-reference to the good cause provision. Likewise, a few commenters stated that PR § 23.129 and § 23.130 should both use the phrase ''in the absence of good cause to the contrary'' as qualifying language because Congress intended State courts to consider the unique circumstances affecting individual children and the statute includes the language ''in the absence of good cause to the contrary'' in each paragraph (section 1915(a) and (b)).

Response: The provision establishing that good cause must exist to depart from the placement preferences is located at FR § 23.129(c). Specific provisions regarding good cause are set out in FR § 23.132; it is not necessary to repeat ''in the absence of good cause to the contrary'' in FR §§ 23.130 or 23.131.

Comment: Several commenters supported requiring a diligent search for placements within ICWA's placement preferences (extended family, Tribal families, and other Indian families) and noted this is a best practice that is in the child's best interest. A commenter stated that the requirement for a diligent search is critically important because ICWA's requirements have been ignored and almost half the children continue to be placed in non-preferred placements. A few commenters suggested further emphasizing the need for States to identify preferred placements by working with Tribes to proactively recruit preferred placement homes.

A few commenters opposed requiring a diligent search, saying it is not required by ICWA and that Congress intended to rely on State family law to establish requirements for placement option searches.

Response: As discussed above, a diligent search is necessarily implied by the Act to comply with the placement preferences. The regulations make this requirement explicit in situations where a party seeks good cause to deviate from the placement preferences based on unavailability. *See* FR § 23.132(c)(5). Furthermore, State agencies generally search for a child's extended family as a matter of practice.

Comment: A commenter stated that the diligent search for foster placements including homes licensed, approved, or specified by the child's Tribe conflicts with the Act's requirement that the

child be placed within a reasonable proximity to his or her home (as well as other requirements associated with Federal funding).

Response: While the specific portion of PR § 23.128(b) that the commenter is addressing is not included in the final rule, FR § 23.131(a) reflects the Act's requirements for the child to be placed in the least restrictive setting that most approximates a family and in which the child's special needs, if any, may be met, and within reasonable proximity to the child's home. *See* 25 U.S.C. 1915(b), (c).

Comment: A commenter asked whether the showing as to the diligent search for placements has to be made at every hearing, or whether the rule is creating a requirement that a specific placement proceeding happen in each ICWA case that does not comply with the first placement preference. This State commenter also expressed concern regarding State resources this would require.

Response: The rule does not require a showing at every hearing that a diligent search for placements has been made or that a specific hearing be held to show why the first placement preference was not attainable. The rule requires that, if the agency relies on unavailability of placement preferences as good cause for deviating from the placement preferences, it must be able to demonstrate to the court on the record that it conducted a diligent search. *See* FR § 23.132(c)(5). This showing would occur at the hearing in which the court determines whether a placement or change in placement is appropriate.

Comment: Several commenters requested that the rule address the Alaska Supreme Court's limitation in *Native Village of Tununak* v. *Alaska* to define what a preferred placement family needs to do to demonstrate a willingness to adopt a particular child (*e.g.,* the individual, agency, or Tribe informs the court orally during a proceeding or in writing of willingness to adopt). Several other commenters stated that the rule ignores the Supreme Court's ruling that the preferences are inapplicable where no eligible placement has formally sought to adopt the child.

Response: As discussed above, ICWA requires that there be efforts to identify and assist preferred placements. As a recommended practice, the State agency should provide the preferred placements with at least enough information about the proceeding so they can avail themselves of the preference. Alaska itself has taken corrective action to address the ruling in *Tununak* by modifying its standards to facilitate more means by which to demonstrate willingness to adopt a particular child. We encourage other States to follow Alaska's lead in this regard.

Comment: A few commenters stated that it is impractical to notify each of the homes listed in PR § 23.128(b)(4) (institutions for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs). A commenter also pointed out that, practically, there are no accessible lists of every Indian foster home in the State or whether they would want such notification which could amount to hundreds of letters each year.

Response: The specific portion of the provision of proposed rule § 23.128(b) that commenters are addressing is not included in the final rule. As discussed above, however, the rule does include a requirement that, in order to determine that there is good cause to deviate from the placement preferences based on unavailability of a suitable placement, the court must determine on the record that a diligent search was conducted to find suitable placements meeting the preference criteria. *See* FR § 23.132(c)(5). A diligent search will almost always require some contact with those preferred placements that also meet the requirements for a least restrictive setting within a reasonable proximity, taking into account the child's special needs. It may also involve contacting particular institutions for children approved or operated by Indian Tribes if other preferred placements are not available.

Comment: A few commenters had suggested edits to PR § 23.128(b). For example, a State commenter requested clarifications in PR § 23.128(b) as to ''placement proceeding'' and ''explanation of the actions that must be taken to propose an alternative placement and to whom those are provided in the proceedings.''

Response: The final rule deletes this provision.

Comment: A commenter suggested changing the last preference to include Indian foster homes ''authorized'' by the Tribe rather than ''licensed'' by the Tribe.

Response: The rule includes ''licensed'' because that is the term the Act uses. *See* 25 U.S.C. 1915(b).

Comment: A commenter requested clarification of whether the agency must show why the higher preferences cannot be complied with instead of a lower preference.

Response: The final rule clarifies what the court will examine in determining whether the placement preferences were met or good cause exists to deviate from the placement preferences. *See* FR § 23.132. The agency must document its search for placement preferences and an explanation as to why each higher priority placement preference could not be met. *See* section 1915(e) (requiring that the State maintain documentation ''evidencing the efforts to comply with the order of preference specified in this section''); FR § 23.141.

Comment: One commenter stated that the mandate that placement must always follow the placement preferences is not practical because there are 17 States with no federally recognized Tribes, meaning the child would face a move to a location that would make reunification more difficult.

Response: The fact that a no federally recognized Tribe is located within a State does not mean that there are no family members or members of Tribes residing or domiciled in that State.

Comment: Some commenters requested that the placement preferences allow siblings to remain together even if only one child is an ''Indian child'' as defined by ICWA. One commenter noted that one State regularly finds that a placement with a minor sibling qualifies as a placement with extended family for purposes of the placement preferences.

Response: As discussed above, the rules governing placement preferences recognize and address the importance of maintaining biological sibling connections.

Comment: One commenter stated that the provision at PR § 23.128(c) stating that the request for anonymity does not relieve the obligation to comply with placement preferences is extremely important because many attorneys in voluntary proceedings advise their clients to request anonymity to avoid the placement preferences.

Response: The final rule includes a provision, discussed above, requiring the court to give weight to the request for anonymity in applying the preferences. *See* FR § 23.129(b).

Comment: A few commenters suggested the rule clarify the ability of State-court judges to issue placement orders under ICWA. These commenters stated that such a provision is necessary because some State codes prohibit a State judge from ordering placement, instead leaving the responsibility to the State social workers.

Response: While it may be the practice in some jurisdictions for judges to defer to State agencies, the statute contemplates court review of placements of Indian children. It requires, for example, court review of

whether active efforts were made (section 1912(d)) and an ''order'' for foster-care placement (section 1912(e)) and termination of parental rights (section 1912(f)). Further, the statute establishes a standard of evidence for foster-care-placement orders and termination-of-parental-rights orders (section 1912(e)-(f)), necessarily requiring court involvement.

Comment: A few commenters suggested adding a cross-reference in PR § 23.128(d) to the section delineating the good-cause criteria.

Response: The final rule adds the requested clarification. *See* FR § 23.129(c).

Comment: One commenter requested additional clarification on the requirements in PR § 23.128(e) for maintenance of records.

Response: The final rule moves the requirement regarding maintenance of records from PR § 23.128(e) to FR § 23.141. *See* comments on PR § 23.137, below.

2. What Placement Preferences Apply, Generally

Comment: Several commenters expressed their strong support of the placement preferences as assuring that the child's best interests are met by giving the child the opportunity to be placed with relatives. One commenter noted that traditional Indian spirituality, culture, and history cannot be fully taught by a non-Indian family. Commenters stated that studies reflect that placement of children within the ICWA preferences are more stable by half than placements that do not fall within ICWA's preferences.

A few commenters opposed the placement preferences. One stated that Federal law already seeks to place children within the same family and community. Another stated that the preferences are not a mandate, and that there are not enough Indian foster homes so in some cases children have to be placed in non-Indian homes.

One commenter stated that the rule should make the placement preferences discretionary because it may not always be possible to adhere to the placement preferences, and the rule must allow for flexibility to place a child where his or her physical and emotional needs are best met.

Response: As discussed above, Congress established preferred placements in ICWA that it believed would help protect Indian children's needs and welfare. The statute provides the flexibility to ensure that special circumstances faced by individual Indian children can be addressed by courts. The final rule reflects the child's best interests and the order of the preferred placements. The criteria applicable to foster-care placements allow for placements in which the child's special needs, if any, may be met.

Comment: A few commenters stated that the guidelines contradict the Multiethnic Placement Act (MEPA) to prevent discrimination based on race, color and/or national origin when making placements, and that some Indian children do not have an apparent existing connection to their traditional culture and are thus ''mainstream.''

Response: These comments are based on the misunderstanding that ICWA is a race-based statute. Congress established certain placement preferences based on, and in furtherance of, the political affiliation of Indian children and their parents with Tribes, and the government-to-government relationship between the United States and Tribes. Recognizing that the applicability of ICWA is based on political affiliation rather than race, Congress made clear that MEPA should not be construed to impact the application of ICWA. 42 U.S.C. 674(d)(4), 1996b(3) (each stating this subsection shall not be construed to affect the application of the Indian Child Welfare Act of 1978).

Comment: One commenter suggested adding language to clarify that the preferences are in descending order of preference. A commenter stated that States should not be allowed to skip steps in the preferences.

Response: FR §§ 23.130(a) and 23.131(b) state that the preferences are in descending order, reflecting that each placement should be considered (without being skipped) in that order; the preferences are in the order of most preferred to least preferred.

Comment: Several commenters suggested adding a provision to allow the court to consider the Tribe's recommended placement for an Indian child, to take into consideration Tribal custom, law, and practice when determining the welfare of Indian children, as authorized by section 1915(c), which states that the Tribe may establish a different order of preference.

Response: Congress established a method for the Tribe to express its preferences in section 1915(c). FR §§ 23.129(a), 23.130(b), and 23.131(c) are included in the final rule in recognition of that statutory requirement. State courts may also wish to consider a Tribe's recommended placement for a particular child.

Comment: A few commenters stated that the placement preferences should better protect the rights of biological fathers. One suggested including biological fathers in the list of placement preferences.

Response: The final rule's placement preferences reflect the statute. If the biological father meets the criteria for the placement preferences (for example, as a member of the Indian child's Tribe), he may avail himself of the placement preferences. In addition, the Act establishes that unwed fathers who have not acknowledged or established paternity are not considered ''parents'' under the Act; however, by acknowledging or establishing paternity, the father may become a ''parent'' under the Act, and avail himself of ICWA's protections.

Comment: A few commenters stated that the placement preferences should extend beyond the nuclear family to include extended family (aunts, uncles, grandparents) because ICWA was designed to keep Indians rooted to their Tribes and culture if the nuclear family breaks down.

Response: Members of the child's extended family are the first-listed preferred placement. *See* 25 U.S.C. 1915(a), (b); FR § 23.130(a)(1); § 23.131(b)(1).

3. Placement Preferences in Adoptive Settings

Comment: One commenter suggested adding licensed adoptive homes to the list of placement preferences in PR § 23.129 and PR § 23.130.

Response: The rule does not specify licensed adoptive homes in the list of placement preferences because the statute does not specify these homes, and this change would not comport with the intent of Congress to place Indian children, where possible, with extended family or Tribal members.

Comment: A State commenter requested clarification in PR § 23.129(b) of the phrase ''where appropriate'' and whether the child or parent's preference supersedes the placement preferences. A few commenters stated that the rule should use the word ''shall'' or ''must'' to require the court to consider the preference of the Indian child or parent, in accordance with section 1915. A few other commenters supported use of ''should'' in this provision, stating that otherwise the Indian child's or parent's preference would trump the placement preferences.

Response: The final rule reflects the language of the statute. This language does not require a court to follow a child or parent's preference, but rather requires that it be ''considered'' ''where appropriate.''

4. Placement Preferences in Foster or Preadoptive Proceedings

Comment: Several commenters expressed concern that unavailability of preferred placements will result in longer periods of instability for the child or delays in permanency for the child. A few commenters requested that timelines be imposed on finding preferred placements. For example, one commenter stated that once a Tribe is notified, it should have a certain timeframe to provide a permanent home for the child or an exception to ICWA should be made for the well-being of the child, otherwise the rule denies permanency for the child in the name of cultural preservation.

Response: The Department has not identified any authority in the statute for imposing timelines to find a placement; therefore, the rule does not do so. The unavailability of a suitable preferred placement is one of the bases for good cause to depart from the placement preferences, so long as a diligent search for a preferred placement was conducted. FR § 23.132(c)(5). Thus, so long as a prompt and diligent search is made for a preferred placement, these rules should not delay permanency.

Comment: A commenter suggested that a needs assessment by a qualified expert witness should be required in PR § 23.130(a)(2) where it references a child's needs.

Response: The statute explicitly refers to ''special needs'' but does not qualify it as requiring the input of a qualified expert witness, as the statute does in other places. Therefore, the rule does not impose this requirement.

5. Good Cause To Depart From Placement Preferences

Comment: A few commenters said the proposed rule requires a hearing on whether good cause exists and opposed the requirement for an agency to wait for a court to act in order to depart from the placement preferences. One commenter stated that this requirement is contrary to ICWA because while ICWA states that the court must determine there is good cause to deny transfer, it does not require the court to determine whether good cause to depart from placement preferences exists. A State commenter asserted that there will be significant workload increases for agencies if there must be an evidentiary hearing even when there is no objection from the Tribe or parents. This commenter also stated that requiring the judge to determine good cause in the absence of the parties' disagreement puts the court in the role of case administrator rather than arbiter.

Response: Where the requirements of 25 U.S.C. 1912(d)–(e) have been met, a court evidentiary hearing may not be required to effect a placement that departs for good cause from the placement preferences, if such a hearing is not required under State law. *See* section 1915(c). Regardless of the level of court involvement in the placement, however, FR § 23.132(a) requires that the basis for an assertion of good cause must be stated in the record or in writing and the statute requires a record of the placement be maintained. Section 1915(e), FR § 23.141.

Where a Tribe or other party objects, however, the final rule establishes the parameters for a court's review of whether there is good cause to deviate from the placement preferences and requires the basis for that determination to be on the record. *See* FR § 23.129(c). While the agency may place a child prior to or without any determination by the court, the agency does so knowing that the court reviews the placement to ensure compliance with the statute.

Comment: A few commenters supported the requirement in PR § 23.128(b) for ''clear and convincing evidence'' that the placement preferences were met, and in PR § 23.131(b) for ''clear and convincing evidence'' of good cause to depart from the placement preferences. Some of these commenters point out that the court in *Tununak II* overturned the initial application of only a ''preponderance of the evidence'' standard. One commenter stated that elevating the standard of proof to ''clear and convincing evidence'' is an important means of strengthening the statutory preferences, but recommended making it permissive because ICWA intended State courts to retain flexibility. *See* S. Rep. No. 95–597. A few other commenters opposed specifying ''clear and convincing evidence'' as exceeding the Department's authority.

Response: The final rule states that the party seeking departure from the placement preferences should prove there is good cause to deviate from the preferences by ''clear and convincing evidence.'' FR § 23.132(b). While this burden of proof standard is not articulated in section 1915 of the statute, courts that have grappled with the issue have almost universally concluded that application of the clear and convincing evidence standard is required as it is most consistent with Congress's intent in ICWA to maintain Indian families and Tribes intact. *See In re MKT,* 4368 P.3d 771 ¶ 47 (Okla. 2016); *Gila River Indian Cmty.* v. *Dep't. of Child Safety,* 363 P.3d 148, 152–53 (Ariz. Ct. App. 2015); *In re Alexandria P.* 176 Cal.Rptr.3d 468, 490 (Cal. Ct. App. 2014); *Native Vill. of Tununak* v. *Alaska,* 303 P.3d 431, 448, 453 (Alaska 2013) *vacated in part on other grounds by* 334 P.3d 165 (Alaska 2014); *People ex rel. S. Dakota Dep't of Soc. Servs.,* 795 N.W.2d 39, 44, ¶ 24 (S.D. 2011); *In re Adoption of Baby Girl B.,* 67 P.3d 359, 374, ¶ 78 (Okla. Civ. App. 2003); *In re Custody of S.E.G.,* 507 N.W.2d 872, 878 (Minn. Ct. App. 1993); *but see Dep't of Human Servs.* v. *Three Affiliated Tribes of Fort Berthold Reservation,* 238 P.3d 40, 50 n. 17 (Or. Ct. App. 2010) (addressing the issue in a footnote in response to a ''passing'' argument).

While the final rule advises that the application of the clear and convincing standard ''should'' be followed, it does not categorically require that outcome. However, the Department finds that the logic and understanding of ICWA reflected in those court decisions is convincing and should be followed. Widespread application of this standard will promote uniformity of the application of ICWA. It will also prevent delays in permanency that would otherwise result from protracted litigation over what the correct burden of proof should be. So, while the Department declines to establish a uniform standard of proof on this issue in the final rule, it will continue to evaluate this issue for consideration in any future rulemakings.

a. Support and Opposition for Limitations on Good Cause

Comment: Many commenters supported emphasizing the need to follow the placement preferences and limiting agencies' and courts' ability to deviate from the placement preferences based on subjective and sometimes biased factors. Commenters reasoned:

- One of ICWA's primary purposes is to keep Indian children connected to their families, Tribal communities and culture, and yet, currently more than 50% of Native American children adopted are placed into non-Native homes;
- Defining ''good cause'' is within DOI's authority under ICWA;
- Defining ''good cause'' will provide clarity to on-the-ground social workers and others because the phrase ''good cause'' has been interpreted differently among States;
- The provision explaining that the length of time a child is in a non-compliant placement is irrelevant is consistent with best practices in child welfare;
- Restrictions on good cause are necessary to ensure courts do not disregard ICWA's placement preferences

based on a non-Indian assessment of what is ''best'' for the child, such as through a generalized ''best interest'' analysis;

• Use of ''good cause'' to deviate from placement preferences has become so liberal that it has essentially swallowed ICWA's mandate; and

• Without the rule, ''good cause'' leaves so much discretion to State courts that the Tribe rarely prevails in moving a child to a preferred placement after initial placement elsewhere.

Many other commenters opposed the rule's definition of ''good cause.'' Among the reasons stated for this opposition were:

• The rule's basis for ''good cause'' is so narrow that it leaves courts with no flexibility, contrary to congressional intent;

• The rule is not a reasonable interpretation and will not receive deference because it predetermines good cause even though the legislative history explicitly states that the term ''good cause'' was intended to give State courts flexibility;

• The rule excludes ''best interest'' factors as a basis for good cause even though placements directly implicate a child's best interests;

• The rule could require placement in a home that every party to the proceeding, including the Tribe, believes is contrary to the best interests of the child; and

• The rule violates Indian children's rights to due process by limiting the factors and probative evidence a State court can consider as compared to non-Indian children.

One commenter expressed concern that courts may interpret the word ''must'' as requiring them to automatically find good cause when any of the listed circumstances exist.

Response: As discussed above, Congress established preferred placements in ICWA that it believed would help protect the long-term health and welfare of Indian children, parents, families, and Tribes. ICWA must be interpreted as providing meaningful limits on the discretion of agencies and courts to remove Indian children from their families and Tribes, since this is the very problem that ICWA was intended to address. Accordingly, the final rule identifies specific factors that should provide the basis for a finding of good cause to deviate from the placement preferences. These factors accommodate many of the concerns raised by commenters, and include the request of a parent, the child, sibling attachments, the extraordinary physical, mental, or emotional needs of a child, and the unavailability of suitable preferred placements. The final rule retains discretion for courts and agencies to consider any unique needs of a particular Indian child in making this determination.

b. Request of Parents as Good Cause

Comment: A commenter stated their support of PR § 23.131(c)(1), requiring both parents to request the deviation in order for it to qualify as good cause, because it will lessen instances where the rights of the child's mother are deemed more important than those of the father. A few commenters opposed requiring both parents to request because there are instances in which one parent is unavailable, cannot be found, is mentally disabled, or has been proven unfit. One stated that there may be instances where both parents do not agree, but the court should still be encouraged to consider each parent's request. A commenter also pointed to case law holding that a single parent's request can constitute good cause. According to this commenter, if a noncustodial parent may not invoke section 1912 to thwart an adoption, under *Adoptive Couple,* then a noncustodial parent has no right to be heard on placement preferences. A commenter stated that the ordinary meaning of section 1915(c) is that the preference of the parent—meaning one or both parents—be considered in applying or departing from the placement preferences, where appropriate.

Response: The final rule changes the requirement for both parents to make the request to ''one or both parents,'' in recognition that in some situations, both parents may not be available to make the request. This is also consistent with the statutory mandate that, where appropriate, the preference of the Indian child or parent [(singular)] shall be considered. 25 U.S.C. 1915(c). If the parents both take positions on the placement, but those positions are different, the court should consider both parents' positions.

Comment: A few commenters suggested the court should also consider the preference of the child's guardian ad litem in making the placement.

Response: The rule does not add that a guardian ad litem's request should be considered as good cause because Congress expressly allowed for consideration of the preference of the Indian child or parent, and did not include the guardian ad litem. *See* 25 U.S.C. 1915(c).

Comment: A few commenters opposed the provision allowing consideration of the request of parents in determining good cause because, they stated, parents are often pressured to accept placement and this provision encourages coercion. Another commenter stated that there is no rationale for acceding to a parental request for placement in the context of an involuntary removal of a child. Likewise, a few commenters stated that the parent's preference does not automatically show good cause to deviate and should only be a consideration. One commenter stated that parents who decided not to raise their child should not have unilateral authority to determine the child's placements and whether the child will have continued contact with relatives and the Tribe. One commenter supported including the parent's request as good cause, and asserted that a birthparent's preference should be considered unless otherwise proven not to be in the child's best interest.

Response: The statute explicitly provides that, where appropriate, preference of the parent must be considered. *See* 25 U.S.C. 1915(c). The regulation therefore provides that the request of the parent or parents should be a consideration in determining whether good cause exists. *See* FR § 23.132(c)(1). The request of the parent is not determinative, however. The final rule includes a provision requiring that the parent or parents attest that they have reviewed the placement options that comply with the order of preference are intended to help address concerns about coercion. *See* FR § 23.132(c)(1).

Comment: One commenter requested clarifying that the parent must attest that they have reviewed the actual families that meet the placement preferences, not just the categories. The commenter stated that if the parents still object after reviewing the preferences, the agency or court should first be required to explore other available preferred families before concluding there is good cause.

Response: The rule uses the term ''placement options'' to refer to the actual placements, rather than just the categories. *See* FR § 23.132(c)(1). A court or agency may consider in determining whether good cause exists whether a diligent search was conducted for placements meeting the placement preferences.

Comment: One commenter stated that the non-Indian foster parent should not be considered the de facto parent for the purposes of this provision.

Response: The definition of ''parent'' does not include foster-care providers. *See* FR § 23.2.

c. Request of the Child as Good Cause

Comment: One commenter opposed allowing consideration of the request of the child in determining ''good cause'' at PR § 23.131(c)(2) because children can be groomed to request a certain placement and it is subjective when a child is able to understand the issue.

Response: The statute explicitly provides that, where appropriate, preference of the Indian child must be considered. *See* 25 U.S.C. 1915(c). The rule adds that the child must be of ''sufficient age and capacity to understand the decision that is being made'' but leaves to the fact-finder to make the determination as to age and capacity. *See* FR § 23.132(c)(2). The rule also leaves to the fact-finder any consideration of whether it appears the child was coached to express a certain preference.

Comment: One commenter agreed with not restricting this provision to children age 12 or older, but recommended language that the consent be completely voluntary and that there be a determination that the child can understand the decision being made, to protect against the child being pressured. Two other commenters stated that the rule should set a baseline age because otherwise there will be starkly different treatments of Indian children (*e.g.,* reporting that South Carolina has found a 3-year-old competent to testify whereas in Oklahoma a 12-year old is presumed competent to state a preference).

Response: Each Indian child and their circumstances differ to a degree that it is not be appropriate to establish a threshold age for a child to express a preference. The rule leaves it to the fact finder to determine whether the child is of ''sufficient age and capacity'' to be able to understand the decision that is being made.

Comment: Several commenters suggested that the rule should provide that Tribal approval of the non-preferred placement constitutes good cause because the rule should defer to a Tribe's determination that a non-preferred placement is in the child's best interests.

Response: The statute provides that the preference of the parent or child should be considered and allows the Tribe to express its preference by establishing a different order of preference by resolution. 25 U.S.C. 1915(c). In addition, the statute and the rule make clear that a foster home specified by the Indian child's Tribe is a preferred placement. FR § 23.131(b)(2).

d. Ordinary Bonding and Attachment

Comment: Many commented on ordinary bonding and attachment. A high-level summary of these comments is provided here. Many commenters strongly supported PR § 23.131(c)(3), stating that ''ordinary bonding or attachment'' does not qualify as the extraordinary physical or emotional needs that may be a basis for good cause to deviate from the placement preferences. Some who supported the provision cited agencies' deliberate failure to identify preferred placements as reasons for a child being initially placed with a non-preferred placement. Among the reasons cited for support of this provision were:

- Ordinary bonding is not relevant to good cause to deviate from placement preferences because ordinary bonding shows that the child is healthy and can bond again.
- The proposed provision is limited in that it still allows for consideration of extraordinary bonding as good cause.
- Many Western bonding and attachment theories are not as relevant to Indian children because they are based on non-indigenous beliefs and psychological theories about connection with one or two individual parents.
- Allowing normal emotional bonding to be considered good cause would negate ICWA's presumption that the statutory placement preferences are in the Indian child's best interest.
- The proposed provision is needed to address the tactic of placing Indian children in non-preferred placements, delaying notification to the child's Tribe and family, then arguing good cause to deviate from the placement preferences based on the child's bonding with the caregivers (in other words, the proposed provision is necessary to remove incentives to place children in non-preferred placement families and removes rewards for non-compliance).
- The proposed provision is necessary to encourage diligent searches to identify preferred placements.
- The proposed provision supports the intent of ICWA to return a child to biological family even where there is a psychological parenting relationship between the placement family and child, and that Congress arrived at this approach after debate and ample testimony, including significant testimony from mental health practitioners.
- The proposed provision recognizes that the long-term best interests protected by ICWA outweigh short-term impacts of breaking an ordinary bond.
- Comparing emotional ties between the foster family and child to those with a biological family undermines the objective of reunification and preservation of families.
- Opposing arguments are unfounded.

Some interpreted the rule as establishing that ordinary bonding or attachment resulting from a non-preferred placement must not be the ''sole basis'' for a court refusing to return a child to his or her family and supported this interpretation.

Many commenters strongly opposed PR § 23.131(c)(3)'s exclusion of ''ordinary bonding or attachment'' as a basis for good cause to deviate from the placement preferences. According to these commenters, the main reason for initial non-preferred placements is unavailability of homes meeting the placement preferences, and that despite the best efforts of caseworkers to find preferred placements, it becomes necessary to put Indian children in non-preferred placements. Other cited reasons were that preferred placements were too far away or the Tribe delays finding a preferred placement. Among the reasons stated for opposition to the provision were:

- Ordinary bonding is relevant to whether there is good cause to deviate from the placement preferences because breaking ordinary bonds harms the child.
- The importance of bonding to children's well-being has been established by documented research.
- Indian children do not bond differently from other children.
- The proposed provision limits court discretion.
- The proposed provision violates children's constitutional rights, giving them less protection than other children to a stable, permanent placement that allows the caretaker to make a full emotional commitment to the child.
- The proposed provision violates precedent of a majority of State courts that have held they may consider the Indian child's attachment to, or bond with, current caregivers and the amount of time the child has been with caregivers.
- The proposed provision will increase resistance to ICWA.
- The proposed provision encourages breaking of ordinary bonds.
- The proposed provision will not address historical trauma.
- The proposed provision places Tribal interests above the child's interests.

Some commenters neither fully supported nor fully opposed the provision prohibiting consideration of ordinary bonding as good cause. A few agreed that a prolonged placement

arising out of a violation of ICWA should not constitute good cause, but expressed concern that the provision could preclude a court's consideration of the likelihood of severe emotional trauma to a child from a change in placement under any circumstance, placing an unnecessary constraint on State courts and disserving Indian children. One commenter stated that bonding should not be considered, whether ordinary or extraordinary. Some commenters suggested alternative approaches to the provision prohibiting consideration of ordinary bonding as good cause.

Response: The final rule provides that a court may not consider, as the sole basis for departing from the preferences, ordinary bonding or attachment that flows from time spent in a non-preferred placement that was made in violation of ICWA. In response to commenters' concerns, the final rule adjusts the proposed provision regarding ''ordinary bonding'' as not being within the scope of extraordinary physical, mental, or emotional needs. PR § 23.131(c)(3). The proposed provision may have inappropriately limited court discretion in certain circumstances. This is particularly the case, given the apparent ambiguity regarding the proposed provision's reference to ''placement[s] that do[ ] not comply with ICWA.'' *Id.*

The Department recognizes that the concepts of bonding and attachment can have serious limitations in court determinations. *See e.g.,* Comments of Casey Family Programs, et al., at 6 n.9 (citing literature including David E. Arrendondo & Leonard P. Edwards, Attachment, Bonding, and Reciprocal Connectedness, 2 J. Ctr. for Fam. Child. & Cts. 109, 110–111 (2000) (discussing the ways that bonding and attachment theory ''may mislead courts'')). The Department also recognizes that, as the Supreme Court has cautioned, courts should not '' 'reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation,' '' *Holyfield,* 490 U.S. at 54 (citation omitted), by treating relationships established by temporary, non-ICWA-compliant placements as good cause to depart from ICWA's mandates.

The final rule, therefore, adjusts the ''ordinary bonding'' provision, stating that ordinary bonding and attachment that flows from length of time in a non-preferred placement due to a violation of ICWA should not be the sole basis for departing from the placement preferences. This provision addresses concerns that parties may benefit from failing to identify that ICWA applies, conduct the required notifications, or identify preferred placements. While it can be difficult for children to shift from one custody arrangement to another, one way to limit any disruption is to mandate careful adherence to procedures that minimize errors in temporary or initial custodial placements. It can also be beneficial to facilitate connections between an Indian child and potential preferred placements. For example, if a child is in a non-preferred placement due to geographic considerations and to promote reunification with the parent, the agency or court should promote connections and bonding with extended family or other preferred placements who may live further away. In this way, the child has the opportunity to develop additional bonds with these preferred placements that will ease any transitions.

The comments reflected some confusion regarding what constitutes a ''placement that does not comply with ICWA.'' For clarity, the final rule instead references a ''violation'' of ICWA to emphasize that there needs to be a failure to comply with specific statutory or regulatory mandates. The determination of whether there was a violation of ICWA will be fact specific and tied to the requirements of the statute and this rule. For example, failure to provide the required notice to the Indian child's Tribe for a year, despite the Tribe having been clearly identified at the start of the proceeding, would be a violation of ICWA. By comparison, placing a child in a non-preferred placement would not be a violation of ICWA if the State agency and court followed the statute and applicable rules in making the placement, including by properly determining that there was good cause to deviate from the placement preferences.

Comment: A few commenters stated that the rule eradicates courts' ability to find ''good cause'' to deviate from the placement preferences by requiring that only qualified expert witnesses can demonstrate good cause based on ''extraordinary bonding.''

Response: The final rule does not require testimony from a qualified expert witness to establish a good cause determination based on the extraordinary physical, mental, or emotional needs of the child. *See* FR § 23.132(c).

e. Unavailability of Placement as Good Cause

Comment: One commenter supported PR § 23.131(c)(4) except for the reference to ''applicable agency'' because the placement preferences apply even when no agency is involved.

Response: The final rule deletes reference to ''applicable agency'' in this section.

Comment: A few commenters suggested clarifying that a ''diligent search'' for a preferred placement must be conducted, rather than requiring ''active efforts'' because ''active efforts'' is a term of art with specific statutory application.

Response: The final rule clarifies that a diligent search must be conducted, rather than using the phrase ''active efforts,'' because the statute uses the phrase ''active efforts'' in a different context. *See* FR § 23.132(c)(5).

Comment: A commenter objected to the language in PR § 23.131(c)(4) stating that a placement is not ''unavailable'' (as a basis for good cause to depart from the placement preferences) if the placement conforms to the prevailing social and cultural standards of the Indian community. The commenter stated that this language is not in ICWA and may lead to argument that good cause does not exist even where the placement does not pass a background check, potentially violating ASFA, which disqualifies people convicted of certain crimes from serving as a placement. This commenter asserted that inability to pass ASFA or State background check requirements is per se good cause.

Response: ICWA requires that the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community. *See* 25 U.S.C. 1915(d). Nothing in the rule eliminates other requirements under State or Federal law for determining the safety of a placement.

f. Other Suggestions Regarding Good Cause To Depart From Placement Preferences

Comment: One commenter stated that the rule should provide that ''good cause'' to deviate from the placement preferences exists if serious emotional or physical damage to the child is likely to result, to follow the line of reasoning in section 1912(e) that uses that standard for continued custody.

Response: The final rule provides that the extraordinary physical, mental, or emotional needs of the child may be the basis for a good cause determination. *See* FR § 23.132(c)(4). In addition, the final rule provides that the unavailability of a suitable placement may be the basis for a good cause determination. *See* FR § 23.132(c)(5). Both of these provisions would allow a court to address the commenter's

concern about preventing serious emotional or physical damage to a child. In addition, the final rule retains discretion for State courts to consider other factors when necessary.

6. Placement Preferences Presumed To Be in the Child's Best Interest

Many commented on the intersection of a ''best interests analysis'' with ICWA's placement preferences. A high-level summary of these comments is provided here. Several commenters stated that a ''best interest of the child'' analysis is not appropriate for Indian children, for the following reasons.

- ICWA compliance already presumptively furthers best interests of the child and represents best practices in child welfare generally.
- There is a movement in literature to replace the ''best interest'' consideration altogether in favor of the least detrimental among available alternatives for the child, to focus on causing no harm to the child, rather than an implication that courts or agencies are well-positioned to determine what is ''best.''
- ICWA was passed to overcome the bias, often subconscious, and lack of knowledge about Tribes and Indian children, and leaving ''best interests'' to be argued by individuals opposing ICWA's preferences evades ICWA's purposes. The ''best interests'' analysis is inherently open to bias.
- The ''best interests of the child'' analysis permits courts and agencies to ignore the placement preferences at will.
- The ''best interests of the child'' analysis is necessarily broader and richer for Indian children because it includes connection to Tribal community, identity, language and cultural affiliation.
- The ''best interests'' analysis is not appropriate in any determination of ''good cause'' because ''good cause'' and ''best interest'' appear in different parts of the statute, meaning Congress carefully and expressly ''cabined'' each concept, and as such should be treated separately.

Several commenters suggested adding language drawn from the Michigan Indian Family Preservation Act on how to determine a child's best interests.

Other commenters asked the Department to keep the focus on the best interests of the children and opposed having no independent consideration of the best interests of the Indian child for the following reasons:

- The presumption that ICWA compliance is in the child's best interest is not always true.
- The ''best interests of the child'' analysis is of paramount importance.
- The ''best interests of the child'' analysis is compatible with ICWA and should be explicitly allowed because ICWA was not enacted to ignore the physical and emotional needs of children and that every child should have all factors considered for the best possible outcome because not doing so would be treating them as possessions.
- The ''best interests of the child'' analysis is not different for Indian children.
- Case law establishes that the child's best interests must be considered and establishes that the child's best interests should be considered in ''good cause'' determinations.
- Not considering the child's best interest violates the constitutional rights of the children and parents.

Response: As discussed above, ICWA and this rule provide objective mandates that are designed to promote the welfare and short- and long-term interests of Indian children. Congress enacted ICWA to protect the best interests of Indian children. However, the regulations also provide flexibility for courts to appropriately consider the particular circumstances of the individual children and to protect those children. For example, courts do not need to follow ICWA's placement preferences if there is ''good cause'' to deviate from those preferences. The ''good cause'' determination should not, however, simply devolve into a free-ranging ''best interests'' determination. Congress was skeptical of using ''vague standards like 'the best interests of the child,' '' H.R. Rep. No. 95–1386 at 19, and intended good cause to be a limited exception, rather than a broad category that could swallow the rule.

N. Post-Trial Rights and Recordkeeping

The final rule describes requirements and standards for vacating an adoption based on consent having been obtained by fraud or duress. It also provides clarification regarding the application of 25 U.S.C. 1914, and the rights to information about adoptee's Tribal affiliations, while removing certain obligations the proposed rule imposed on agencies. The final rule provides procedures for how notice of a change in an adopted Indian child's status is to be provided, including provisions for waiver of this right to notice. The final rule also contains provisions regarding the transmittal of certain adoption records to the BIA, and the maintenance of State records.

1. Petition To Vacate Adoption

Comment: Several commenters opposed PR § 23.132(a) allowing a final decree of adoption to be set aside if the proceeding failed to comply with ICWA. These commenters pointed out that section 1913(d) of the Act only allows a collateral attack on an adoption decree if consent to the adoption was obtained through fraud or duress, not if the proceeding failed to comply with ICWA, while section 1914 allows for invalidation only of a foster-care placement or termination of parental rights if the proceeding failed to comply with ICWA.

Response: The final rule deletes ''the proceeding failed to comply with ICWA'' as a basis for vacating an adoption decree because FR § 23.136 implements section 1913(d) of the Act, which is limited to invalidation based on the parent's consent having been obtained through fraud or duress.

Comment: A commenter pointed out that PR § 23.133(a) refers generally to ICWA being violated, but the statute and PR § 23.133(b) both refer specifically to violations of Sections 1911, 1912, or 1913.

Response: The final rule specifies the appropriate sections of ICWA in FR § 23.137(a).

Comment: Several commenters stated that the two-year statute of limitations should not apply to section 1914 actions to invalidate foster-care placements and termination of parental rights. Some commenters asserted that State statutes of limitations should apply; others stated that State statutes of limitations should not apply because it would cause uncertainty and inconsistency. One commenter suggested adding a statute of limitation of 90 days. A few commenters suggested establishing a statute of limitations that allows minors three to five years after they turn age 18 to sue for violations of their rights under ICWA.

Response: The final rule clarifies that the two-year statute of limitations does not apply to actions to invalidate foster-care placements and terminations of parental rights, by clarifying that FR § 23.136 applies only to invalidation of adoptions based on parental consent having been obtained through fraud or duress. If a State's statute of limitations exceeds two years, then the State statute of limitations may apply; the two-year statute of limitations is a minimum timeframe. *See* 25 U.S.C. 1913. The statute does not establish a statute of limitations for invalidation of foster-care placements and termination of parental rights under section 1914, and the

Department declines to establish one at this time.

Comment: A few commenters noted that PR § 23.133 fails to provide the requirement in section 1916(a) that the best interests of the child be considered before determining whether to return the child if the court invalidates an adoption decree or adoptive couples voluntarily terminate their parental rights.

Response: Section 1916(a) addresses a narrow set of circumstances: When an adoption fails because the court invalidates the adoption decree or the adoptive couples voluntarily terminate their parental rights. The statute provides that, under this narrow set of circumstances, the best interests of the child must be considered in determining whether to return the child to biological parent or prior Indian custodian. The regulation does not address this narrow set of circumstances. FR § 23.136(b) requires notice to the parent or Indian custodian of the right to petition for return of the child, but the final rule does not set out the standard for determining whether to return the child to the parent's or Indian custodian's custody. FR § 23.136(c) implements section 1913(d) of the Act, which provides that the court ''shall'' return the child to the parent if it finds the parent's consent was obtained through fraud or duress.

2. Who Can Make a Petition To Invalidate an Action

Comment: A few commenters requested changing ''the court must determine whether it is appropriate to invalidate the action'' to ''the court must invalidate the action'' in PR § 23.133. These commenters stated that the plain language of section 1914 does not allow for court discretion. These commenters further asked how the court would determine appropriateness and under what standard of review.

Response: 25 U.S.C. 1914 does not require the court to invalidate an action, but allows certain parties to petition for invalidation. For this reason, the final rule states that the court must determine whether it is appropriate to invalidate the action under the standard of review applicable under State law. *See* FR § 23.137.

Comment: A few commenters supported PR § 23.133(c) as clarifying that the Indian child, parents, or Tribe may seek to invalidate an action to uphold the political status and rights of each child. One commenter stated that PR § 23.133(c) is important in that it clarifies that certain provisions of ICWA cannot be waived because any party may challenge based on violations of another party's rights. A few other commenters stated that the rule purports to convey standing to those who do not have a personal stake in the controversy. These commenters claim there is no evidence Congress intended to grant the Department authority to rewrite constitutional standing requirements and the fundamental principle of American jurisprudence that someone seeking relief must have standing.

Response: The final rule does not dictate that a court must find that the listed parties have constitutional standing; rather, it recognizes the categories of those who may petition. The statutory scheme allows one party to assert violations of ICWA requirements that may have impacted other parties rights (*e.g.,* a parent can assert a violation of the requirement for a Tribe to receive notice under section 1912(a)). There is no basis in the statute for the regulation to limit the parties' opportunities for redress for violations of ICWA. Through section 1914, ICWA makes clear that a violation of Sections 1911, 1912, or 1913 necessarily impacts the Indian child, Indian parent or custodian, and the Indian child's Tribe such that each is afforded a right to petition for invalidation of an action taken in violation of any of these provisions. The provision also makes clear that one party cannot waive another party's right to seek to invalidate such an action. Additionally, parties may have other appeal rights under State or other Federal law in addition to the rights established in ICWA.

Comment: A commenter requested deleting from PR § 23.133(a)(2) ''from whose custody such child was removed'' because it would prevent a noncustodial biological parent from petitioning to invalidate the action.

Response: The final rule continues to include the qualifying phrase ''from whose custody such child was removed'' because the statute includes this phrase, authorizing parents or Indian custodians ''from whose custody such child was removed'' the right to petition to invalidate an action. 25 U.S.C. 1914; FR § 23.137(a)(2).

Comment: A commenter requested adding a guardian ad litem to the list of persons in PR § 23.133(a) who may petition to invalidate an action. A commenter requested adding that the child must be a minimum age to petition to invalidate an action.

Response: The final rule does not add a guardian ad litem to the list of persons who may petition to invalidate an action because the statute does not list this category of persons. Nor does the final rule add a minimum age for a child to be able to petition to invalidate an action because the statute does not provide a minimum age. The statute allows an Indian child to petition, which necessarily means that someone with authority to act for the child may petition on the child's behalf. *See* 25 U.S.C. 1914.

Comment: One commenter suggested adding ''or was'' to read ''an Indian child who is or was the subject of any action'' to account for actions that occurred in the past.

Response: The final rule adds the requested clarification because it can be inferred from the statute that the action for foster-care placement or termination of parental rights need not be in process at the time the child petitions to invalidate the action. *See* FR § 23.136(a)(1).

Comment: A State commenter requested clarification of whether the ''court of competent jurisdiction'' may be a Tribal court, district court, or different court from where the original proceedings occurred.

Response: The court of competent jurisdiction may be a different court from the court where the original proceedings occurred.

Comment: A State commenter requested clarification of whether the ability to challenge the proceeding applies to the proceeding at issue or a subsequent proceeding and stated that, as written, it appears the adoption proceeding could be undone due to failures to follow ICWA in the underlying termination case. This commenter requested clarification that only the proceeding currently before the court may be invalidated.

Response: The ability to petition to invalidate an action does not necessarily affect only the action that is currently before the court. For example, an action to invalidate a termination of parental rights may affect an adoption proceeding. *See, e.g., In re the Adoption of C.B.M.,* 992 N.E.2d 687 (Ind. 2013) (where termination of parental rights has been overturned on appeal, ''letting the adoption stand would be an overreach of State power into family integrity''); *State ex rel. T.W.* v. *Ohmer,* 133 S.W.3d 41, 43 (Mo. 2004) (ordering lower court to set aside adoption decree where parent has appealed termination decision).

3. Rights of Adult Adoptees

Comment: A few commenters supported outlining post-trial rights to protect adopted Indian children, Tribes, parents, and family members. A few commenters opposed PR § 23.134(b) and (c) as undermining the established

practice in some jurisdictions of opening adoption-related records for Indian adoptees when they would otherwise be closed. These commenters expressed concern that PR § 23.134(b) and (c) could be interpreted to allow States to keep records sealed.

Response: The final rule addresses section 1917 of the Act at FR § 23.138 and addresses section 1951 at FR § 23.140. The rule clarifies that it is addressing certain specific rights of adult adoptees to information on Tribal affiliation, in accordance with the statute, rather than all rights of adult adoptees. States may provide additional rights. At FR § 23.71(b), the final rule replaces the proposed text with language restating the Secretary's duty under section 1951(b) of the Act.

Comment: A commenter suggested edits to PR § 23.134(b) and (c) to clarify that it is the court that must seek the assistance of BIA and communicate directly with the Tribe's enrollment office. A few commenters opposed PR § 23.134 to the extent it shifts responsibility to the States, particularly with regard to requiring agencies to communicate directly with Tribal enrollment offices. A few commenters stated that PR § 23.134(c) should include other offices designated by the Tribe, rather than just the Tribal enrollment office.

Response: The final rule deletes the provisions referenced by the commenters.

Comment: One commenter stated that the rule should require disclosure of information to allow adult adoptees to reunite with their siblings.

Response: The final rule does not add the requested requirement because it is beyond the scope of the statute; however, some States have registries that allow individuals to obtain information on siblings for purposes of reunification.

Comment: A few commenters stated that the final adoption decree should require adoptive parents to maintain ties to the Tribe for the benefit of the child or include Tribal affiliation in the adoption papers.

Response: The final rule does not include this requirement. The statute and the regulations, however, provide a range of provisions, including Sections 1917 and 1951, which are focused on promoting the relationship between the adoptee and the Tribe.

Comment: A few commenters noted that the Act provides for BIA to assist adult adoptees in securing information to establish their rights as Tribal citizens, and suggested the rule add a provision to this effect.

Response: The final rule includes a provision at FR § 23.71(b) that incorporates the statute's requirements for BIA assistance to adult adoptees.

4. Data Collection

Comment: A few commenters suggested minimizing non-preferred placements by saying the placement must be documented throughout the case.

Response: FR §§ 23.129(c) and 23.132(c) require that the court's good cause determination be on the record. FR § 23.141 also requires that the record of placement include information justifying the placement determination. This regulatory requirement ensures the statutory provision allowing the Department and Tribe to review State placement records for compliance with the placement preferences is fulfilled. *See* 25 U.S.C. 1915(e).

Comment: A State commenter requested clarification that the agency that places the child must maintain the records.

Response: FR § 23.141 clarifies that the State must maintain the records, but allows a State court or agency to fulfill that role.

Comment: A few commenters opposed PR § 23.136 to the extent it duplicates obligations already assigned to BIA under the current regulation at § 23.71.

Response: The commenters are correct that PR § 23.134 and PR § 23.136 duplicated the content in 25 CFR 23.71 to a large extent. The final rule addresses these comments by keeping those provisions that address BIA responsibilities in FR § 23.71, and moving those provisions that address State responsibilities to FR § 23.140. FR § 23.71 keeps provisions in former § 23.71(b) governing BIA, with minor modifications for readability and to replace the reference to the BIA ''chief Tribal enrollment officer'' with a general reference to BIA. Other provisions at former § 23.71(a) are contained in FR § 23.140.

Comment: Several commenters supported the proposed data-collection requirements as necessary to determine compliance with the Act. Some stated concern that the information is not currently being maintained and suggested BIA conduct mandatory compliance checks on each State to determine record maintenance and availability.

Response: The regulation is intended to strengthen the effectiveness of States' implementation of this important provision.

Comment: One commenter noted that the first sentence of PR § 23.136(a) uses the term ''child'' rather than ''Indian child.''

Response: The final rule specifies ''Indian child.'' *See* FR § 23.140(a).

Comment: A few commenters suggested adding that the documentation be sent to the child's Tribe, in addition to BIA.

Response: The statute, at section 1951(a), requires only that the State provide the Secretary with this information.

Comment: A few commenters opposed PR § 23.137, stating that the requirements for a single repository in each State and the seven-day timeframe are beyond the requirements of § 1915(e) and would be an administrative and fiscal burden on States. A commenter stated that the cost to courts in relocating the approximate 1,123 files throughout 58 counties to a single location would be significant and disruptive. Some claimed it would be an unfunded mandate. A few requested clarifications on how the records must be maintained in a single location. A commenter suggested a timeframe of 30 days would be more appropriate.

Response: The final rule deletes the requirement for storing records of placement in a single repository, but retains a timeframe. The statute provides that the State must make the record available at any time upon the request of the Secretary or the Indian child's Tribe. *See* 25 U.S.C. 1915(e). A timeframe is appropriate to ensure that the record is available upon request ''at any time,'' but the final rule ensures States have the flexibility to determine the best way to maintain their records to ensure that they can comply with the timeframe. In response to comments about the reasonableness of the timeframe, the final rule extends the timeframe to 14 days, which will generally allow two full working weeks to provide the record. *See* FR § 23.141.

Comment: A commenter requested clarification of whether copies or the original files must be maintained and provided.

Response: The regulation does not clarify whether the files must be originals or may be copies because as long as the copies are true copies of the originals, there is no need to specify.

Comment: A commenter requested clarification as to whether only court records are within the regulation's scope or if the regulation covers State agencies or private adoption agencies.

Response: FR § 23.141 directly addresses only court records because the court records must include all evidence justifying the placement determination. *See* 25 U.S.C. 1915, FR

§ 23.132. States may require that additional records be maintained.

Comment: One commenter suggested requiring States to submit annual reports assessing compliance with the regulations. Other commenters suggested BIA work closely with the U.S. Department of Health and Human Services to encourage broader data collection in AFCARS reporting and enforcement. A Tribal commenter stated that there are currently no reliable data sources for information on Indian children in State care and, without accurate numbers, it is difficult to ascertain with any precision the needs of Indian children in any State.

Response: The final rule does not requiring annual reporting. The Department is working closely with the Department of Health and Human Services on data collection regarding ICWA. *See* AFCARS Proposed Rule at 81 FR 20283 (April 7, 2016).

Comment: A commenter suggested the rule should address the records filed with the Secretary, including who may access them, the procedure for gaining access, and the timeframe for the Secretary to respond to requests for access.

Response: BIA has maintained a central repository of adoption decrees and responds to requests for access. The final rule, at FR § 23.71(b), incorporates section 1951(b) of the Act, to clarify that someone can request the records from the Secretary.

Comment: A commenter suggested adding a mechanism for securing the information required by PR § 23.136(a) when a State court fails to comply, for example, by requiring them to provide the information to the Secretary.

Response: FR § 23.140(a) implements section 1951(a) of the Act which establishes a State court responsibility to provide information to the Secretary. This provision was formerly located at 25 CFR 23.71(a).

Comment: A commenter suggested that the ''good cause'' basis stated on the record should be reported in the State database and reported to Tribes and adoptees.

Response: The regulation requires that the State record the basis for ''good cause'' to deviate from the preferred placements (*see* FR § 23.129(c)); this information and evidence must be included in the court record.

Comment: A commenter suggested that PR § 23.136 clarify that an affidavit requesting anonymity does not preclude disclosure of identifying information to the Tribe for the purpose of approving an application for Tribal membership, which the Tribe undertakes in its sovereign capacity. The commenter also suggested the rule clarify that all non-identifying information will still be disclosed, including for example, the name and Tribal affiliation of the Tribe and the identity of the court or agency with relevant information. The commenter also suggests the adoptive parents' identities may be disclosed.

Response: FR § 23.71(a) implements section 1951(a) of the Act, providing a role for the Secretary to provide information as may be necessary for the enrollment of an Indian child in the Tribe.

Comment: A commenter suggested that one parent's affidavit for anonymity should not extend anonymity to the other parent.

Response: An affidavit of one parent would not extend anonymity to the other parent.

Comment: A commenter suggested an affidavit requesting anonymity should not preclude disclosure of the adoptive parents' identities.

Response: The Act only addresses an affidavit of anonymity for the biological parent or parents. *See* 25 U.S.C. 1951(a).

Comment: A commenter suggested PR § 23.136 should provide for notification of foster and adoptive parents of their right and the right of their adoptive child upon reaching age 18 to apply for the adoption records held by the Secretary.

Response: Neither the statute nor the final rule require the Secretary to proactively reach out to adoptive and foster parents and adopted children regarding their records; rather, the Act at section 1917 and the final rule provide that the State court provides such information upon application.

Comment: The commenter suggested that, when there is an affidavit for anonymity, the Secretary notify the biological parent of the request and allow them the opportunity to withdraw anonymity if desired.

Response: The parent may have the right to withdraw or rescind an affidavit for anonymity under State law; the parent should contact the State court or agency for directions.

Comment: A commenter suggested adding a section to authorize release of records maintained by the Secretary to any Indian child, parent or Indian custodian, or child's Tribe upon a showing that the records are needed as evidence in an action to invalidate a placement in violation of Sections 1911, 1912, 1913 or 1915.

Response: Section 1951 of the Act provides that the Secretary may release such information as may be necessary for the enrollment of an Indian child . . . or for determining any rights or benefits associated with that membership. To the extent a party seeks evidence in an action to invalidate a placement in violation of Sections 1911, 1912, 1913, or 1915, the party would be able to seek that information from the State and through discovery.

O. Effective Date and Severability

The final rule includes a new section, FR § 23.143, that provides that the provisions of this rule will not affect a proceeding under State law for foster-care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to 180 after the publication date of the rule, but will apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child. This is drawn from the language of 25 U.S.C. 1923.

This provision ensures that ongoing proceedings are not disrupted or delayed by the issuance of this rule and that there is an orderly phasing in of the effect of the rule. *See* H.R. Rep. No. 95–1386, at 25. Standards affecting pending proceedings should not be changed in midstream. This could create confusion, duplication, and delays in proceedings. And, by providing 180 days from the date of issuance for the rule to be fully effective, all parties affected—States courts, State agencies, Tribes, private agencies, and others—have ample time to adjust their practices, forms, and guidance as necessary.

FR § 23.144 states the Department's intent that if some portion of this rule is held to be invalid by a court of competent jurisdiction, the other portions of the rule should remain in effect. The Department has considered whether the provisions of the rule can stand alone, and has determined that they can. For example, the agency has considered whether particular provisions that are intended to be followed in both voluntary and involuntary proceedings should remain valid if a court finds the provision invalid as applied to one type of proceeding, and has concluded that they should. The Department has also considered whether the particular requirements of the rule (*e.g.,* requirements for notice, active efforts, consent, transfer, placement preferences) may each function independently if other requirements were determined to be invalid. The Department has determined that they can.

Comment: One commenter stated that the ICWA regulations should be retroactive to include all Indian

children currently involved in ICWA cases.

Response: As discussed above, the final rule includes a provision that mirrors 25 U.S.C. 1923, providing none of the provisions of this rule will affect a proceeding which was initiated or completed prior to 180 days from the date of issuance.

P. Miscellaneous

1. Purpose of Subpart

Comment: A few commenters supported PR § 23.101 and especially supported reiterating that the Indian canons of construction are to be used when interpreting ICWA. A few commenters suggested explaining in PR § 23.101, for the general public, that ICWA is not a race-based preference, but is a political decision because of the government-to-government relationship between Tribes and the Federal Government.

Response: The Department agrees that statutes are to be liberally construed to the benefit of Indians but determined it was not necessary to reiterate that canon here. Further, ICWA is based on an individual's political affiliation with a Tribe.

Comment: A few commenters suggested strengthening the provision stating that ICWA establishes minimum Federal standards. These commenters suggested adding reference to the national policy is that these standards define the best interests of Indian children.

Response: The statement that ICWA establishes minimum Federal standards is sufficient. Congress enacted ICWA to protect the best interests of Indian children.

2. Interaction With State Laws

Comment: A few commenters stated that PR § 23.105, providing that if applicable State law provides a higher standard of protection, then the State court must apply that standard, should specify that if the State imposes sanctions, that constitutes a higher standard of protection.

Response: It is unclear what the commenters mean by ''sanctions.'' ICWA provides that, where 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 [ICWA], the State or Federal court shall apply the State or Federal standard. 25 U.S.C. 1921. The final rule is designed to reflect that requirement.

Comment: One commenter stated that the regulation should emphasize that ICWA's provisions in Sections 1911 through 1917 and Sections 1920 through 1922 are mandatory standards that supplant State law. Other commenters requested clarification that minimum Federal standards do not supplant State laws and regulations and Tribal-State agreements applying standards beyond the minimum Federal standards, and that State law and Tribal-State agreements may expand upon or clarify ICWA consistent with the statute. A commenter recommended stating that the minimum Federal Standards preempt State laws that directly conflict with the Federal standards and do not provide heightened protections.

Response: Congress established 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. 25 U.S.C. 1902. Congress's clear intent in ICWA is to displace State laws and procedures that are less protective. *See, e.g., In re Adoption of M.T.S.,* 489 NW. 2d 285, 288 (Minn. Ct. App. 1992) (ICWA preempted Minnesota State law because State law did not provide higher standard of protection to the rights of the parent or Indian custodian of Indian child). By establishing ''minimum'' standards for removal and placement of Indian children, Congress made clear that it was not preempting the entire field of child-custody or adoption law as to Indian children, including all State laws that provide greater protection to such children than those established by ICWA. *See e.g.,* H.R. Rep. No. 95–1386, at 19. ICWA specifically provides that, where 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 ICWA, the State or Federal court shall apply the State or Federal standard.'' 25 U.S.C. 1921.

Comment: A commenter suggested deleting ''in which ICWA applies'' from PR § 23.105(a) because ICWA is applicable to all child-custody proceedings, so this phrase is redundant and adds confusion.

Response: The final rule deletes the phrase ''and are applicable in all child-custody proceedings . . .'' because FR § 23.103 addresses applicability.

Comment: A few commenters stated that the new regulations conflict with various judicial decisions and asked whether the regulations will supersede existing case law.

Response: The regulations are intended to provide a binding, consistent, nationwide interpretation of the minimum requirements of ICWA. If State 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 ICWA, as interpreted by this rule, State law will still apply. *See* 25 U.S.C. 1921.

3. Time Limits and Extensions

Comment: One commenter stated that ICWA section 1912(a) allows ''up to 20 days'' whereas PR § 23.111(c)(4)(v) adds a burden of stating a specific number of days, and the regulation should mirror the Act because it is difficult to obtain continuances.

Response: FR § 23.111(c)(4)(v) deletes the requirement to specify a number of days and now reflects the statutory language allowing ''up to 20 days.'' Other provisions also now reflect that the extension may be ''up to an additional 20 days.''

Comment: One commenter suggested imposing timeframes on States for providing notice to Tribes.

Response: To promote the statute's intent, FR § 23.111(a) adds that the State must ''promptly'' provide notice to Tribes.

Comment: A commenter suggested splitting PR § 23.111(h), regarding time periods, into two subsections, one to address involuntary placements and one to address termination of parental responsibilities, and adding that findings and orders at involuntary placement proceedings are not binding on parties who did not receive notice but should have, and that courts will make diligent efforts to ensure timely notice.

Response: The statute and regulation provide a mechanism for addressing instances where parties who did not receive notice but should have can seek to invalidate the action, by filing a petition under section 1914 of the Act. *See* FR § 23.137.

Comment: A few commenters suggested that timeframes longer than those set out in PR § 23.112 are appropriate in Alaska, where a majority of villages are remote and subject to extreme weather conditions.

Response: The timeframes in FR § 23.112 are established by statute in section 1912(a). The minimum timeframes are to ensure that the parents or Indian custodians, and Indian child's Tribe have sufficient advance notice and time to prepare for a proceeding. State courts have discretion to allow for more time.

Comment: A few commenters expressed their support for PR § 23.112's timeframes as key accountability mechanisms. One commenter stated that additional extensions of time should not be allowed in PR § 23.112(a) unless it is for

good reason (*e.g.,* deployment in the military). Another suggested a good reason would be to allow for a child's participation.

Response: The final rule does not impose restrictions on additional extensions because the Act does not provide any parameters for additional extensions, thereby leaving such additional extensions to the discretion of State courts.

Comment: One commenter requested clarification in PR § 23.112(b) as to how many times a party may ask for an additional 20 days to prepare, and whether this is for each ''proceeding'' or each ''hearing.''

Response: The parent, Indian custodian, and Indian child's Tribe are entitled to one extension of up to 20 days for each proceeding. As discussed above, any extension beyond the initial extension up to 20 days is subject to the judge's discretion.

4. Participation by Alternative Methods (Telephone, Videoconferencing, etc.)

Comment: A few commenters suggested that the provision located throughout the proposed rule allowing for participation by alternative methods be moved into a separate section, applicable to all stages, instead of repeating the provision throughout the rule.

Response: The final rule consolidates provisions on alternative methods of participation into one section at FR § 23.133.

Comment: Many commenters supported the provisions throughout the regulations for the court to allow alternative methods of participation in State proceedings. Commenters noted that Tribes have citizens living in many States and allowing participation by phone or video allows Tribes and all stakeholders to participate when they are unable to travel or appear, whether due to financial constraints, distance, or otherwise. Several commenters suggested the rule require the court to allow alternative methods of participation, rather than making it discretionary, because the burden on States to allow such participation is low and the rights protected by allowing alternative methods of participation are important. One suggested the court must allow it if it has the capability.

Response: The final rule retains the word ''should'' rather than making the provision mandatory.

Comment: One State commenter stated that alternative methods of participation should not be available for testimony because the witness must be in person for the court to make credibility determinations. This commenter also noted that the proceedings are closed, confidential proceedings and the court would be unable to monitor who was present if alternative methods were allowed.

Response: Several courts allow judges to determine credibility by phone or video, including in criminal proceedings. The Department notes that requesting statements under oath, even by teleconference, as to who is present may provide sufficient safeguards to maintain control over who is present on the teleconference for the purposes of confidentiality.

Comment: One commenter suggested adding Skype as an example of an alternative method.

Response: A service such as Skype would be included in ''other methods.''

Comment: A few commenters requested adding parents, Indian custodians, presumed parents, Indian children, and qualified expert witnesses to the list of those who may participate by alternative methods.

Response: The final rule allows for participation by alternative methods generally, without specifying who may so participate.

Comment: A few commenters stated that the rule should specify that the State may not charge fees for participation by alternative methods, and noted that some courts are requiring fees of as much as $85 per hearing and continuing the hearing until the fees are paid. The commenters state that such fees are prohibitive for Tribes and families.

Response: This is not addressed in the proposed or final rule. However, in March 2016, the Department of Justice issued a Dear Colleague letter to State and local courts regarding their legal obligations (under the U.S. Constitution and/or other Federal Laws) with respect to the enforcement of fines and fees. States should review the letter as they consider the appropriateness of fees in this context.

5. *Adoptive Couple* v. *Baby Girl* and *Tununak II*

Comment: Many commented on how the rule should be interpreted in light of the Supreme Court's decision in *Adoptive Couple* v. *Baby Girl.* Some commenters stated that the regulations should explicitly address the *Adoptive Couple* holding in various ways. For example, several requested the rule clarify that the decision should not be applied outside of the private adoption context and to provide guidance on how it should be implemented to better serve Native children, families, and Tribes. A few commenters stated that, without such guidance, courts will use the ruling to evade ICWA. A few commenters stated that the rule should clarify that the *Adoptive Couple* ruling should not be applied as broadly as the Alaska Supreme Court applied it in *Tununak II,* in which the Alaska Supreme Court stated that the grandmother must have filed a formal adoption petition to enjoy the placement preference in an involuntary proceeding. Several commenters stated that the proposed rule is contrary to the Supreme Court's ruling in *Adoptive Couple.*

Response: Adoptive Couple addresses a specific individual factual scenario. The regulations do not explicitly address the *Adoptive Couple* holding because the regulation governs implementation of ICWA generally.

Comment: A few commenters suggested addressing the holding in *Tununak II,* to provide that in an involuntary proceeding, ICWA's placement preferences apply without regard to whether a preferred individual has come forward, sought to adopt, or filed a formal adoption petition. Commenters noted that, otherwise, the holding in *Tununak II* makes it harder for preferred parties to adopt by imposing procedural burdens. Another commenter stated the rule should expressly provide that preferred parties need not have sought to adopt the child in order to be eligible as a placement, because ICWA does not require formal attempts to adopt.

Response: The Department recommends that States provide clear guidance to preferred placements on how to assert their rights under ICWA and that States should work to eliminate obstacles to preferred placements doing so. For example, the State of Alaska issued an emergency regulation following the ruling in *Tununak* to consider certain actions a proxy for a formal petition for adoption. *See* Alaska Admin. Code tit. 7 § 54.600 (2015).

6. Enforcement

Comment: Multiple commenters asked how the regulations will be enforced or requested including an enforcement mechanism. Some suggested various enforcement mechanisms, such as imposing civil or criminal penalties or sanctions for agency and court noncompliance or tying compliance to State or Federal funding. Commenters stated that such penalties would better promote compliance with ICWA and the final rule. One commenter noted their experience in hearing excuses for noncompliance because there are no consequences for failure to comply with ICWA and, therefore, little incentive to

comply. Commenters had several additional suggestions for improving monitoring and compliance with ICWA.

Response: The final rule clarifies the right of particular parties to seek to invalidate a foster-care placement or termination of parental rights based on certain violations of ICWA. FR § 23.137. The final rule does not expressly address other enforcement mechanisms that may be available to the Federal government or other parties.

7. Unrecognized Tribes

Comment: A few commenters noted that some Indian Tribes are not federally recognized and that the rules leave those Tribes in danger of losing their children by addressing only children of federally recognized Indian Tribes. These commenters assert that the rule should apply to children of non-federally recognized Tribes, including but not limited to State-recognized Tribes.

Response: The statute defines ''Indian Tribe'' as federally recognized Tribes; therefore, the regulations address children who are members of federally recognized Tribes, or who are eligible for membership in a federally recognized Indian Tribe and whose parent is a member of a federally recognized Indian Tribe. *See* 25 U.S.C. 1903(8).

8. Foster Homes

Comment: Several commenters had suggestions for increasing the availability of Indian foster homes, including comments that the rule should:

- Require States to work with Tribes and families to break down obstacles to make it easier and faster to license Indian foster homes and to facilitate funding of those homes;
- Require acceptance of Tribal licensure of foster homes;
- Exclude individuals who are preferred placements from requirements necessary to become a foster home because they create barriers for Indian families;
- Require each State social services agency to publish its criteria to become a licensed foster home;
- Require each State social services agency to maintain a centralized registry containing all rejected foster-home applications for periodic review by Federal officials;
- Eliminate State requirements that contradict traditional practices and cause problems for Indian foster homes, such as the requirement for each child to have a separate bedroom.

Response: ICWA establishes Indian foster homes as preferred placements, but does not elaborate on how to increase the availability of such placements. The Department nevertheless encourages States and Tribes to collaborate to increase the availability of Indian foster homes. Organizations such as the National Resource Center for Diligent Recruitment at AdoptUSKids provide tools and resources for recruiting Indian homes. S*ee, e.g.,* National Resource Center for Diligent Recruitment, *For Tribes: Tool and Resources* (last visited Apr. 27, 2016), *http://www.nrcdr.org/for-tribes/tools-and-resources*.

9. Other Miscellaneous

Comment: A commenter suggested adding ''local'' to PR § 23.104(c), so it states that assistance may be sought ''from the BIA local, Regional Office and/or Central Office.''

Response: The final rule makes this addition for clarification at FR § 23.105(c).

Comment: A few commenters expressed concern that biological parents use ICWA as a tool to disrupt the child's placement. One commenter stated that if a child has been in a home for six months or more, they should not be forced to leave unless abuse is a factor.

Response: ICWA is designed to prevent the breakup of the Indian family and thereby focuses on maintaining the biological parents (or Indian custodian) with the Indian child, rather than the bond between the foster parents and the Indian child. Biological parents may avail themselves of their rights under ICWA and reunification with the biological parents or a change in placement may be appropriate even after many months or years, depending on the circumstances (as is true for non-Indian children as well).

Comment: One commenter suggested clarifying how immediate termination-of-parental-rights proceedings in cases involving shocking and heinous abuse or previous terminations as to other children should be handled to comply with ICWA.

Response: ICWA does not allow for ''immediate termination of parental rights'' because it requires certain timeframes for notice of the proceedings. *See* 25 U.S.C. 1912(a). Emergency removal and emergency placement may be appropriate for immediate action if the requirements of section 1922 of the Act are met, and the child may be placed in foster care pending the termination-of-parental-rights proceeding if the requirements of section 1912(e) of the Act are met.

Comment: A few commenters stated that Indian people should be removed from the State index for crimes if the crime was committed over five years ago, because States are refusing to place children with Indian relatives who are in the index.

Response: ICWA does not address restrictions on placements due to past criminal convictions.

Comment: A few commenters suggested the rule should provide for legal representation of Indian children through a guardian ad litem or equivalent to ensure the child's viewpoint is considered.

Response: ICWA addresses legal representation of Indian children in section 1912(b).

Comment: Several commenters stated that attorneys should be appointed to represent parents and extended family members as a matter of indigenous rights.

Response: ICWA states that the parent or Indian custodian has the right to court-appointed counsel in an ICWA proceeding. *See* 25 U.S.C. 1912(b).

Comment: A commenter stated that the regulations impermissibly attempt to shift Federal responsibility to the State courts and agencies.

Response: ICWA establishes minimum standards to be applied in State child-custody proceedings. The final rule is consistent with ICWA, and elaborates on these minimum standards. It does not shift Federal responsibilities to State courts and agencies.

Comment: Several commenters suggested making all provisions of the rule mandatory, rather than using the word ''should.''

Response: The final rule generally uses mandatory language, as it represents binding interpretations of Federal law. In a few instances, the Department did not use mandatory language, such as to indicate the best means of compliance with another statutory or regulatory requirement.

Comment: A commenter stated that the regulations should encourage States, in coordination with Tribes, to advance ICWA implementation beyond what is required by the regulations, to ensure that the ''minimum Federal standards'' do not become the maximum standards. One commenter suggested including standard forms to help guide States in which ICWA is less frequently used, to help familiarize States with ICWA and save time. The commenter suggested reviewing the forms at *www.nd.gov/dhs/Triballiaison/forms*.

Response: The Department underscores that these regulations are indeed minimum standards. The Department encourages States and Tribes to collaborate to advance ICWA implementation and suggests looking to

some of the tools developed by States to aid in implementation of ICWA. For example:

- New York has published a State guide to ICWA (*see A Guide to Compliance with the Indian Child Welfare Act* published by the New York Office of Children and Family Services at *http://ocfs.ny.gov/main/publications/pub4757guidecompliance.pdf*);
- Washington has established a State evaluation of ICWA implementation, which it performs in partnership with Tribes (*see 2009 Washington State Indian Child Welfare Case Review* at *https://www.dshs.wa.gov/sites/default/files/SESA/oip/documents/Region%202%20ICW%20CR%20report.pdf*).
- Michigan has established a ''bench card'' as a tool for judges implementing ICWA and the State counterpart law (*see 2014 Michigan Indian Family Preservation Act (MIFPA) Bench Card* (last visited Apr. 27, 2016), *http://courts.mi.gov/Administration/SCAO/OfficesPrograms/CWS/CWSToolkit/Documents/BC_ICWA_MIFPA.pdf*)
- Several States have established State-Tribal forums to discuss child-welfare policy and practice issues (*see* Montana, North Dakota, Oklahoma, Oregon, Utah, and Washington).
- Several States have established State-Tribal court improvement forums where court system representatives meet regularly to improve cooperation between their jurisdictions (*see* California, Michigan, New Mexico, New York, and Wisconsin).

In addition, several non-governmental entities offer tools for ICWA implementation, such as the National Council of Juvenile and Family Court Justices, National Indian Child Welfare Association, and Native American Rights Fund.

Comment: A few commenters stated their concerns over comments provided by adoption lawyers, stating that they are primarily concerned with making money from private adoptions of Indian children. These commenters noted that the private adoption industry profits in the billions of dollars annually and require fees for adopting Indian infants. A few other commenters stated their concern that Tribes are seeking more power through the regulations.

Response: The Department has considered the substance of each comment and without presuming the commenters' motivations.

Comment: A commenter suggested using ''or'' rather than ''and/or'' throughout the regulation.

Response: The final rule continues to use the term ''and/or'' in several places for clarity.

Comment: A commenter suggested Tribes and birth parents enter into ''Contract After Adoption'' agreements whereby non-Indian adoptive parents agree to register the child with the Tribe, stating that these agreements have been productive and protective of rights. Another commenter suggested requiring adoptive parents to enter a cultural outreach program as defined by the Tribe, to ensure continued connection that strengthens the culture.

Response: This is beyond the scope of this rule.

Comment: A commenter stated that State child-welfare agencies should include input from Tribes in their plans for implementing ICWA. Likewise, a commenter stated that States and Tribes should join forces to look at early intervention, prevention, and rehabilitative services to avoid ICWA situations, and work together for the good and welfare of our children.

Response: This is beyond the scope of this rule. The Department encourages States to collaborate with Tribes on implementation of ICWA.

Comment: A commenter suggested BIA ask Tribes whether State courts and agencies complied with ICWA because if BIA relies only on agency documentation, it will not receive the whole picture. This commenter provided an example of one State that claimed compliance but the Tribes in the State disagree.

Response: This is beyond the scope of this rule.

Comment: A commenter stated that guardian ad litems should have significant understanding of indigenous cultures and traditions so they can better interface with the children.

Response: State law governs the standards and procedures for appointing guardian ad litem. The Department encourages appointment of guardian ad litem with significant understanding of the Indian child's culture.

Comment: A commenter asserted that one of the greatest challenges State courts face is reconciling the ICWA provisions with other Federal statutes governing child-welfare matters, such as Title IV–E of the Social Security Act and suggests BIA and HHS work together to ensure there is no conflict.

Response: Interior and the Department of Health and Human Services are committed to working together to ensure harmonious implementation of the various Federal statutory requirements.

Comment: Many commenters noted the dire need for additional funding to Tribes, preferred placements, and others to better support ICWA implementation. A few commenters stated that there should be enforcement to ensure any ICWA funding provided to Tribes is used for that purpose.

Response: While the final rule cannot affect funding levels, the Department notes the importance of funding in implementation.

Comment: Many commenters noted the dire need for ICWA training and suggested requiring State social workers, attorneys, and judges to undergo training on ICWA. One commenter stated that education regarding legal, social, historical, and ethical components of ICWA would strengthen compliance. Other commenters suggested requiring non-Indian adoptive families to take certified training on the history of Native Americans and issues concerning Tribes today.

Response: ICWA does not establish requirements for training, but the Department notes the importance of training in implementation.

V. Summary of Final Rule and Changes From Proposed Rule to Final Rule

The following table summarizes changes made from the proposed rule to the final rule.

Proposed rule	Final rule	Summary of changes from proposed rule to final rule	Summary of final rule (as compared to rule in effect before this final rule)
23.2 Definitions	23.2 Definitions	Added definitions for emergency proceeding, hearing, Indian foster home, involuntary proceeding, proceeding, and voluntary proceeding. Revised definitions of active efforts, child-custody proceeding, continued custody, domicile, Indian child, Indian child's Tribe, Indian custodian, and upon demand. Deleted definitions of imminent physical damage or harm and voluntary placement.	Added definitions for active efforts, continued custody, custody, domicile, emergency proceeding, hearing, Indian foster home, involuntary proceeding, proceeding, status offenses, upon demand, and voluntary proceeding. Revised definitions of child-custody proceeding, extended family member, Indian child, Indian child's Tribe, Indian custodian, parent, reservation, Secretary, and Tribal court.
23.11 Notice	23.11 Notice	Revises current (a) to delete requirement to send a copy of the notice to BIA Central Office. Clarifies that notice must include the information specified in 23.111. Clarifies that certain BIA duties remain. Replaces ''certified mail'' with ''registered or certified mail.'' Specifies where notice should be sent.	Restates current 23.11, but deletes the requirement to send a copy of the notice that goes to the BIA Regional Director to the BIA Central Office, and replaces ''certified mail'' with ''registered or certified mail.'' Updates information on where notice should be sent. Moves provisions from § 23.11(b), (d), (e) to FR § 23.111.
N/A	23.71 Recordkeeping and information availability.	Deletes provisions of current § 23.71(a) because duplicative of § 23.140. Moves current § 23.71(b) to (a) as part of non-material changes to restructure the section Revises 23.71(b) to more closely match section 1951(b) of the Act. Deletes reference to BIA Tribal enrollment officer because position no longer exists.	Revises current 23.71 to more closely match section 1951(b) of the Act.
23.101 What is the purpose of this subpart?	23.101 What is the purpose of this subpart?	Deletes sentence on when the regulations apply because FR § 23.103 addresses when ICWA applies.	New section. Establishes the purpose of the new subpart.
23.102 What terms do I need to know?	23.102 What terms do I need to know?	Revises definition of ''agency''	New section. Defines ''agency'' and ''Indian organization'' for the purposes of this subpart only.
23.103 When does ICWA apply?	23.103 When does ICWA apply?	Clarifies what types of proceedings ICWA does and does not apply to. Revises text addressing ''existing Indian family'' exception. Moves provisions regarding the requirement to ask whether ICWA applies to FR § 23.107. Moves provision requiring treatment of a child as an Indian child pending verification to § 23.107. Clarifies that if ICWA applies at the commencement of a proceeding, it continues to apply even if the child reaches age 18.	New section. Delineates when ICWA's requirements may apply and do not apply. Establishes that there is no exception to the application of ICWA based on certain factors. Establishes that ICWA continues to apply even if the child reaches the age of 18.
N/A	23.104 What provisions of this subpart apply to each type of child-custody proceeding?	Adds a chart to clarify which type of proceeding each rule provision applies to.	New section. Delineates what type of proceeding the sections of the subpart apply to.
23.104 How do I contact a Tribe under the regulations in this subpart?	23.105 How do I contact a Tribe under the regulations in this subpart?	No significant changes	New section. Establishes how to contact a Tribe to provide notice or obtain information or verification.
23.105 How does this subpart interact with State laws?	23.106 How does this subpart interact with State and Federal laws?	Deletes provision regarding ICWA applicability because applicability is addressed in 23.103.	New section. Specifies that the regulations provide minimum Federal standards, and that more protective State or Federal laws apply.
23.106 When does the requirement for active efforts begin?	N/A	Deletes section	N/A.

Proposed rule	Final rule	Summary of changes from proposed rule to final rule	Summary of final rule (as compared to rule in effect before this final rule)
23.107 What actions must an agency and State court undertake to determine whether a child is an Indian child?	23.107 How should a State court determine if there is a reason to know the child is an Indian child?	Limits provision to standards applicable in State-court proceedings. Clarifies that inquiry is required in emergency, involuntary, and voluntary proceedings. Clarifies that if there is ''reason to know'' the child is an Indian child, this triggers certain obligations. Deletes list of information that the court may require the agency to provide. Replaces ''active efforts'' to identify Tribes with ''due diligence'' to identify Tribes. Moves provision requiring treatment of the child as an Indian child from proposed 23.103(d). Adds to the list of factors providing ''reason to know'' the child is an ''Indian child'' that the child is or has been a ward of Tribal court and that either parent or child possesses a Tribal identification card, but removes residency on an Indian reservation or in a predominantly Indian community. Adds that, where anonymity is requested in voluntary proceedings, the Tribe must keep the information confidential.	New section. Establishes that State courts must ask as a threshold question at the start of a proceeding whether there is reason to know the child is an Indian child. Establishes that, if there is reason to know the child is an Indian child, the State court must confirm the agency used due diligence to identify and work with Tribes to obtain verification, and must treat the child as an Indian child unless and until it is determined otherwise. Establishes what factors indicate a ''reason to know.'' Establishes that a court and Tribe must keep documents confidential if a consenting parent requested anonymity in a voluntary proceeding.
23.108 Who makes the determination as to whether a child is a member of a Tribe?	23.108 Who makes the determination as 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?	Adds that a Tribal determination of membership or eligibility may be reflected in facts of evidence, such as Tribal enrollment documentation.	New section. Establishes that only the Tribe may make determinations as to Tribal membership or eligibility, and that such determinations may be reflected in documentation issued by the Tribe.
23.109 What is the procedure for determining an Indian child's tribe when the child is a member or eligible for membership in more than one Tribe?	23.109 How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?	Deletes provision requiring notification by agencies. Clarifies process and considerations where more than one Tribe is involved. Deletes requirement for notifying all other Tribes that a particular Tribe was designated as the child's Tribe. Deletes statement that a Tribe can designate another Tribe to act as its representative.	New section. Incorporates statutory provisions for establishing the child's Tribe. Establishes that deference must be given to Tribe in which the child is already a member unless otherwise agreed to by the Tribes. Establishes that, where the child is a member in more than one Tribe or eligible for membership in more than one Tribe, the court must provide opportunity for the Tribes to determine which should be designated as the child's Tribe. Establishes what the State court should consider in determining which has ''more significant contacts'' if Tribes are unable to reach an agreement.
23.110 When must a State court dismiss an action?	23.110 When must a State court dismiss an action?	Adds that the provision is subject to agreements between States and Tribes pursuant to 25 U.S.C. 1919. Requires the Tribe be expeditiously notified of the pending dismissal and sent information regarding the child-custody proceeding.	New section. Establishes that a State court must determine its jurisdiction and when a State court must dismiss an action Requires State court to ensure the Tribal court is expeditiously notified and sent information on the proceeding.

Proposed rule	Final rule	Summary of changes from proposed rule to final rule	Summary of final rule (as compared to rule in effect before this final rule)
23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?	23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?	Limited to standards to be applied in State-court proceedings. Clarifies that provision applies to involuntary foster-care-placement and termination-of-parental-rights proceedings. Adds ''certified mail'' as an option ..... Incorporates additional information from current 23.11 (e.g., maiden names, requirement to keep confidential information in the notice). Deletes provision stating that counsel is appointed only if authorized by State law. Deletes provision requiring a specific amount of additional time to be included in the request. Clarifies language-access requirements. Removes provision addressing Interstate Compact on Placement of Children. Moves provision regarding no rulings occurring until the waiting period has elapsed to 23.112(a).	New section. Establishes required contents of the notice. Allows notice to be sent by certified or registered mail, as long as return receipt is requested. Incorporates provisions of current 23.11. Incorporates statutory provision requiring court to inform a parent or Indian custodian who appears in court without an attorney of certain rights. Requires a State court to provide language-access services as required by Federal law.
23.112 What time limits and extensions apply?	23.112 What time limits and extensions apply?	Reorganizes section. States that no proceeding can be held until at least 10 days after the required notice is provided. Clarifies that extensions may be ''up to'' an additional 20 days. Moves provision regarding alternative methods of participation to 23.133. Clarifies that additional extensions of time may be granted.	New section. Incorporates statutory prohibition on foster care or termination-of-parental-rights proceedings being held until certain timelines are passed.
23.113 What is the process for the emergency removal of an Indian child?	23.113 What are the standards for emergency proceedings involving an Indian child?	Adds that emergency removal/placement must terminate immediately when no longer necessary to prevent imminent physical damage or harm. Clarifies what standards state court should apply in emergency proceedings involving an Indian child. Changes standard from whether emergency removal/placement is ''proper'' to whether it is ''necessary to prevent imminent physical damage or harm to the child.'' Removes certain requirements on the agency Clarifies that agency may terminate the emergency removal/placement. Requires additional statements in the petition or accompanying documents. Replaces provision requiring a hearing if emergency removal/placement is continued for more than 30 days with a requirement for a court determination that restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm, and the court cannot transfer jurisdiction to the Tribe, and that it is not possible to initiate a child-custody proceeding defined in § 23.2. Moves provision regarding alternative methods of participation to § 23.133.	New section. Incorporates statutory limitations on State emergency removals and emergency placements. Establishes what a petition, or accompanying documents, for emergency removal or emergency placement should include. Requires State court to determine at each hearing whether the emergency removal or emergency placement is no longer necessary. Establishes a 30-day deadline by which emergency removal and emergency placement should end unless the court determines that restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm, and the court cannot transfer jurisdiction to the Tribe, and that it is not possible to initiate a child-custody proceeding defined in § 23.2.
23.114 What are the procedures for determining improper removal?	23.114 What are the requirements for determining improper removal?	Changes ''reason to believe'' to ''reason to know'' of an improper removal. Changes ''immediately stay the proceeding until a determination can be made on the question of improper removal'' to ''expeditiously determine whether there was improper removal or retention''. Changes standard from ''imminent physical damage or harm'' to ''substantial and immediate danger or threat of such danger''.	New section. Establishes that the State court must expeditiously determine whether there was an improper removal or retention under certain circumstances. Requires the child to be returned immediately to parents if there has been an improper removal or retention, unless it would subject the child to substantial and immediate danger or threat of such danger.

Proposed rule	Final rule	Summary of changes from proposed rule to final rule	Summary of final rule (as compared to rule in effect before this final rule)
23.115 How are petitions for transfer of proceeding made?	23.115 How are petitions for transfer of a proceeding made?	Adds that a request for transfer may be made at any stage of each proceeding. Clarifies that provision applies to foster-care and termination-of-parental-rights proceedings.	New section. Establishes how petitions for transfer may be made.
23.116 What are the criteria and procedures for ruling on transfer petitions?	23.117 What are the criteria for ruling on transfer petitions?	Changes ''case'' to ''child-custody proceeding''. Clarifies that a court must make a determination when transfer is not appropriate. Moves provision for court to provide records related to the proceeding to Tribal court to § 23.119.	New section. Establishes that a State court must transfer a proceeding unless one or more of the listed criteria are met.
23.117 How is a determination of ''good cause'' not to transfer made?	23.118 How is a determination of ''good cause'' to deny transfer made?	Clarifies that the court ''must not'' consider certain factors, rather than ''may not''. Combines the two separate lists of factors that must not be considered into one list. Clarifies when court must not consider whether the proceeding is at an advanced stage. Adds that the court must not consider whether there have been prior proceedings involving the child for which no petition to transfer was filed. Changes the factor on whether the transfer ''would'' result in a change in placement to whether the transfer ''could'' affect placement. Changes the factor on the Indian child's ''contacts'' to Indian child's ''cultural connections''. Eliminates language regarding burden of proof. Requires the basis for denying transfer to be stated on the record or in a written opinion.	New section. Prohibits State court from considering certain factors in determining whether good cause to deny transfer exists. Requires the basis for denying transfer to be stated on the record or in a written opinion.
23.118 What happens when a petition for transfer is made?	23.116 What happens when a petition for transfer is made? 23.119 What happens after a petition for transfer is granted?	Splits the proposed section into two sections. Deletes provision stating the notice should specify how long the Tribal court has to make its decision and requiring at least 20 days for Tribal court to decide. Adds that the State court ''may request a timely response'' regarding whether the Tribe wishes to decline the transfer. Changes ''promptly provide the Tribal court with all court records'' to ''expeditiously provide the Tribal court with all records related to the proceeding.'' Adds language regarding coordination between State and Tribal courts.	New section. Establishes that the State court must ensure the Tribal court is promptly notified in writing of a transfer petition. New section. Establishes that State court should expeditiously provide the Tribal court with all records related to the proceeding if the Tribal court accepts transfer, and should coordinate the transfer with the Tribal court.
23.119 Who has access to reports or records?	23.134 Who has access to reports or records during a proceeding?	Deletes provision stating that decisions of the court must be based only upon what is in the record.	New section. Establishes rights of parties to examine records of proceedings.
23.120 What steps must a party take to petition a State court for certain actions involving an Indian child?	23.120 How does the State court ensure that active efforts have been made?	Deletes provision directly imposing requirements on any party petitioning for foster care or termination of parental rights; instead requires the court to conclude that active efforts have been made.	New section. Requires State court to conclude that active efforts to avoid the need to remove the Indian child from his or her parents or Indian custodian were made prior to ordering an involuntary foster-care placement or termination-of-parental-rights. Requires documentation of active efforts.
23.121 What are the applicable standards of evidence?	23.121 What are the applicable standards of evidence?	Clarifies that court ''must not issue an order'' absent the appropriate standard of evidence, rather than ''may not issue an order.'' Changes standard from ''seriously physical damage or harm'' to ''serious emotional or physical damage.'' Clarifies that a causal relationship is required for finding both clear and convincing evidence and evidence beyond a reasonable doubt. States that none of the listed factors may be the sole evidence without a causal relationship for both clear and convincing evidence and evidence beyond a reasonable doubt.	New section. Establishes standards of evidence in foster-care placement proceedings and termination-of-parental-rights proceedings. Requires the existence of a causal relationship between the particular conditions in the home and risk of serious emotional or physical damage to the child. Establishes that, without the causal relationship, certain factors may not be the sole factor for meeting the standard of evidence.

Proposed rule	Final rule	Summary of changes from proposed rule to final rule	Summary of final rule (as compared to rule in effect before this final rule)
23.122 Who may serve as a qualified expert witness?	23.122 Who may serve as a qualified expert witness?	Clarifies that expert witness must be able to testify regarding whether the Indian child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage, and should also have specific knowledge of the prevailing social and cultural standards of the Indian child's Tribe. Changes text from ''specific knowledge of the child's Indian Tribe's culture and customs'' to ''knowledge of the prevailing social and cultural standards of the Indian child's Tribe.'' Eliminates the list of persons presumed to meet the requirements to two categories, and states instead that a person may be designated by the Indian child's Tribe has having knowledge of the prevailing social and cultural standards of that Tribe.	New section. Establishes that a qualified expert witness should have knowledge of the prevailing social and cultural standards of the Indian child's Tribe.
N/A	23.123	Reserved for numbering purposes	Reserved for numbering purposes.
23.123 What actions must an agency and State court undertake in voluntary proceedings?	23.124 What actions must a State court undertake in voluntary proceedings?	Deletes requirements directed at agencies .... Clarifies that courts must ensure the party seeking placement has taken all reasonable steps to verify the child's status.. Adds that State courts must ensure that the placement complies 23.129–23.132.	New section. Requires State courts to ask whether the child is an ''Indian child'' in voluntary proceedings. Where there is reason to know that the child is an Indian child, requires State courts to ensure the party seeking placement has taken all reasonable steps to verify the child's status. Requires State courts to ensure that the placement complies 23.129–23.132.
23.124 How is consent obtained?	23.125 How is consent obtained?	Clarifies that the consent must be made before a judge, not necessarily in court. Clarifies what the court must explain to the parent/Indian custodian prior to accepting consent, and separates out the limitations applicable to each type of proceeding. Clarifies that the court's explanation must be on the record and in English (unless English is not the primary language of the parent/Indian custodian). Clarifies that consent need not be executed in open court but still must be made before a court of competent jurisdiction.	New section. Requires consent to voluntary termination of parental rights, foster-care placement, or adoption to be in writing and recorded before a court of competent jurisdiction. Requires court to explain the consequences of the consent in detail and certify that terms and consequences were explained in English or the language of the parent or Indian custodian.
23.125 What information should the consent document contain?	23.126 What information must the consent document contain?	Clarifies that the consent document must contain the identifying Tribal enrollment number ''where known'' rather than ''if any.'' Adds that the parent or Indian custodian's identifying information must be included, rather than definitively requiring their addresses.	New section. Establishes required contents of consent document.
23.126 How is withdrawal of consent achieved in a voluntary foster-care placement?	23.127 How is withdrawal of consent to a foster-care placement achieved?	Clarifies that a parent or Indian custodian may withdraw consent to foster-care placement at any time. Removes requirement for the withdrawal to be filed in the same court where the consent document was executed. Adds that State law may provide additional methods of withdrawing. Clarifies that the court must ensure the child is returned as soon as practicable.	New section. Establishes when and how consent of foster-care placement may be withdrawn. Establishes that the child must be returned to the parent or Indian custodian as soon as practicable.
23.127 How is withdrawal of consent to a voluntary adoption achieved?	23.128 How is withdrawal of consent to a termination of parental rights or adoption achieved?	Separates out provisions for withdrawing consent to a termination of parental rights from provisions for withdrawing consent to an adoption. Adds that withdrawal may be accomplished by testimony before the court. Adds that State law may provide additional methods of withdrawing. Changes ''clerk of the court'' to ''the court.''	New section. Establishes when and how consent to a termination of parental rights and an adoption may be withdrawn. Establishes that the child must be returned to the parent or Indian custodian as soon as practicable.

Proposed rule	Final rule	Summary of changes from proposed rule to final rule	Summary of final rule (as compared to rule in effect before this final rule)
23.128 When do the placement preferences apply?	23.129 When do the placement preferences apply?	Deletes provisions directed at agencies ..... Clarifies that the Tribe's placement preferences may apply. Clarifies that the court must consider requests for anonymity in voluntary proceedings. Moves provisions regarding documentation to 23.137 and 23.138.	New section. Establishes when placement preferences apply. Establishes that where a parent requests anonymity in a voluntary proceeding, the court must give weight to this request. Establishes that the placement preferences must be followed unless a determination is made on the record that good cause exists not to apply those preferences.
23.129 What placement preferences apply in adoptive placements?	23.130 What placement preferences apply in adoptive placements?	Clarifies that the Tribe's placement preferences may apply. Clarifies that the court ''must'' consider, where appropriate, the preferences of the Indian child or parent.	New section. Lists the placement preferences in adoptive placements. Establishes that the Tribe may establish a different order of preference by resolution.
23.130 What placement preferences apply in foster care or preadoptive placements?	23.131 What placement preferences apply in foster-care or preadoptive placements?	Clarifies that preferences apply to changes in placements. Adds that sibling attachment as a consideration in whether the placement approximates a family. Clarifies that the Tribe's placement preferences may apply. Deletes the provision ''whether on or off the reservation'' as superfluous. Clarifies that the Tribe's placement preferences established by order or resolution apply, so long as the placement is the least restricted setting appropriate to the particular needs of the child. Requires the court to consider the preference of the Indian child or parent.	New section. Lists the placement preferences in foster- care and preadoptive placements. Establishes that the Tribe may establish a different order of preference by resolution. Requires the court to consider the preference of the Indian child or parent.
23.131 How is a determination for ''good cause'' to depart from the placement preferences made?	23.132 How is a determination for ''good cause'' to depart from the placement preferences made?	Clarifies that the court must ensure reasons for good cause are on the record and available to the parties. Clarifies that a determination of good cause must be justified on the record or in writing. Changes the requirement for the court to base good cause on the listed considerations to a statement that the court ''should'' base good cause on the listed considerations. Clarifies that the request of one or both parents may be a consideration for good cause. Adds the presence of a sibling attachment as a consideration for good cause. Adds ''mental'' needs of the child ..... Deletes the provision stating that extraordinary needs does not include ordinary bonding and attachment. Deletes requirement for qualified expert witness. Changes unavailability of placements to unavailability of ''suitable'' placements, and clarifies that a placement may not be considered ''unavailable'' if it conforms to prevailing social and cultural standards of the Indian community. Changes requirement for active efforts to find placements to a ''diligent search'' to find placements.. Adds that the court 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.	New section. Requires the court to ensure the reasons for good cause are on the record and available to parties. Establishes that the standard for proving good cause is clear and convincing evidence. Requires the good cause determination to be in writing. Establishes considerations that the good cause determination should be based on. Prohibits court from departing 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.
N/A	23.133 Should courts allow participation by alternative methods?	New section, incorporating provisions previously at PR §§ 23.112, 23.113, and 23.115.	New section. Establishes that courts should allow, where they possess the capability, alternative methods of participation in proceedings.

Proposed rule	Final rule	Summary of changes from proposed rule to final rule	Summary of final rule (as compared to rule in effect before this final rule)
23.132 What is the procedure for petitioning to vacate an adoption?	23.136 What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?	Clarifies that this provision addresses vacating an adoption (deletes "termination of parental rights"). Deletes provision allowing an adoption decree to be vacated based on the proceeding failing to comply with ICWA.	New section. Establishes the procedure for vacating an adoption based on consent having been obtained through fraud or duress.
23.133 Who can make a petition to invalidate an action?	23.137 Who can make a petition to invalidate an action for certain ICWA violations?	Clarifies which sections of ICWA violations of may justify a petition to invalidate an action. Clarifies that an Indian child that was, in the past, the subject of an action for foster care or termination of parental rights may petition. Moves provision regarding alternative methods of participation to § 23.133.	New section. Establishes who can make a petition to invalidate an action based on a violation of certain statutory provisions.
23.134 What are the rights of adult adoptees?	23.138 What are the rights to information about adoptees' Tribal affiliations?	Narrows section to apply only to rights to information about adult adoptees' Tribal affiliations. Deletes provision regarding BIA helping adoptee obtain information because an updated version of this provision is at § 23.71. Deletes provision about closed adoptions ..... Deletes provision about Tribes identifying a Tribal designee to assist adult adoptees.	New section. Establishes how adult adoptees may receive information on Tribal affiliations.
23.135 When must notice of a change in child's status be given?	23.139 Must notice be given of a change in an adopted Indian child's status?	Clarifies that notice is required for Indian children who have been adopted. Deletes provision regarding change in placement. Adds that the notice must include the current name and any former names of the Indian child, and must include sufficient information to allow the recipient to participate in any scheduled hearings. Adds provisions requiring the court to explain the consequences of a waiver of the right to notice and certify that the explanation was provided. Adds that a waiver need not be made in a session of court open to the public but must be before a court. Clarifies that a revocation of the right to receive notice does not affect completed proceedings.	New section. Requires notice to be given to the child's biological parents or prior Indian custodians and Tribe of certain actions affecting an Indian child that has been adopted. Establishes the required content for the notice. Establishes provisions allowing the parent or Indian custodian to waive notice.
23.136 What information must States furnish to the Bureau of Indian Affairs?	23.140 What information must State courts furnish to the Bureau of Indian Affairs?	Clarifies applicability to voluntary and involuntary adoptions. Adds time period from 23.71 to provide that State court must provide a copy of the adoptive decree or order within 30 days. Adds requirement from 23.71 that the child's birthdate must be included in the information State courts provide to BIA. Incorporates provisions from 23.71(a) regarding marking information "confidential" and regarding State agencies assuming reporting responsibilities.	Incorporates some of § 23.71(a) regarding State requirement to provide a copy of the adoptive placement decree or order to BIA within 30 days, along with certain information.
23.137 How must the State maintain records?	23.141 What records must the State maintain?	Deletes requirement for State to establish a single location to maintain records. Increases the time in which the State must make the record available to the Tribe or Secretary from 7 days to 14 days. Adds requirement for the record to include document on efforts to comply with the placement preferences and the court order authorizing departure, if the placement departs from the placement preferences. Clarifies that records may be maintained by a State court or State agency.	New section. Requires States to maintain records of all placements made under the Act. Establishes a minimum of what each record must include.
23.138 How does the Paperwork Reduction Act affect this subpart?	23.139 How does the Paperwork Reduction Act affect this subpart.	Adds the OMB Control number	New section. Addresses information collection requirements in the subpart.

Proposed rule	Final rule	Summary of changes from proposed rule to final rule	Summary of final rule (as compared to rule in effect before this final rule)
NA	23.143 How does this subpart apply to pending proceedings?		New section. States that the provisions of the rule will not affect a child-custody proceeding initiated prior to 180 days after publication date of the rule.
NA	23.144 What happens if some portion of this part is held to be invalid by a court of competent jurisdiction?		New section. States that if any portion of the rule is determined to be invalid by a court, the other portions of the rule remains in effect.

VI. Procedural Requirements

A. Regulatory Planning and Review (E.O. 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is not significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. The Department has developed this rule in a manner consistent with these requirements.

B. Regulatory Flexibility Act

This rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*). The rule directly affects courts that hear Indian child welfare proceedings, and indirectly affects public child welfare agencies and private placement agencies. All of these categories of affected entities likely include entities that qualify as small entities, so the Department has estimated that rule affects approximately 7,625 small entities in these categories. Therefore, the Department has determined that this rule will have an impact on a substantial number of small entities. However, the Department has determined that the impact on entities affected by the rule will not be significant because of the total economic impact of this rule's requirements on any given entity is likely to be limited to an order of magnitude that is minimal in comparison to the entity's annual operating budget. The Department's detailed review of the potential economic effects resulting from new regulatory requirements is available upon request.

C. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The rule does not have an annual effect on the economy of $100 million or more. The rule's requirements will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. As noted above, the rule's requirements on any given entity is a minimal order of magnitude compared to an entity's annual operating budget. In cases where that is not true, the entity (such as a private adoption agency) may choose to pass their costs on to parties seeking placement and, on an individual level, the incremental increase in costs is minimal. Nor will this rule have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of the U.S.-based enterprises to compete with foreign-based enterprises because the rule affects only placement of domestic children who qualify as an ''Indian child'' under the Act. The Department has reviewed the potential increase in costs resulting from new regulatory requirements, and this analysis is available upon request.

D. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

E. Takings (E.O. 12630)

Under the criteria in Executive Order 12630, this rule does not affect individual property rights protected by the Fifth Amendment nor does it involve a compensable ''taking.'' A takings implication assessment is therefore not required.

F. Federalism (E.O. 13132)

Under the criteria in Executive Order 13132, this rule does not have sufficient Federalism implications to warrant preparation of a Federalism summary impact statement. The Department carefully reviewed comments regarding potential Federalism implications and determined that this rule complies with the fundamental Federalism principles and policymaking criteria established in EO 13132. Congress determined that the issue of Indian child welfare is sufficiently national in scope and significance to justify a statute that applies uniformly across States. This rule invokes the United States' special relationship with Indian Tribes and children by establishing a regulatory baseline for implementation to further the goals of ICWA. Such goals include protecting the best interests of Indian children and promoting the stability and security of Indian Tribes and families by establishing minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes that reflect the unique values of Indian culture. States are required to comply with ICWA even in the absence of this rule, and that requirement has existed since ICWA's passage in 1978.

G. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of Executive Order 12988. Specifically, this rule meets the criteria

of section 3(a) requiring all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation and meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

H. Consultation With Indian Tribes (E.O. 13175)

The Department strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have identified substantial direct effects on federally recognized Indian Tribes that will result from this rule. This rule will affect Tribes by promoting implementation of a Federal statute intended to promote the stability and security of Indian Tribes and families. These regulations are the outcome of recommendations made by Tribes during several listening sessions on the ICWA guidelines. The Department hosted several formal Tribal consultation sessions on the proposed rule, including on April 20, 2015, in Portland, Oregon; April 23, 2015, in Rapid City, South Dakota; May 5, 2015, in Albuquerque, New Mexico; May 7, 2015, in Prior Lake, Minnesota; May 11, 2015, by teleconference; and May 14, 2015, in Tulsa, Oklahoma. Many federally recognized Indian Tribes submitted written comments and nearly all, if not all, uniformly supported the regulations, though some had suggestions for improvements. The Department considered each Tribe's comments and their suggested improvements and has addressed them, where possible, in the final rule.

I. Paperwork Reduction Act

This rule contains information collection requirements and a submission to OMB under the Paperwork Reduction Act (PRA) is required. The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* prohibits a Federal agency from conducting or sponsoring a collection of information that requires OMB approval, unless such approval has been obtained and the collection request displays a currently valid OMB control number. Nor is any person required to respond to an information collection request that has not complied with the PRA. OMB has approved the information collection for this rule and has assigned a control number:

OMB Control Number: 1076–0186.

Title: Indian Child Welfare Act (ICWA) Proceedings in State Court.

Brief Description of Collection: This collection addresses the reporting, third-party disclosure, and recordkeeping requirements of ICWA, which requires State courts and agencies and private businesses to provide notice to or contact Tribes and parents/custodians of any child custody proceeding that may involve an ''Indian child,'' and requires State courts and agencies to document certain actions and maintain certain records regarding the removal and placement of an ''Indian child.''

Type of Review: Existing collection in use without OMB control number.

Respondents: State and Tribal governments, businesses, and individuals.

Number of Respondents: 6,906 on average (each year).

Number of Responses: 98,069 on average (each year).

Frequency of Response: On occasion.

Estimated Time per Response: Ranges from 15 minutes to 12 hours.

Estimated Total Annual Hour Burden: 301,811 hours.

Estimated Total Annual Non-Hour Cost: $309,630.

Section	Respondent	Information collection	Annual number of respondents	Frequency of responses	Annual number of responses	Completion time per response	Total annual burden hours
23.107	State court and/or agency.	Obtain information on whether child is ''Indian child''.	50	260	13,000	12	156,000
23.108, 23.109	Tribe	Respond to State regarding Tribal membership.	567	23	13,041	1	13,041
23.110	State court	Notify Tribal court of dismissal and provide records.	50	5	250	0.25	63
23.11, 23.111	State court and/or agency.	Notify Tribe, parents, Indian custodian of child custody proceeding.	50	273	13,650	6	81,900
23.11, 23.111	Private placement agency.	Notify Tribe, parents, Indian custodian of child custody proceeding.	1,289	2	2,578	6	15,468
23.113	State agency or State court.	Document basis for emergency removal/placement.	50	260	13,000	0.5	6,500
23.116, 23.119	State court	Notify Tribal court of transfer request, and provide records.	50	5	250	0.25	63
23.120	Agency	Document ''active efforts''	50	167	8,350	0.5	4,175
23.125, 23.126	Parent/Indian custodian.	Consent to termination or adoption (with required contents).	5,000	1	5,000	0.5	2,500
23.127, 23.128	State court	Notify placement of withdrawal of consent.	50	2	100	0.25	25
23.136	State court	Notify of petition to vacate	50	5	250	0.25	63
23.138	State court	Inform adult adoptee of Tribal affiliation upon request.	50	20	1,000	0.5	500
23.139	State court	Notify of change in status quo of adopted child.	50	4	200	0.25	63
23.140	State court	Provide copy of final adoption decree/order.	50	47	2,350	0.25	588
23.141	State court	Maintain records of each placement (including required documents).	50	167	8,350	0.5	4,175
23.141	State court or agency.	Provide placement records to Tribe or Secretary upon request within 14 days.	50	167	8,350	1.5	12,525

Section	Respondent	Information collection	Annual number of respondents	Frequency of responses	Annual number of responses	Completion time per response	Total annual burden hours
23.141	State court or State agency.	Notify where records maintained	50	167	8,350	0.5	4,175
			.....	.....	98,069	.....	301,811

The annual cost burden to respondents associated with providing notice by certified mail is $6.74 and the cost of a return receipt green card is $2.80. For each Indian child-custody proceeding, at least two notices must be sent—one to the parent and one to the Tribe, totaling $19.08. At an annual estimated 13,000 child welfare proceedings that may involve an ''Indian child,'' where approximately 650 of these include an interstate transfer (13,650), this totals: $260,442. In addition, there are approximately 2,578 voluntary proceedings for which parties may choose to provide notice, at a cost of $49,118. Together, the total cost burden is $309,630.

Comment was taken on this information collection in the proposed rule, as part of the public notice and comment period proposed rule, in compliance with OMB regulations. One commenter, the California Health and Human Services Agency, Department of Social Services (CHHS) submitted comments specifically in response to the request for comments on the information collection burden.

• *Comment on Proposed § 23.111:* The proposed rule states that notice must be by registered mail, whereas the current 23.11(a) allows for notice by certified mail. To require registered mail will increase costs that undermine noticing under ICWA. *Response:* The statute specifies ''registered mail with return receipt requested.'' 25 U.S.C. 1912(a). In response to these comments, the Department examined whether certified mail with return receipt requested is allowable under the statute, and determined that it is because certified mail with return receipt requested better meets the goals of prompt, documented notice. The final rule allows for certified mail.

• *Comment on Proposed § 23.104, providing information on how to contact a Tribe:* The rule should clarify BIA's obligation in gathering the information for the list of Tribe's designated agents and contact information because the current list is outdated, inefficient, and inconsistently maintained. The list is hampered by publication in the **Federal Register** and BIA should be required to publish updates on the Web. The list also no longer maintains the historical affiliations, which was helpful. *Response:* BIA is now publishing the list using historical affiliations, as requested, and making the list available on its Web site, where it can be updated more frequently. The rule does not address this because these are procedures internal to the BIA.

• *Comment on Proposed § 23.111(i), requiring notice by both States where child is transferred interstate:* Requiring both the originating State court and receiving State court to provide notice is duplicative and burdensome because notice should only be required in the State where the actual court proceeding is pending. Another commenter stated that the provision appears to apply to transfers between Tribes and States, where notice is unnecessary. *Response:* The final rule deletes this provision.

• *Comment on Proposed § 23.134, requiring BIA to disclose information to adult adoptees:* This section appears to be creating duplicative work of the BIA and States, because both sections require each to provide adult adoptees information for Tribal enrollment. *Response:* The Act imposes this responsibility on both BIA and the State. Section 1951(b) of the Act imposes the responsibility on BIA, which is in § 23.71(b) of the final rule. Section 1917 of the Act imposes the responsibility on States, which is addressed at § 23.134 of the final rule.

• *Comment on Proposed § 23.137, requiring the State to establish a single location for placement records:* This requirement would be an unfunded mandate with undue burden and would require relocating 1,145 files to a different location and require changes to existing recordkeeping systems. Another State agency commented that there is a significant fiscal and annual burden due to the staffing, costs for copying, packaging and transferring physical files to a different location. *Response:* The final rule deletes the provision requiring States to establish a single, central repository. The associated information collection request has also been deleted.

• *Comment on Proposed § 23.137, requiring providing records to the Department or Tribe upon request:* The 15-minute burden estimate allocated to this task is too low. The time to copy, package and mail the documents will be no less than one hour, but more realistically two hours. *Response:* The final rule updates the burden estimates to reflect 1.5 hours.

If you have comments on this information collection, please submit them to Elizabeth K. Appel, Office of Regulatory Affairs & Collaborative Action—Indian Affairs, U.S. Department of the Interior, 1849 C Street NW., MS–3071, Washington, DC 20240, or by email to *elizabeth.appel@bia.gov.*

J. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment because it is of an administrative, technical, and procedural nature. *See,* 43 CFR 46.210(i). No extraordinary circumstances exist that would require greater review under the National Environmental Policy Act.

K. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

List of Subjects in 25 CFR Part 23

Administrative practice and procedure, Child welfare, Indians, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, amends part 23 in Title 25 of the Code of Federal Regulations as follows:

PART 23—INDIAN CHILD WELFARE ACT

■ 1. The authority citation for part 23 continues to read as follows: 5 U.S.C. 301; 25 U.S.C. 2, 9, 1901–1952.

■ 2. In § 23.2:

■ a. Add a definition for ''active efforts'' in alphabetical order;

■ b. Revise the definition of ''child-custody proceeding'';

■ c. Add definitions for ''continued custody'', ''custody'', and ''domicile'' in alphabetical order;

■ d. Add a definition for ''emergency proceeding'' in alphabetical order;
■ e. Revise the definition of ''extended family member'';
■ f. Add a definition for ''hearing'' in alphabetical order;
■ g. Revise the definitions of ''Indian child'', ''Indian child's Tribe'', and ''Indian custodian'';
■ h. Add a definition for ''Indian foster home'' in alphabetical order;
■ i. Add a definition of ''involuntary proceeding'' in alphabetical order;
■ j. Revise the definition of ''parent'';
■ k. Revise the definitions of ''reservation'' and ''Secretary'';
■ l. Add a definition for ''status offenses'' in alphabetical order;
■ m. Revise the definition of ''Tribal court''; and
■ n. Add definitions for ''upon demand'', and ''voluntary proceeding'' in alphabetical order.

The additions and revisions read as follows:

§ 23.2 Definitions.

* * * * *

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.

* * * * *

Child-custody proceeding. (1) ''Child-custody proceeding'' means and includes any action, other than an emergency proceeding, that may culminate in one of the following outcomes:

(i) *Foster-care placement,* which is any action removing an Indian child from his or her 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 is any action resulting in the termination of the parent-child relationship;

(iii) *Preadoptive placement,* which is 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; or

(iv) *Adoptive placement,* which is the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

(2) An action that may culminate in one of these four outcomes is considered a separate child-custody proceeding from an action that may culminate in a different one of these four outcomes. There may be several child-custody proceedings involving any given Indian child. Within each child-custody proceeding, there may be several hearings. If a child is placed in foster care or another out-of-home placement as a result of a status offense, that status offense proceeding is a child-custody proceeding.

* * * * *

Continued custody means physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law, that a parent or Indian custodian already has or had at any point in the past. The biological mother of a child has had custody of a child.

Custody means physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law. A party may demonstrate the existence of custody by looking to Tribal law or Tribal custom or State law.

Domicile means:

(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.

Emergency proceeding means and includes any court action that involves an emergency removal or emergency placement of an Indian child.

Extended family member is defined by the law or custom of the Indian child's Tribe or, in the absence of such law or custom, is a person who has reached age 18 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.

* * * * *

Hearing means a judicial session held for the purpose of deciding issues of fact, of law, or both.

* * * * *

Indian child means any unmarried person who is under age 18 and either:

(1) Is a member or citizen of an Indian Tribe; or

(2) Is eligible for membership or citizenship in an Indian Tribe and is the

biological child of a member/citizen of an Indian Tribe.

Indian child's Tribe means:

(1) The Indian Tribe in which an Indian child is a member or eligible for membership; or

(2) In the case of an Indian child who is a member of or eligible for membership in more than one Tribe, the Indian Tribe described in § 23.109.

Indian custodian means any Indian who has legal custody of an Indian child under applicable Tribal law or custom or under applicable State law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child. An Indian may demonstrate that he or she is an Indian custodian by looking to Tribal law or Tribal custom or State law.

Indian foster home means a foster home where one or more of the licensed or approved foster parents is an ''Indian'' as defined in 25 U.S.C. 1903(3).

Involuntary proceeding means a child-custody proceeding in which the parent does not consent of his or her free will to the foster-care, preadoptive, or adoptive placement or termination of parental rights or in which the parent consents to the foster-care, preadoptive, or adoptive placement under threat of removal of the child by a State court or agency.

* * * * *

Parent or *parents* means any biological parent or parents of an Indian child, or any Indian who has lawfully adopted an Indian child, including adoptions under Tribal law or custom. It does not include an unwed biological father where paternity has not been acknowledged or established.

Reservation means Indian country as defined in 18 U.S.C 1151 and any lands, not covered under that section, 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.

Secretary means the Secretary of the Interior or the Secretary's authorized representative acting under delegated authority.

* * * * *

Status offenses mean offenses that would not be considered criminal if committed by an adult; they are acts prohibited only because of a person's status as a minor (*e.g.,* truancy, incorrigibility).

* * * * *

Tribal court means a court with jurisdiction over child-custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian Tribe, or any other administrative body of a Tribe vested with authority over child-custody proceedings.

* * * * *

Upon demand means that the parent or Indian custodian can regain custody simply upon verbal request, without any formalities or contingencies.

* * * * *

Voluntary proceeding means 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.

■ 3. Revise § 23.11 to read as follows:

§ 23.11 Notice.

(a) In any involuntary proceeding in a State court where the court knows or has reason to know that an Indian child is involved, and where the identity and location of the child's parent or Indian custodian or Tribe is known, the party seeking the foster-care placement of, or termination of parental rights to, an Indian child must directly notify the parents, the Indian custodians, and the child's Tribe by registered or certified mail with return receipt requested, of the pending child-custody proceedings and their right of intervention. Notice must include the requisite information identified in § 23.111, consistent with the confidentiality requirement in § 23.111(d)(6)(ix). Copies of these notices must be sent to the appropriate Regional Director listed in paragraphs (b)(1) through (12) of this section by registered or certified mail with return receipt requested or by personal delivery and must include the information required by § 23.111.

(b)(1) For child-custody proceedings in Alabama, Connecticut, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, or any territory or possession of the United States, notices must be sent to the following address: Eastern Regional Director, Bureau of Indian Affairs, 545 Marriott Drive, Suite 700, Nashville, Tennessee 37214.

(2) For child-custody proceedings in Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio, or Wisconsin, notices must be sent to the following address: Minneapolis Regional Director, Bureau of Indian Affairs, 331 Second Avenue South, Minneapolis, Minnesota 55401–2241.

(3) For child-custody proceedings in Nebraska, North Dakota, or South Dakota, notices must be sent to the following address: Aberdeen Regional Director, Bureau of Indian Affairs, 115 Fourth Avenue SE., Aberdeen, South Dakota 57401.

(4) For child-custody proceedings in Kansas, Texas (except for notices to the Ysleta del Sur Pueblo of El Paso County, Texas), or the western Oklahoma counties of Alfalfa, Beaver, Beckman, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Cotton, Custer, Dewey, Ellis, Garfield, Grant, Greer, Harmon, Harper, Jackson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Major, Noble, Oklahoma, Pawnee, Payne, Pottawatomie, Roger Mills, Texas, Tillman, Washita, Woods or Woodward, notices must be sent to the following address: Anadarko Regional Director, Bureau of Indian Affairs, P.O. Box 368, Anadarko, Oklahoma 73005. Notices to the Ysleta del Sur Pueblo must be sent to the Albuquerque Regional Director at the address listed in paragraph (b)(6) of this section.

(5) For child-custody proceedings in Wyoming or Montana (except for notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana), notices must be sent to the following address: Billings Regional Director, Bureau of Indian Affairs, 316 N. 26th Street, Billings, Montana 59101. Notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, must be sent to the Portland Regional Director at the address listed in paragraph (b)(11) of this section.

(6) For child-custody proceedings in the Texas counties of El Paso and Hudspeth or in Colorado or New Mexico (exclusive of notices to the Navajo Nation from the New Mexico counties listed in paragraph (b)(9) of this section), notices must be sent to the following address: Albuquerque Regional Director, Bureau of Indian Affairs, 615 First Street, P.O. Box 26567, Albuquerque, New Mexico 87125. Notices to the Navajo Nation must be sent to the Navajo Regional Director at the address listed in paragraph (b)(9) of this section.

(7) For child-custody proceedings in Alaska (except for notices to the Metlakatla Indian Community, Annette Island Reserve, Alaska), notices must be sent to the following address: Juneau Regional Director, Bureau of Indian

Affairs, 709 West 9th Street, Juneau, Alaska 99802–1219. Notices to the Metlakatla Indian Community, Annette Island Reserve, Alaska, must be sent to the Portland Regional Director at the address listed in paragraph (b)(11) of this section.

(8) For child-custody proceedings in Arkansas, Missouri, or the eastern Oklahoma counties of Adair, Atoka, Bryan, Carter, Cherokee, Craig, Creek, Choctaw, Coal, Delaware, Garvin, Grady, Haskell, Hughes, Jefferson, Johnson, Latimer, LeFlore, Love, Mayes, McCurtain, McClain, McIntosh, Murray, Muskogee, Nowata, Okfuskee, Okmulgee, Osage, Ottawa, Pittsburg, Pontotoc, Pushmataha, Marshall, Rogers, Seminole, Sequoyah, Stephens, Tulsa, Wagoner, or Washington, notices must be sent to the following address: Muskogee Regional Director, Bureau of Indian Affairs, 101 North Fifth Street, Muskogee, Oklahoma 74401.

(9) For child-custody proceedings in the Arizona counties of Apache, Coconino (except for notices to the Hopi Tribe of Arizona and the San Juan Southern Paiute Tribe of Arizona) or Navajo (except for notices to the Hopi Tribe of Arizona); the New Mexico counties of McKinley (except for notices to the Zuni Tribe of the Zuni Reservation), San Juan, or Socorro; or the Utah county of San Juan, notices must be sent to the following address: Navajo Regional Director, Bureau of Indian Affairs, P.O. Box 1060, Gallup, New Mexico 87301. Notices to the Hopi and San Juan Southern Paiute Tribes of Arizona must be sent to the Phoenix Regional Director at the address listed in paragraph (b)(10) of this section. Notices to the Zuni Tribe of the Zuni Reservation must be sent to the Albuquerque Regional Director at the address listed in paragraph (b)(6 of this section).

(10) For child-custody proceedings in Arizona (exclusive of notices to the Navajo Nation from those counties listed in paragraph (b)(9) of this section), Nevada, or Utah (exclusive of San Juan County), notices must be sent to the following address: Phoenix Regional Director, Bureau of Indian Affairs, 1 North First Street, P.O. Box 10, Phoenix, Arizona 85001.

(11) For child-custody proceedings in Idaho, Oregon, or Washington, notices must be sent to the following address: Portland Regional Director, Bureau of Indian Affairs, 911 NE 11th Avenue, Portland, Oregon 97232. All notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, located in the Montana counties of Flathead, Lake, Missoula, and Sanders, must also be sent to the Portland Regional Director.

(12) For child-custody proceedings in California or Hawaii, notices must be sent to the following address: Sacramento Regional Director, Bureau of Indian Affairs, Federal Office Building, 2800 Cottage Way, Sacramento, California 95825.

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

(d) Upon request from a party to an Indian child-custody proceeding, the Secretary will make a reasonable attempt to identify and locate the child's Tribe, parents, or Indian custodians to assist the party seeking the information.

■ 4. Revise § 23.71 to read as follows:

§ 23.71 Recordkeeping and information availability.

(a) The Division of Human Services, Bureau of Indian Affairs (BIA), is authorized to receive all information and to maintain a central file on all State Indian adoptions. This file is confidential and only designated persons may have access to it.

(b) Upon the request of an adopted Indian who has reached age 18, the adoptive or foster parents of an Indian child, or an Indian Tribe, BIA will disclose such information as may be necessary for purposes of Tribal enrollment or determining any rights or benefits associated with Tribal membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, BIA must certify to the Indian child's Tribe, where the information warrants, that the child's parentage and other circumstances entitle the child to enrollment under the criteria established by such Tribe.

(c) BIA will ensure that the confidentiality of this information is maintained and that the information is not subject to the Freedom of Information Act, 5 U.S.C. 552, as amended.

■ 5. Add subpart I to read as follows:

Subpart I—Indian Child Welfare Act Proceedings

General Provisions

Sec.

Pretrial Requirements

Petitions To Transfer to Tribal Court

Adjudication of Involuntary Proceedings

Voluntary Proceedings

Subpart I—Indian Child Welfare Act Proceedings

General Provisions

§ 23.101 What is the purpose of this subpart?

The regulations in this subpart clarify the minimum Federal standards governing implementation of the Indian Child Welfare Act (ICWA) to ensure that ICWA is applied in all States consistent with the Act's express language, Congress's intent in enacting the statute, and to promote the stability and security of Indian tribes and families.

§ 23.102 What terms do I need to know?

The following terms and their definitions apply to this subpart. All other terms have the meanings assigned in § 23.2.

Agency means a nonprofit, for-profit, or governmental organization and its employees, agents, or officials that performs, or provides services to biological parents, foster parents, or adoptive parents to assist in the administrative and social work necessary for foster, preadoptive, or adoptive placements.

Indian organization means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians or a Tribe, or a majority of whose members are Indians.

§ 23.103 When does ICWA apply?

(a) ICWA includes requirements that apply whenever an Indian child is the subject of:

(1) A child-custody proceeding, including:

(i) An involuntary proceeding;

(ii) A voluntary proceeding that could prohibit the parent or Indian custodian from regaining custody of the child upon demand; and

(iii) A proceeding involving status offenses if any part of the proceeding results in the need for out-of-home placement of the child, including a foster-care, preadoptive, or adoptive placement, or termination of parental rights.

(2) An emergency proceeding.

(b) ICWA does not apply to:

(1) A Tribal court proceeding;

(2) A proceeding regarding a criminal act that is not a status offense;

(3) An award of custody of the Indian child to one of the parents including, but not limited to, an award in a divorce proceeding; or

(4) A voluntary 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, chosen for the Indian child and that does not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand.

(c) If a proceeding listed in paragraph (a) of this section concerns a child who meets the statutory definition of ''Indian child,'' then ICWA will apply to that proceeding. In determining whether ICWA applies to a proceeding, the State court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum.

(d) If ICWA applies at the commencement of a proceeding, it will not cease to apply simply because the child reaches age 18 during the pendency of the proceeding.

§ 23.104 What provisions of this subpart apply to each type of child-custody proceeding?

The following table lists what sections of this subpart apply to each type of child-custody proceeding identified in § 23.103(a):

Section	Type of proceeding
23.101–23.106 (General Provisions)	Emergency, Involuntary, Voluntary.
Pretrial Requirements:	
23.107 (How should a State court determine if there is reason to know the child is an Indian child?).	Emergency, Involuntary, Voluntary.
23.108 (Who makes the determination as 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?).	Emergency, Involuntary, Voluntary.
23.109 (How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?).	Emergency, Involuntary, Voluntary.
23.110 (When must a State court dismiss an action?)	Involuntary, Voluntary.
23.111 (What are the notice requirements for a child-custody proceeding involving an Indian child?).	Involuntary (foster-care placement and termination of parental rights).
23.112 (What time limits and extensions apply?)	Involuntary (foster-care placement and termination of parental rights).
23.113 (What are the standards for emergency proceedings involving an Indian child?)	Emergency.
23.114 (What are the requirements for determining improper removal?)	Involuntary.
Petitions to Transfer to Tribal Court:	
23.115 (How are petitions for transfer of a proceeding made?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).

Section	Type of proceeding
23.116 (What happens after a petition for transfer is made?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
23.117 (What are the criteria for ruling on transfer petitions?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
23.118 (How is a determination of ''good cause'' to deny transfer made?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
23.119 (What happens after a petition for transfer is granted?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
Adjudication of Involuntary Proceedings:	
23.120 (How does the State court ensure that active efforts have been made?)	Involuntary (foster-care placement and termination of parental rights).
23.121 (What are the applicable standards of evidence?)	Involuntary (foster-care placement and termination of parental rights).
23.122 (Who may serve as a qualified expert witness?)	Involuntary (foster-care placement and termination of parental rights).
23.123 Reserved	N/A.
Voluntary Proceedings:	
23.124 (What actions must a State court undertake in voluntary proceedings?)	Voluntary.
23.125 (How is consent obtained?)	Voluntary.
23.126 (What information must a consent document contain?)	Voluntary.
23.127 (How is withdrawal of consent to a foster-care placement achieved?)	Voluntary.
23.128 (How is withdrawal of consent to a termination of parental rights or adoption achieved?)	Voluntary.
Dispositions:	
23.129 (When do the placement preferences apply?)	Involuntary, Voluntary.
23.130 (What placement preferences apply in adoptive placements?)	Involuntary, Voluntary.
23.131 (What placement preferences apply in foster-care or preadoptive placements?)	Involuntary, Voluntary.
23.132 (How is a determination of ''good cause'' to depart from the placement preferences made?).	Involuntary, Voluntary.
Access:	
23.133 (Should courts allow participation by alternative methods?)	Emergency, Involuntary.
23.134 (Who has access to reports and records during a proceeding?)	Emergency, Involuntary.
23.135 Reserved.	N/A.
Post-Trial Rights & Responsibilities:	
23.136 (What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?).	Involuntary (if consent given under threat of removal), voluntary.
23.137 (Who can petition to invalidate an action for certain ICWA violations?)	Emergency (to extent it involved a specified violation), involuntary, voluntary.
23.138 (What are the rights to information about adoptees' Tribal affiliations?)	Emergency, Involuntary, Voluntary.
23.139 (Must notice be given of a change in an adopted Indian child's status?)	Involuntary, Voluntary.
Recordkeeping:	
23.140 (What information must States furnish to the Bureau of Indian Affairs?)	Involuntary, Voluntary.
23.141 (What records must the State maintain?)	Involuntary, Voluntary.
23.142 (How does the Paperwork Reduction Act affect this subpart?)	Emergency, Involuntary, Voluntary.
Effective Date:	
23.143 (How does this subpart apply to pending proceedings?)	Emergency, Involuntary, Voluntary.
Severability:	
23.144 (What happens if some portion of part is held to be invalid by a court of competent jurisdiction?).	Emergency, Involuntary, Voluntary.

Note: For purposes of this table, status-offense child-custody proceedings are included as a type of involuntary proceeding.

§ 23.105 How do I contact a Tribe under the regulations in this subpart?

To contact a Tribe to provide notice or obtain information or verification under the regulations in this subpart, you should direct the notice or inquiry as follows:

(a) Many Tribes designate an agent for receipt of ICWA notices. The BIA publishes a list of Tribes' designated Tribal agents for service of ICWA notice in the **Federal Register** each year and makes the list available on its Web site at *www.bia.gov.*

(b) For a Tribe without a designated Tribal agent for service of ICWA notice, contact the Tribe to be directed to the appropriate office or individual.

(c) If you do not have accurate contact information for a Tribe, or the Tribe contacted fails to respond to written inquiries, you should seek assistance in contacting the Indian Tribe from the BIA local or regional office or the BIA's Central Office in Washington, DC (see *www.bia.gov*).

§ 23.106 How does this subpart interact with State and Federal laws?

(a) The regulations in this subpart provide minimum Federal standards to ensure compliance with ICWA.

(b) Under section 1921 of ICWA, where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires the State or Federal court to apply the higher State or Federal standard.

Pretrial Requirements

§ 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.

§ 23.108 Who makes the determination as 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.

§ 23.109 How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?

(a) If the Indian child is a member or eligible for membership in only one Tribe, that Tribe must be designated as the Indian child's Tribe.

(b) If the Indian child meets the definition of ''Indian child'' through more than one Tribe, deference should be given to the Tribe in which the Indian child is already a member, unless otherwise agreed to by the Tribes.

(c) If an Indian child meets the definition of ''Indian child'' through more than one Tribe because the child is a member in more than one Tribe or the child is not a member of but is eligible for membership in more than one Tribe, the court must provide the opportunity in any involuntary child-custody proceeding for the Tribes to determine which should be designated as the Indian child's Tribe.

(1) If the Tribes are able to reach an agreement, the agreed-upon Tribe should be designated as the Indian child's Tribe.

(2) If the Tribes are unable to reach an agreement, the State court designates, for the purposes of ICWA, the Indian Tribe with which the Indian child has the more significant contacts as the Indian child's Tribe, taking into consideration:

(i) Preference of the parents for membership of the child;

(ii) Length of past domicile or residence on or near the reservation of each Tribe;

(iii) Tribal membership of the child's custodial parent or Indian custodian; and

(iv) Interest asserted by each Tribe in the child-custody proceeding;

(v) Whether there has been a previous adjudication with respect to the child by a court of one of the Tribes; and

(vi) Self-identification by the child, if the child is of sufficient age and capacity to meaningfully self-identify.

(3) A determination of the Indian child's Tribe for purposes of ICWA and the regulations in this subpart do not constitute a determination for any other purpose.

§ 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.

§ 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.

§ 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.

§ 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.

§ 23.114 What are the requirements for determining improper removal?

(a) If, in the course of any child-custody proceeding, any party asserts or the court has reason to believe that the Indian child may have been improperly removed from the custody of his or her parent or Indian custodian, or that the Indian child has been improperly retained (such as after a visit or other temporary relinquishment of custody), the court must expeditiously determine whether there was improper removal or retention.

(b) If the court finds that the Indian child was improperly removed or retained, the court must terminate the proceeding and the child must be returned immediately to his or her parent or Indian custodian, unless returning the child to his parent or Indian custodian would subject the child to substantial and immediate danger or threat of such danger.

Petitions To Transfer to Tribal Court

§ 23.115 How are petitions for transfer of a proceeding made?

(a) Either parent, the Indian custodian, or the Indian child's Tribe may request, at any time, orally on the record or in writing, that the State court transfer a foster-care or termination-of-parental-rights proceeding to the jurisdiction of the child's Tribe.

(b) The right to request a transfer is available at any stage in each foster-care or termination-of-parental-rights proceeding.

§ 23.116 What happens after a petition for transfer is made?

Upon receipt of a transfer petition, the State court must ensure that the Tribal court is promptly notified in writing of the transfer petition. This notification may request a timely response regarding whether the Tribal court wishes to decline the transfer.

§ 23.117 What are the criteria for ruling on transfer petitions?

Upon receipt of a transfer petition from an Indian child's parent, Indian custodian, or Tribe, the State court must transfer the child-custody proceeding unless the court determines that transfer is not appropriate because one or more of the following criteria are met:

(a) Either parent objects to such transfer;

(b) The Tribal court declines the transfer; or

(c) Good cause exists for denying the transfer.

§ 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.

§ 23.119 What happens after a petition for transfer is granted?

(a) If the Tribal court accepts the transfer, the State court should expeditiously provide the Tribal court with all records related to the proceeding, including, but not limited to, the pleadings and any court record.

(b) The State court should work with the Tribal court to ensure that the transfer of the custody of the Indian child and of the proceeding is accomplished smoothly and in a way that minimizes the disruption of services to the family.

Adjudication of Involuntary Proceedings

§ 23.120 How does the State court ensure that active efforts have been made?

(a) Prior to ordering an involuntary foster-care placement or termination of parental rights, the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful.

(b) Active efforts must be documented in detail in the record.

§ 23.121 What are the applicable standards of evidence?

(a) The court must not order a foster-care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(b) The court must not order a termination of parental rights for an Indian child unless evidence beyond a reasonable doubt is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(c) For a foster-care placement or termination of parental rights, the evidence must 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.

(d) Without a causal relationship identified in paragraph (c) of this section, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.

§ 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.

§ 23.123 [Reserved]

Voluntary Proceedings

§ 23.124 What actions must a State court undertake in voluntary proceedings?

(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. As described in § 23.107, where a consenting parent requests anonymity, a Tribe receiving such information must keep relevant documents and information confidential.

(c) State courts must ensure that the placement for the Indian child complies with §§ 23.129–23.132.

§ 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.

§ 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.

§ 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.

§ 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.

Dispositions

§ 23.129 When do the placement preferences apply?

(a) In any preadoptive, adoptive, or foster-care placement of an Indian child, the placement preferences specified in § 23.130 and § 23.131 apply.

(b) Where a consenting parent requests anonymity in a voluntary proceeding, the court must give weight to the request in applying the preferences.

(c) The placement preferences must be applied in any foster-care, preadoptive, or adoptive placement unless there is a determination on the record that good cause under § 23.132 exists to not apply those placement preferences.

§ 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.

§ 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.

§ 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.

Access

§ 23.133 Should courts allow participation by alternative methods?

If it possesses the capability, the court should allow alternative methods of participation in State-court child-custody proceedings involving an Indian child, such as participation by telephone, videoconferencing, or other methods.

§ 23.134 Who has access to reports and records during a proceeding?

Each party to an emergency proceeding or a foster-care-placement or termination-of-parental-rights proceeding under State law involving an Indian child has a right to timely examine all reports and other documents filed or lodged with the court upon which any decision with respect to such action may be based.

§ 23.135 [Reserved]

Post-Trial Rights & Responsibilities

§ 23.136 What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?

(a) Within two years after a final decree of adoption of any Indian child by a State court, or within any longer period of time permitted by the law of the State, the State court may invalidate the voluntary adoption upon finding that the parent's consent was obtained by fraud or duress.

(b) Upon the parent's filing of a petition to vacate the final decree of adoption of the parent's Indian child, the court must give notice to all parties to the adoption proceedings and the Indian child's Tribe and must hold a hearing on the petition.

(c) Where the court finds that the parent's consent was obtained through fraud or duress, the court must vacate the final decree of adoption, order the consent revoked, and order that the child be returned to the parent.

§ 23.137 Who can petition to invalidate an action for certain ICWA violations?

(a) Any of the following may petition any court of competent jurisdiction to invalidate an action for foster-care placement or termination of parental rights under state law where it is alleged that 25 U.S.C. 1911, 1912, or 1913 has been violated:

(1) An Indian child who is or was the subject of any action for foster-care placement or termination of parental rights;

(2) A parent or Indian custodian from whose custody such child was removed; and

(3) The Indian child's Tribe.

(b) Upon a showing that an action for foster-care placement or termination of parental rights violated any provision of 25 U.S.C. 1911, 1912, or 1913, the court must determine whether it is appropriate to invalidate the action.

(c) To petition for invalidation, there is no requirement that the petitioner's rights under ICWA were violated; rather, a petitioner may challenge the action based on any violations of 25 U.S.C. 1911, 1912, or 1913 during the course of the child-custody proceeding.

§ 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 parents and provide such other information necessary to protect any rights, which may include Tribal membership, resulting from the individual's Tribal relationship.

§ 23.139 Must notice be given of a change in an adopted Indian child's status?

(a) If an Indian child has been adopted, the court must notify, by registered or certified mail with return receipt requested, the child's biological parent or prior Indian custodian and the Indian child's Tribe whenever:

(1) A final decree of adoption of the Indian child has been vacated or set aside; or

(2) The adoptive parent has voluntarily consented to the termination of his or her parental rights to the child.

(b) The notice must state the current name, and any former name, of the Indian child, inform the recipient of the right to petition for return of custody of the child, and provide sufficient information to allow the recipient to participate in any scheduled hearings.

(c) A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice and filing the waiver with the court.

(1) Prior to accepting the waiver, the court must explain the consequences of the waiver and explain how the waiver may be revoked.

(2) The court must certify that the terms and consequences of the waiver and how the waiver may be revoked were explained 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.

(3) Where confidentiality is requested or indicated, execution of the waiver 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.

(4) The biological parent or Indian custodian may revoke the waiver at any time by filing with the court a written notice of revocation.

(5) A revocation of the right to receive notice does not affect any child-custody proceeding that was completed before the filing of the notice of revocation.

Recordkeeping

§ 23.140 What information must States furnish to the Bureau of Indian Affairs?

(a) Any State court entering a final adoption decree or order in any voluntary or involuntary Indian-child adoptive placement must furnish a copy of the decree or order within 30 days to the Bureau of Indian Affairs, Chief, Division of Human Services, 1849 C Street NW., Mail Stop 4513 MIB, Washington, DC 20240, along with the following information, in an envelope marked ''Confidential'':

(1) Birth name and birthdate of the Indian child, and Tribal affiliation and name of the Indian child after adoption;

(2) Names and addresses of the biological parents;

(3) Names and addresses of the adoptive parents;

(4) Name and contact information for any agency having files or information relating to the adoption;

(5) Any affidavit signed by the biological parent or parents asking that their identity remain confidential; and

(6) Any information relating to Tribal membership or eligibility for Tribal membership of the adopted child.

(b) If a State agency has been designated as the repository for all State-court adoption information and is fulfilling the duties described in paragraph (a) of this section, the State courts in that State need not fulfill those same duties.

§ 23.141 What records must the State maintain?

(a) The State must maintain a record of every voluntary or involuntary foster-care, preadoptive, and adoptive

placement of an Indian child and make the record available within 14 days of a request by an Indian child's Tribe or the Secretary.

(b) The record must contain, at a minimum, the petition or complaint, all substantive orders entered in the child-custody proceeding, the complete record of the placement determination (including, but not limited to, the findings in the court record and the social worker's statement), and, if the placement departs from the placement preferences, detailed documentation of the efforts to comply with the placement preferences.

(c) A State agency or agencies may be designated to be the repository for this information. The State court or agency should notify the BIA whether these records are maintained within the court system or by a State agency.

§ 23.142 How does the Paperwork Reduction Act affect this subpart?

The collections of information contained in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned OMB Control Number 1076–0186. Response is required to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless the form or regulation requesting the information displays a currently valid OMB Control Number. Send comments regarding this collection of information, including suggestions for reducing the burden, to the Information Collection Clearance Officer—Indian Affairs, 1849 C Street NW., Washington, DC 20240.

Effective Date

§ 23.143 How does this subpart apply to pending proceedings?

None of the provisions of this subpart affects a proceeding under State law for foster-care placement, termination of parental rights, preadoptive placement, or adoptive placement that was initiated prior to December 12, 2016, but the provisions of this subpart apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

Severability

§ 23.144 What happens if some portion of this part is held to be invalid by a court of competent jurisdiction?

If any portion of this part is determined to be invalid by a court of competent jurisdiction, the other portions of the part remain in effect. For example, the Department has considered separately whether the provisions of this part apply to involuntary and voluntary proceedings; thus, if a particular provision is held to be invalid as to one type of proceeding, it is the Department's intent that it remains valid as to the other type of proceeding.

Dated: June 6, 2016.

Lawrence S. Roberts,

Acting Assistant Secretary—Indian Affairs.

[FR Doc. 2016–13686 Filed 6–13–16; 8:45 am]

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United States Department of the Interior

OFFICE OF THE SOLICITOR
1849 C STREET N.W.
WASHINGTON, DC 20240

JUN - 8 2016

M-37037

Memorandum

To: Secretary

From: Solicitor

Subject: Implementation of the Indian Child Welfare Act by Legislative Rule

I. Introduction

This Memorandum identifies the authority for the promulgation of the Department of the Interior's ("Department's") Indian Child Welfare Act ("ICWA" or "the Act")[1] final rule. As discussed below, Congress delegated the Department the authority to issue this legislative rule.

II. Background

Pursuant to its broad constitutional authority over Indian affairs, Congress enacted ICWA in 1978 to address "the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes."[2] ICWA was the result of lengthy congressional hearings, several years of government-to-government consultation with Indian tribes and organizations, and input from Federal and State government agencies and public and private organizations.[3]

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[1] 25 U.S.C. §§ 1901 *et seq.*, Pub. L. No. 95-608, 92 Stat. 3069 (1978).
[2] *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989).
[3] *See, e.g.*, *To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, To Prevent the Breakup of Indian Families, and for Other Purposes: Hearing on S. 1214 Before the Subcomm. On Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 29 (1978) [hereinafter "1978 House Hearing"]; *To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs*, 95th Cong. (1977) [hereinafter "1977 Senate Hearing"]; *Problems that American Indian Families Face in Raising their Children and How these Problems are Affected by Federal Action or Inaction: Hearing Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93rd Cong. (1974) [hereinafter "1974 Senate Hearing"]; H.R. REP. NO. 95-1386 (1978) [hereinafter "House Report"]; S. REP. NO. 95-597 (1977) [hereinafter "Senate Report"]; 124 CONG. REC. 38,101-12 (1978); 123 CONG. REC. 37,223-26 (1977); 123 CONG. REC. 21,042-44 (1977); TASK FORCE FOUR: FEDERAL, STATE, AND TRIBAL JURISDICTION, FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION, REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION (1976) [hereinafter "AIPRC Report"].

A. Congressional Authority

The plenary power of Congress to address Indian affairs "is drawn both explicitly and implicitly"[4] from the Constitution's Indian Commerce Clause[5] and Treaty Clause.[6] The United States Supreme Court has recognized the Indian Commerce Clause as the source of Congress's "broad power" in the arena of Indian affairs,[7] granting Congress wider authority in Indian affairs than it has pursuant to the Interstate Commerce Clause.[8] In addition, it is "undisputed" that a trust relationship exists between the United States and Indian Tribes,[9] and courts have found the trust relationship to be another source of Congress's plenary authority over Indian affairs.[10] Congress regularly defines and structures its trust relationship with Indian Tribes through legislation.[11]

Congressional authority includes not only the power to legislate regarding Indian Tribes, but also regarding Indians as individuals. "On numerous occasions [the Supreme] Court specifically has upheld legislation that singles out Indians for particular and special treatment."[12] In *Morton v. Mancari*, the Supreme Court held that a statute providing a hiring preference and a policy providing a promotion preference at the Bureau of Indian Affairs to Indians did not violate the Due Process Clause of the Fifth Amendment because such a preference was not racial, but rather turned on the special legal and political status of Indians and was both "reasonable and rationally designed to further Indian self-government."[13] In the wake of *Mancari*, the Supreme Court has

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[4] *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

[5] U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . with the Indian tribes[.]").

[6] U.S. CONST. art. II, § 2, cl. 2 (granting the President the power to make treaties); *United States v. Lara*, 541 U.S. 193, 200 (2004) (noting that the Supreme Court has "traditionally identified" the Indian Commerce Clause and the Treaty Clause as sources of Congress's Indian affairs power) (citations omitted)).

[7] *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 837 (1982); *see also Lara*, 541 U.S. at 200 ("The 'central function of the Indian Commerce Clause,' we have said, 'is to provide Congress with plenary power to legislate in the field of Indian affairs.'") (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)).

[8] *Cotton Petroleum*, 490 U.S. at 192.

[9] *See, e.g.*, *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011) ("We do not question 'the undisputed existence of a general trust relationship between the United States and the Indian people.'") (quoting *United States v. Mitchell*, 463 U.S. 206, 225 (1983)); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (noting that "this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with" Indians, and that "in many acts of Congress and numerous decisions of this Court, [the Government] has charged itself with moral obligations of the highest responsibility and trust" (internal citations and footnotes omitted)); *see also* U.S. Dep't of Interior, Office of the Sec'y, Order No. 3355 at 2 (Aug. 20, 2014), *available at* https://www.doi.gov/sites/doi.gov/files/migrated/news/pressreleases/upload/Signed-SO-3335.pdf ("The United States' trust responsibility is a well-established legal obligation that originates from the unique, historical relationship between the United States and Indian tribes.").

[10] *United States v. Long*, 324 F.3d 475, 479 (7th Cir. 2003) ("Courts have attributed Congress's plenary powers over Indian relations to the Indian Commerce Clause . . . and to Congress's protectorate or trust relationship with the Indian tribes.") (citing, *inter alia*, *Cotton Petroleum*, 490 U.S. at 192).

[11] *See Jicarilla Apache Nation*, 564 U.S. at 176 ("Congress has expressed this [trust] policy in a series of statutes that have defined and redefined the trust relationship between the United States and the Indian tribes."); *see also Mitchell*, 463 U.S. at 219-27 (discussing trust relationship in context of statutes charging the Department with managing sales of timber from Indian lands).

[12] *Mancari*, 417 U.S. at 554-55 (collecting cases upholding Indian-specific statutes).

[13] *Id.* at 555.

consistently rejected constitutional challenges to statutes that provide special treatment for Indians.[14] Moreover, in *United States v. Antelope*, the Court established that *Mancari* was not a narrow holding; rather, *Mancari* stands broadly for "the conclusion that federal regulation of Indian affairs is not based on impermissible classifications," but is instead "rooted in the unique status of Indians as a separate people with their own political institutions."[15]

Congress enacted ICWA in recognition and furtherance of the "special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people."[16] In particular, Congress found that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe."[17] Congress accordingly did not apply ICWA to all children with Indian ancestry, but instead limited the Act's scope exclusively to children who are either themselves Tribal members, or are both eligible for membership and the biological child of a Tribal member.[18] Thus, like the preferences at issue in *Mancari*, ICWA does not apply based on a showing of racial ancestry, but rather applies to particular children on the basis of the unique political status of Indian Tribes.[19] And, because ICWA was enacted to provide procedural and substantive safeguards for qualifying children to be placed or remain with Indian families, the Act thus was passed to help fulfill "Congress's unique obligation toward the Indians."[20]

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[14] *See, e.g.*, *United States v. Antelope*, 430 U.S. 641, 646-47 (1977) (statute bringing crimes committed by Indians on Indian reservations under Federal jurisdiction did not violate due process or equal protection); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479-80 (1976) (tax immunity for reservation Indians is not racial discrimination).

[15] *Antelope*, 430 U.S. at 646 (internal quotation omitted); *accord Fisher v. Dist. Ct. of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 390-91 (1976) (exclusive Tribal court jurisdiction over adoption proceedings involving Indians is not racial discrimination). Although *Antelope* and *Fisher* concerned on-reservation activities, the Federal government's authority to legislate with regard to Indians has never been limited to Indians on reservations. *Morton v. Ruiz*, 415 U.S. 199, 236 (1974) (describing "[t]he overriding duty of our Federal Government to deal fairly with Indians wherever located"). *See also Washington v. Wash. St. Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979) (noting "the peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment on their behalf when rationally related to the Government's 'unique obligation toward the Indians'") (quoting *Mancari*, 417 U.S. at 555); *Livingston v. Ewing*, 601 F.2d 1110, 1115-16 (10th Cir. 1979) (rejecting equal protection challenge to state policy and city resolution providing Indian preference in the sale of crafts at a city museum and State government building); *St. Paul Intertribal Housing Bd. v. Reynolds*, 564 F. Supp. 1408, 1412-13 (D. Minn. 1983) (rejecting equal protection challenge to off-reservation Indian housing program).

[16] 25 U.S.C. § 1901.

[17] *Id.* at § 1901(3).

[18] *Id.* at § 1903(4). As the Supreme Court has made clear, membership is voluntary and tribal authority exists only "over Indians who consent to be tribal members." *Duro v. Reina*, 495 U.S. 676, 693 (1990), *superseded by statute on other grounds*, Pub. L. No. 101-511, § 8077(d), 104 Stat. 1893 (codified as amended at 25 U.S.C. §§ 1301-1303); *accord id.* at 693 ("Indians like all other citizens share allegiance to the overriding sovereign, the United States. A tribe's additional authority comes from the consent of its members . . . ."). And by the same token, the Supreme Court has made clear that "a tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978).

[19] *See Mancari*, 417 U.S. at 553 n.24 (noting preference "applies only to members of 'federally recognized' tribes"); *see also In re L.S.*, 812 N.W.2d 505, 508-09 (S.D. 2012) (ICWA not based on racial classifications).

[20] *Mancari*, 417 U.S. at 555; 25 U.S.C. § 1901 (citing "the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people" in enacting ICWA). *See also* 124 CONG. REC. at 38,102 ("[C]lose analysis of the Supreme Court decisions in this area . . . firmly supports the

In enacting ICWA, Congress found that the Constitution provides Congress authority over Indian affairs.[21] ICWA states that "Congress . . . has assumed the responsibility for the protection and preservation of Indian tribes and their resources,"[22] and that ICWA both "'seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.'"[23] Congress further declared "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."[24] And although Congress sought to address "the failure of State officials, agencies, and procedures to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future,"[25] Congress carefully considered the traditional role of the States in the arena of child welfare outside Indian reservations. Congress accordingly crafted ICWA to balance the interests of the United States, the individual States, Indian Tribes, and individual Indians:

> While the committee does not feel that it is necessary or desirable to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits, it does feel the need to establish minimum Federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe.[26]

B. Legislative History of ICWA

After several years of investigation in the 1970s, Congress found "that an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies."[27] The congressional investigation, which resulted in hundreds of pages of legislative testimony compiled over the course of four years of hearings, deliberation, and debate, revealed "the wholesale separation of Indian children from their families."[28] The empirical and anecdotal evidence showed that Indian children were separated from their families at significantly higher rates than non-Indian children.[29] In some

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constitutionality of all the provisions of the bill. In addition, the American law division of the Library of Congress made a similar exhaustive analysis and arrived at the same conclusion.").

[21] 25 U.S.C. § 1901(1) (citing U.S. CONST. art I, § 8, cl. 3).

[22] *Id.* at § 1901(2).

[23] *Holyfield*, 490 U.S. at 37 (quoting House Report, *supra* note 3, at 23).

[24] 25 U.S.C. § 1902.

[25] House Report, *supra* note 3, at 19.

[26] *Id.*

[27] 25 U.S.C. § 1901(4); *see also Holyfield*, 490 U.S. at 32 (noting statistics indicating "that 25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions").

[28] House Report, *supra* note 3, at 9 (sic corrected).

[29] Congress described "shocking" disparities:

> In Minnesota, Indian children are placed in foster care or in adoptive homes at a per capita rate five times greater than non-Indian children. In Montana, the ratio of Indian foster-care placement is at least 13 times greater. In South Dakota, 40 percent of all adoptions made by the State's Department of Public Welfare since 1967-68 are of Indian children, yet Indians make up only 7 percent of the juvenile population. The

States, between twenty-five and thirty-five percent of Indian children lived in foster care, adoptive care, or institutions.[30] Indian children removed from their homes were most often placed in non-Indian foster care and adoptive homes.[31] These separations contributed to a number of problems, including the loss of children from Tribal communities, loss of Indian traditions and culture, and long-term emotional effects on Indian children caused by the loss of their Indian identity.[32]

Congress found that removal of children and unnecessary termination of parental rights were utilized to separate Indian children from their Indian communities. The four leading factors contributing to the high rates of Indian child removal were a lack of culturally competent State child welfare standards for assessing the fitness of Indian families; systematic due process violations during child custody procedures that deprived Indian children and their parents of fundamental rights; economic incentives favoring removal of Indian children from their families and communities; and social conditions in Indian country.[33]

Congress also found that many of these problems arose from State actions, *i.e.*, "that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."[34] The standards used by State and private child welfare agencies to assess Indian parental fitness promoted unrealistic non-Indian socioeconomic norms and failed to account for legitimate cultural differences in Indian families. Time and again, social workers "ma[d]e decisions that [we]re wholly inappropriate in the context of Indian family life and so they frequently discover[ed] neglect or abandonment where none exist[ed]."[35] For example, Indian parents might leave their children in the care of extended family members, sometimes for long periods of time. Social workers untutored in the ways of Indian family life assumed leaving children in the care of anyone outside the nuclear family amounted to neglect and grounds for

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number of South Dakota Indian children living in foster homes is per capita, nearly 16 times greater than the non-Indian rate. In the state of Washington, the Indian adoption rate is 19 times greater and the foster care rate 10 times greater. In Wisconsin, the risk run by Indian children of being separated from their parents is nearly 1,600 percent greater than it is for non-Indian children.

Id.

[30] *Id.*; *see also Holyfield*, 490 U.S. at 32.

[31] AIPRC Report, *supra* note 3, at 78-88.

[32] *See* 1974 Senate Hearing, *supra* note 3, at 1-2, 47-51 (statements of Sen. James Abourezk, Chairman, Subcomm. on Indian Affairs, and Dr. Joseph Westermeyer, Dep't of Psychiatry, Univ. of Minn.).

[33] House Report, *supra* note 3, at 10-12. In addition to these four factors, Congress acknowledged that federal boarding schools also contributed to the loss of Indian children from their communities. *Id.* at 9. However, as described in the AIPRC Report, despite the continued existence of, and problems with, boarding schools, "[c]urrent issues focus more on the problems of the adoption of Indian children by non-Indian families and the temporary and permanent placement of Indian children in non-Indian foster care homes and institutions." AIPRC Report, *supra* note 3, at 79.

[34] 25 U.S.C. § 1901(5).

[35] House Report, *supra* note 3, at 10.

terminating parental rights.[36] Yet, the House Report noted, this is an accepted practice for certain Tribes.[37]

Further, Congress found that State agencies and judges applied non-Indian socioeconomic values in the child welfare context that failed to account for the differences in family structure and child-rearing practices between Indian and non-Indian communities.[38] The House Report concluded that these cultural differences resulted in unequal and incongruent application of child welfare standards for Indian families.[39] In addition, there was evidence of disparate treatment between Indian and non-Indian families. For example, parental alcohol abuse was one of the most frequently advanced reasons for removing Indian children from their parents.[40] However, in areas where Indians and non-Indians had similar rates of problem drinking, alcohol abuse was rarely used as grounds to remove children from non-Indian parents.[41]

Congress heard testimony that removing Indian children from their families had become a routine practice in many areas. One of the causes for the prevalence of removal was the simple fact that "agencies established to place children have an incentive to find children to place."[42] Indian leaders alleged that some non-Indians took in Indian children in order to supplement their incomes with federally-subsidized foster care payments,[43] and that some non-Indian families sought to foster Indian children to gain access to the child's Federal trust account.[44] While economic incentives encouraged the removal of Indian children, the economic conditions in Indian country prevented Tribes from providing their own foster care facilities and certified adoptive parents. Poverty and substandard housing were pervasive on reservations, and obtaining State foster care licenses required a standard of living that was often out of reach in Indian communities. Otherwise loving and supportive Indian families were accordingly prevented from becoming foster parents, resulting in the placement of Indian children in non-Indian homes away from their Tribes.[45]

In addition, State procedures for removing Indian children from their natural homes commonly violated due process. Social workers sometimes obtained "voluntary" parental rights waivers to gain access to Indian children using coercive and deceitful measures.[46] Indian parents with little education, reading comprehension, and understanding of English signed voluntary waivers

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[36] *Id.*
[37] *Id.*; *see also* Brief of Professors of Indian Law as Amici Curiae Supporting Respondents, Adoptive Couple v. Baby Girl at 16-17, 133 S. Ct. 2552 (2013) (No. 12-399) (discussing examples of lack of understanding of Indian family customs among State social workers).
[38] House Report, *supra* note 3, at 10.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.* at 11.
[43] *Id.*
[44] 1974 Senate Hearing, *supra* note 3, at 118 (statement of Mel Sampson, Nw. Affiliated Tribes, Wash.).
[45] *See* House Report, *supra* note 3, at 12.
[46] 1974 Senate Hearing, *supra* note 3, at 95 (excerpt from *Indian Affairs, Newsletter of the Association on American Indian Affairs, Inc.*, June-August 1988, submitted by Bertram Hirsch, Staff Attorney, Ass'n on Am. Indian Affairs) ("Indian foster parents are threatened with jail and loss of welfare payment if they refuse to give up their children.").

without knowing what rights they were forfeiting.[47] Moreover, State courts sometimes failed to protect the rights of Indian children and Indian parents. In involuntary removal proceedings, the Indian parents and children rarely were represented by counsel and sometimes received little if any notice of the proceeding,[48] and termination of parental rights was seldom supported by expert testimony.[49] Instead, Indian children were removed from their families due to cultural variances or economic conditions in their home or community.[50] Rather than helping Indian parents correct parenting issues, or acknowledging that the alleged problem was the result of legitimate cultural and socioeconomic differences, social workers claimed removal was in the child's best interest.[51]

Congress understood that these issues went beyond reservations and significantly impacted Indian children who lived off reservations as well. Congress noted that there were approximately 35,000 Indian children in foster care, adoptive homes, or institutions whose families did not "live on or near reservations"[52] and yet who were subject to the same problematic State child custody proceedings. In the AIPRC Final Report, which was included as part of the Senate Report on ICWA, the Commission recommended that any final legislation

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[47] House Report, *supra* note 3, at 11 ("In a recent South Dakota entrapment case, an Indian parent in a time of trouble was persuaded to sign a waiver granting temporary custody to the State, only to find that this is now being advanced as evidence of neglect and grounds for the permanent termination of parental rights.")

[48] 1974 Senate Hearing, *supra* note 3, at 67-68 (statement of Bertram Hirsch, Staff Attorney, Ass'n on Am. Indian Affairs):

> The first hearing was a hearing on the petition of the social worker stating that there was a need for emergency custody in the department of welfare over Mrs. DeCoteau's children.
>
> The judge issued an order placing that child in the custody of the department of public welfare without informing Mrs. DeCoteau that such a hearing was taking place, and without allowing her an opportunity to come before the court and submit testimony that such an order should not be issued.
>
> So, the child was placed in a foster home and the judge appointed an attorney for Mrs. DeCoteau and set a hearing date on the issue of dependency and neglect. . . .
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> . . .
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> . . . They notified Mrs. DeCoteau by publication in the local Sisseton paper, despite the fact that her social worker knew exactly where to find her. This is another problem where the State quite frequently uses the publication notice when, in fact, they know very clearly where the person can be found and how to serve that person directly. They use publication notices instead.

[49] House Report, *supra* note 3, at 11.

[50] *See, e.g.*, House Report, *supra* note 3, at 10 (lack of understanding of tribal social and familial norms); 1974 Senate Hearing, *supra* note 3, at 19 ("Poverty, poor housing, lack of modern plumbing, and overcrowding are often cited by social workers as proof of parental neglect and are used as grounds for beginning custody proceedings.") (Statement of William Byler, Executive Dir., Ass'n on Am. Indian Affairs).

[51] 1974 Senate Hearing, *supra* note 3, at 62 (describing the "best interests of the child" standard as one with "few standards or criteria facilitating its interpretation and therefore allows for wide variations in how individual states' agents or courts put it into practice. This at least allows for, and perhaps encourages the state's agents to use his own value and moral system in evaluating the child-rearing of any particular family who comes before it") (Prepared statement of Dr. Carl Mindell and Dr. Alan Gurwitt, child psychiatrists.).

[52] 124 CONG. REC. at 38,102. *See also* 123 CONG. REC. at 21,043 (noting that the "the lack of preventive and supportive services on reservations *and in urban Indian communities* contributes to the higher placement rates" with non-Indian families (emphasis added)); Letter from Don Milligan, Indian Desk, Wash. State Dep't of Health and Social Servs., to Al Elgin, Chairman, Task Force #8, Am. Indian Policy Review Comm'n (Feb. 17, 1976) (noting that the "largest percentage" of Indian children receiving child protection services "are in urban and rural off-reservation areas" and that the "proportion of Indian child welfare cases on reservations is a numerical minority in comparison to Indian child welfare cases off-reservation").

address the fact that because "[m]any Indian families move back and forth from a reservation dwelling to border communities or even to distant communities, depending on employment and educational opportunities," problems could arise when Tribal and State courts offered competing child custody determinations, and that legislation therefore had to address situations where "an Indian child is not domiciled on a reservation and [is] subject to the jurisdiction of non-Indian authorities."[53] Congress accordingly fashioned ICWA to address the removal of Indian children, as defined in the statute, regardless of where their families were located.[54]

Congress further recognized that the "wholesale removal of [Indian] children by nontribal government and private agencies constitutes a serious threat to [Tribes'] existence as on-going, self-governing communities,"[55] and that the "future and integrity of Indian tribes and Indian families are in danger because of this crisis."[56] As one Tribal representative testified before Congress, "[t]he ultimate preservation and continuation of [Tribal] cultures depends on our children and their proper growth and development."[57] The Tribal Chief of the Mississippi Band of Choctaw Indians, a member of the National Tribal Chairmen's Association, told Congress that removal of Indian children from their homes and communities threatened the very survival of Tribal cultures, stating that the "chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their people."[58] Thus, in addition to protecting individual Indian children and families, Congress also was concerned about preserving the integrity of Tribes as self-governing, sovereign entities and ensuring Tribes' cultural and political survival.[59]

C. Overview of ICWA's Provisions

ICWA applies to "child custody proceedings," defined as foster care placements, terminations of parental rights, and preadoptive and adoptive placements,[60] involving an "Indian child," defined as "any 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."[61] In such proceedings, Congress accords Tribes "numerous prerogatives . . . through the ICWA's substantive provisions . . . as a means of protecting not only the interests of

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[53] Senate Report at 51-52 .

[54] In response to questions concerning the scope of congressional authority to apply ICWA to off-reservation children, Congress analyzed relevant law and concluded that its power to legislate was not "limited to Indian lands or to the reservation in the exercise of its plenary power over Indian affairs," House Report, *supra* note 3, at 15, and that Congress had the "power to control the incidents of child custody litigation involving nonreservation Indian children and parents pursuant to the Indian commerce clause." *Id.* at 18.

[55] 124 CONG. REC. at 38,103. *See also Wakefield v. Little Light*, 347 A.2d 228, 237-38 (Md. 1975) (finding that "there can be no greater threat to 'essential tribal relations,' and no greater infringement on the right of the . . . tribe to govern themselves than to interfere with tribal control over the custody of their children").

[56] 124 CONG. REC. at 38,103.

[57] 1977 Senate Hearing, *supra* note 3, at 169 (statement of Bobby George, Navajo Tribe).

[58] *Id.* at 157 (Statement of Calvin Isaac, Nat'l Tribal Chairmen's Ass'n).

[59] *See* 124 CONG. REC. at 38,102 ("[B]ecause of the trust responsibility owed to the Indian tribes by the United States to protect their resources and future, [Congress has] an obligation to act to remedy this serious problem.").

[60] 25 U.S.C. § 1903(1). ICWA also defines each of these four types of child custody proceeding. *Id.*

[61] *Id.* at § 1903(4).

individual Indian children and families, but also of the tribes themselves."[62] In addition, ICWA provides important procedural and substantive standards to be followed in State-administered proceedings concerning possible removal of an Indian child from his or her family.[63]

The "most important substantive requirement imposed on state courts" by ICWA is the placement preference for any adoptive placement of an Indian child.[64] "In any adoptive placement of an Indian child under State law," ICWA requires that "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."[65] ICWA requires similar placement preferences for pre-adoptive placement and foster care placement.[66] These preferences reflect "Federal policy that, where possible, an Indian child should remain in the Indian community. . . ."[67]

Congress also sought to maximize Tribal participation in, and jurisdiction over, Indian child custody proceedings. In involuntary child custody proceedings, State courts must notify the child's Tribe when the court knows or has reason to know that an Indian child is involved.[68] Tribal jurisdiction is generally exclusive over Indian child custody proceedings for on-reservation children,[69] and State courts must generally transfer proceedings involving an Indian child living off-reservation to Tribal court upon a petition by the child's parent, Indian custodian, or Tribe.[70] And an Indian child's Tribe may petition any court of competent jurisdiction to invalidate any action for foster placement or termination of parental rights under State law that violates certain provisions of ICWA.[71] These provisions recognize the importance of ensuring that Tribes are proactively made aware of Indian child custody proceedings and given the opportunity to adjudicate such proceedings internally should the Tribe so choose.

D. Current Necessity for Regulations

ICWA's requirements remain vitally important today. Although ICWA has helped to prevent the wholesale separation of Indian children from their families in many regions of the United States, Indian children remain disproportionately more likely to be removed from their homes and

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[62] *Holyfield*, 490 U.S. at 49.
[63] *See, e.g.*, 25 U.S.C. § 1912(d) (requiring party seeking foster-care placement to prove that "active efforts" designed to prevent the breakup of the Indian family were provided); *id.* at § 1912(e) (requiring expert testimony regarding potential damage to child resulting from continued custody by parent before foster care placement may be ordered).
[64] *Holyfield*, 490 U.S. at 36-37.
[65] 25 U.S.C. § 1915(a).
[66] *Id.* at § 1915(a)-(b).
[67] House Report, *supra* note 3, at 23; *see also Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960, 963 (Ariz. Ct. App. 2000) ("The Act is also based on the notion that protecting tribal interests best serves the interests of Indian children."); *In re Appeal in Pima Cty. Juvenile Action No. S-903*, 635 P.2d 187, 189 (Ariz. Ct. App. 1981) ("The Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected.").
[68] 25 U.S.C. § 1912. This notice requirement also applies to the child's parent or Indian guardian.
[69] *Id.* at § 1911(a).
[70] *Id.* at § 1911(b). The exceptions to this rule are when there is good cause for State court jurisdiction, the Tribal court declines jurisdiction, or either of the child's parents objects to the transfer. *Id.*
[71] *Id.* at § 1914. The child's parent or Indian guardian may also file such a petition.

communities.[72] In addition, based on 2013 data, Indian children are present in State foster care at a rate 2.5 times their proportion in the general population.[73] This disparity has *increased* since 2000.[74] In some States, including numerous States with significant Indian populations, Indian children are present in State foster care systems at rates as high as 14.8 times their proportion in the general population of that State.[75] While this overrepresentation of Indian children in the foster care system likely has multiple causes, it nonetheless supports the need for this rule to ensure such placements comport with ICWA.

In addition, the absence of uniform Federal standards has resulted in competing standards being applied to ICWA adjudications across the United States, contrary to Congress's intent.[76] Perhaps the most noted example is the "existing Indian family" exception, under which some State courts first determine the "Indian-ness" of the child and family before applying the Act.[77] As a result, children who meet the statutory definition of "Indian child," and their parents, are denied the procedures and protections that Congress established by Federal law based on a subjective State court determination that the child or his or her family does not seem "Indian enough" for ICWA to apply.[78] State courts also differ as to what constitutes "good cause" for departing from ICWA's child placement preferences,[79] and are inconsistent as to how to demonstrate sufficient "active efforts" to keep a family intact.[80] In other instances, State courts simply have ignored ICWA requirements outright.[81]

These trends demonstrate that many of the problems Congress intended to address by enacting ICWA persist today. Indian children still face disproportionate (and often unwarranted) representation in State child care systems, often for the exact reasons that led to similar overrepresentation in the 1970s. At the same time, in the absence of binding regulations

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[72] *See, e.g.*, ATTORNEY GENERAL'S ADVISORY COMMITTEE ON AMERICAN INDIAN AND ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE, ENDING VIOLENCE SO CHILDREN CAN THRIVE 87 (Nov. 2014).

[73] *See* National Council of Juvenile and Family Court Judges, *Disproportionality Rates for Children of Color in Foster Care in Fiscal Year 2013* tbl. 1 (June 2015).

[74] *Id.* (showing disproportionality rate of 1.5 in 2000).

[75] *Id.*

[76] *See Holyfield*, 490 U.S. at 43-46; *see also* 25 U.S.C. § 1902; House Report, *supra* note 3, at 19; *see generally* Casey Family Programs, *Indian Child Welfare Act: Measuring Compliance* (2015), *available at* www.casey.org/media/measuring-compliance-icwa.pdf.

[77] *See, e.g.*, *S.A. v. E.J.P.*, 571 So. 2d 1187, 1189 (Ala. Civ. App. 1990) (describing Existing Indian Family Doctrine as a rule that "ICWA [is] inapplicable in a case where [a] child who had never been a member of an Indian family or culture is the subject of a child custody proceeding," regardless of whether that child satisfies the threshold statutory definition of "Indian child").

[78] *See, e.g.*, *Thompson v. Fairfax Cty. Dep't of Family Servs.*, 747 S.E.2d 838, 847-48 (Va. Ct. App. 2013) (collecting cases); *In re Alexandria P.*, 176 Cal. Rptr. 3d 468, 484-85 (Cal. Ct. App. 2014) (noting split across California jurisdictions); *see also Holyfield*, 490 U.S. at 46 (concluding that absent a uniform Federal meaning for the term "domicile," parties or agencies could avoid ICWA's application "merely by transporting [the child] across state lines").

[79] *See, e.g.*, *In re A.J.S.*, 204 P.3d 543, 551 (Kan. 2009); *In re Adoption of F.H.*, 851 P.2d 1361, 1363-64 (Alaska 1993); *In re Adoption of M.*, 832 P.2d 518, 522 (Wash. 1992).

[80] *See State ex rel. C.D. v. State*, 200 P.3d 194, 205 (Utah Ct. App. 2008) (noting State-by-State disagreement over what qualifies as "active efforts").

[81] *Oglala Sioux Tribe & Rosebud Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 754 (D.S.D. 2015) (finding that the State had "developed and implemented policies and procedures for the removal of Indian children from their parents' custody in violation of the mandates of the Indian Child Welfare Act").

interpreting the statutory language, State courts apply ICWA inconsistently and often in contravention of congressional intent.

E. Department Implementation of ICWA

1. 1979 and 1994 Regulations

The Department issued ICWA regulations in July 1979 to establish procedures through which a Tribe may reassume jurisdiction over Indian child custody proceedings,[82] as well as procedures for notice of involuntary Indian child custody proceedings, payment for appointed counsel in state courts, and procedures for the Department to provide grants to Tribes and Indian organizations for Indian child and family programs.[83] In January 1994, the Department revised its ICWA regulations in order to convert the competitive grant award process for Tribes to a noncompetitive funding mechanism, while continuing the competitive award system for Indian organizations.[84] As discussed in further depth below, the Department limited the rules to these specific subjects because, at the time, the agency misinterpreted the scope of its rulemaking authority.

2. 1979 and 2015 Guidelines

In April 1979, the Department published proposed recommended guidelines for State courts to consider during Indian child custody proceedings.[85] The Department noted that the guidelines, which set out the Department's "best practice" recommendations for implementing ICWA's substantive requirements, were intended to "complement those related procedures"[86] published in the July 1979 regulations discussed above.[87] However, the Department also stated its belief that ICWA "does not delegate the Interior Department the authority to *mandate* procedures for state or tribal courts" concerning the majority of ICWA's provisions.[88]

In June 1979, the Department invited public comment on the guidelines.[89] Several commenters remarked that the Department did have the authority to issue regulations and should do so.[90] The

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[82] Tribal Reassumption of Jurisdiction Over Child Custody Proceedings, 44 Fed. Reg. 45,092, 45,095 (July 31, 1979) (codified at 25 C.F.R. pt. 13).

[83] Indian Child Welfare Act; Implementation, 44 Fed. Reg. 45,096, 45,102 (July 31, 1979) (codified at 25 C.F.R. pt. 23).

[84] Indian Child Welfare Act, 59 Fed. Reg. 2,248 (Jan. 13, 1994) (codified at 25 C.F.R. pt. 23).

[85] Recommended Guidelines for State Courts – Indian Child Custody Proceedings, 44 Fed. Reg. 24,000 (Apr. 23, 1979).

[86] *Id.*

[87] *Id.*

[88] *Id.* (emphasis in original)

[89] Recommended Guidelines for State Courts – Indian Child Custody Proceedings, 44 Fed. Reg. 32,294 (June 5, 1979).

[90] *See, e.g.*, Letter from Bob Aitken, Dir., Social Servs., The Minnesota Chippewa Tribe, to David Etheridge, U.S. Dep't of Interior, Office of the Solicitor, Div. of Indian Affairs (May 23, 1979) (on file with the Department of the Interior) ("I feel strongly the Bureau of Indian Affairs should not be putting any of the act in 'guideline' form. The 'recommended guidelines for state courts' should be in rule or regulation form for state courts to follow. It appears the state courts will have a choice on whether or not to follow the Act. In my opinion, the Act does delegate to the Interior Department the authority to mandate such procedures.") (emphasis in original); Letter from Henry

Department nevertheless declined to issue regulations, and instead, revised its recommended guidelines and published them in final form in November 1979.[91]

In 2014, the Department invited public comments to determine whether to update its guidelines to address inconsistencies in State-level ICWA implementation that had arisen since 1979 and, if so, to determine what changes should be made. The Department held several listening sessions, including sessions with representatives of Federally-recognized Indian Tribes, State-court representatives (e.g., the National Council of Juvenile and Family Court Judges and the National Center for State Courts' Conference of Chief Justices Tribal Relations Committee), the National Indian Child Welfare Association, and the National Congress of American Indians. The Department received comments at the listening sessions and also received additional written comments, including comments from individuals and organizations. The Department considered these comments and subsequently published updated Guidelines (2015 Guidelines) in February 2015.[92]

The 2015 Guidelines encompass a broader range of issues than the 1979 guidelines given the Department's benefit of experience and continued challenges to achieving Congress's intent in ICWA. For example, the 2015 Guidelines provide additional guidance on ICWA's applicability, such as whether State courts determine whether ICWA applies in virtually any child custody proceeding, whether ICWA applies even if an Indian child is not removed from a home, and when a child is treated as an Indian child.[93] The Guidelines also encourage agencies and courts

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Sockheson, Chairman, Steering Comm. of the Nat'l Ass'n of Indian Legal Servs., to David Etheridge, U.S. Dep't of Interior, Office of the Solicitor, Div. of Indian Affairs (May 17, 1979) (on file with the Department of the Interior) ("Fearful of a constitutional challenge by states, a possibility soundly discredited and rejected by the lawmakers, the Secretary has adopted a position which flies in the face of clear Congressional intent to the contrary, i.e., that he, even as a steward of Congressional purpose, cannot mandate procedures for state or tribal courts, the very meat & potatoes of the whole of Title I of the Act. In the place of these badly needed regulations, therefore, was substituted a Notice of 'Recommended Guidelines for State Courts-Indian Child Custody Proceedings', which will have the practical effect of regulations without the protections afforded to the public under the Administrative Procedures Act. . . . It is apparent that the delicate relationships sought to be preserved by the Act justified and required regulatory action with regard to state court procedures by the Bureau and cannot be subjected to the whim of what surely Congress believed were recalcitrant state courts now functioning under questionable 'guidelines.'"); Letter from Alexander Lewis, Sr., Governor, Gila River Indian Comty., to David Etheridge, U.S. Dep't of Interior, Office of the Solicitor, Div. of Indian Affairs (May 21, 1979) (on file with the Department of the Interior) ("[A]bsent regulations without force and effect, the guidelines are useless and the aims of the Act will be made more difficult to achieve. . . . By virtue of the Supremacy Clause of the United States Constitution, and this Act of Congress – the Indian Child Welfare Act, the Secretary of the Interior does have authority to promulgate regulations regarding the transfer of jurisdiction of Indian child proceedings from State to Tribal Court. I urge that you reconsider this action and promulgate regulations instead of guidelines, so that the provisions of the Act will not be emasculated."); Letter from Frank Stede, Vice-Chief, Miss. Band of Choctaw Indians, to David Etheridge U.S. Dep't of Interior, Office of the Solicitor, Div. of Indian Affairs (May 22, 1979) (on file with the Department of the Interior) ("[T]he notices should have been issued [as] regulations contrary to what the Interior Department presents as an [argument] for not issuing the guide lines as notices, the Congress clearly gave the Secretary authority to mandate procedures for State or Tribal court by passing legislation which deals with State and Tribal [i]ssue[s] in such an extensive fashion, clearly Congress would not have [g]one to such details if it had intended that compliance to [be] voluntary.").

[91] Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979).

[92] Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146 (Feb. 25, 2015).

[93] *Id.* at 10,147.

to consider whether ICWA applies as early in the proceedings as possible, addressing the use of evidence of investigations into whether the child is an Indian child, and discuss when "active efforts" begin.[94] The 2015 Guidelines discuss the process and scope of the ICWA notice requirements, as well as procedures concerning transfers to Tribal court.[95] More generally, the Guidelines touch on the types of substantive ICWA provisions about which State courts have issued inconsistent opinions.

3. Proposed Rule

Many commenters on the 2015 Guidelines requested that the Department not only update its ICWA guidelines, but also issue binding regulations addressing the requirements and standards that ICWA provides for State-court child custody proceedings. Commenters offered many reasons why regulations are needed, but particularly emphasized the valuable role regulations could play in promoting uniform application of ICWA across the country. Recognizing that need, the Department began a notice-and-comment process to promulgate formal ICWA regulations. The Department issued a proposed rule on March 20, 2015 that would "incorporate many of the changes made to the recently revised guidelines into regulations, establishing the Department's interpretation of ICWA as a binding interpretation to ensure consistency in implementation of ICWA across all States."[96] As part of its process collecting input on the proposed regulations, the Department held five public hearings and five Tribal consultation sessions across the country, as well as one public hearing and one Tribal consultation by teleconference.

4. Final Rule

The final rule updates definitions and notice provisions in the existing ICWA regulations and adds a new subpart I to 25 C.F.R. part 23 to address ICWA implementation by State courts.[97] It promotes nationwide uniformity and provides clarity to the minimum Federal standards established by the Act. In many instances, the standards in the final rule reflect State interpretations and best practices, as reflected in State court decisions, State laws implementing ICWA, or State guidance documents. The rule also reflects comments from organizations and individuals that serve children and families, including, in particular, Indian children, and have substantial expertise in child welfare practices.

In particular, the final rule addresses the following issues:

- *Applicability.* The final rule clarifies when ICWA applies, and clarifies that ICWA does not contain an "existing Indian family" exception.

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[94] *Id.* at 10,148.
[95] *Id.* at 10,148-49.
[96] Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 14,880, 14,881 (Mar. 20, 2015).
[97] While the final rule's publication in the Federal Register is pending as of the date of this M-Opinion, a copy of the rule can be found at http://www.indianaffairs.gov/WhoWeAre/BIA/OIS/HumanServices/IndianChildWelfareAct/index.htm.

- *Initial Inquiry.* The final rule clarifies the steps involved in conducting a thorough inquiry, at the beginning of child custody proceedings, into whether the child is an "Indian child" subject to the Act.
- *Emergency proceedings.* The final rule clarifies the distinction between the requirements for emergency proceedings and other child custody proceedings involving Indian children. It also includes provisions helping to ensure that emergency removal and placements are as short as possible, and that, when necessary, proceedings are promptly initiated and fully comply with ICWA.
- *Notice.* The final rule describes uniform requirements for prompt notice to parents and Tribes in involuntary proceedings to facilitate compliance with statutory requirements.
- *Transfer.* The final rule clarifies the requirement that a State court determine whether the State or Tribe has jurisdiction and, where jurisdiction is concurrent, establishes standards to guide the determination whether good cause exists to deny transfer (including factors that cannot properly be considered) and addresses transfer of proceedings to Tribal court.
- *Qualified expert witnesses.* The final rule clarifies the term "qualified expert witness."
- *Placement preferences.* The final rule clarifies when and what placement preferences apply in foster care, preadoptive, and adoptive placements, provides presumptive standards for what may constitute good cause to depart from the placement preferences, and prohibits courts from considering certain factors as the basis for departure from placement preferences.
- *Voluntary proceedings.* The final rule clarifies certain aspects of ICWA's applicability to voluntary proceedings, including addressing the need to determine whether a child is an "Indian child" in voluntary proceedings and specifying the requirements for obtaining consent.
- *Information, recordkeeping, and other rights.* The final rule addresses the rights of adult adoptees to information and sets out what records States and the Secretary shall maintain.
- *Effective date.* The final rule specifies that it will take effect 180 days after its publication in the Federal Register.

III. Analysis

A. Authority to Promulgate Regulations

When an agency seeks to issue a legislative rule, which carries with it the force of law necessary to bind third parties,[98] the threshold inquiry is whether the agency has sufficient statutory authority to do so.[99] I conclude that ICWA grants the Department the authority to promulgate the final rule,[100] and that the Department's contrary determination in 1979 was legally incorrect.

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[98] *See Nat'l Latino Media Coal. v. FCC*, 816 F.2d 785, 788 (D.C. Cir. 1987) ("A valid legislative rule is binding upon all persons, and on the courts, to the same extent as a congressional statute.").

[99] *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); *see also Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1141 (9th Cir. 2007) (citation omitted).

[100] As noted in the proposed rule and by several commenters on the proposed rule, in addition to the express authority in ICWA, the Secretary is charged with "the management of all Indian affairs and of all matters arising out of Indian relations," 25 U.S.C. § 2, and may "proscribe such regulations as [s]he may think fit for carrying into effect the various provisions of any act relating to Indian affairs. . . ." 25 U.S.C. § 9. *See also* 43 U.S.C. § 1457

The Department's primary authority for this rule is 25 U.S.C. § 1952, which states: "Within one hundred and eighty days after November 8, 1979, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." This expansive language evinces clear Congressional intent that the Department issue rules to implement ICWA. And, as discussed above, the Department has previously issued several rules implementing portions of ICWA. The rulemaking grant in Section 1952 is therefore sufficiently broad to encompass authority for the Department to issue rules that set standards for Indian child custody proceedings in State courts.[101]

Not only does ICWA authorize the Department to promulgate implementing regulations generally, but any such rules also may be binding legislative rules. When determining whether a statute gives an agency legislative rulemaking ability, "the grant of authority relied upon by a federal agency in promulgating regulations need not be specific; it is only necessary that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued."[102] Courts therefore have found that a statutory directive for an agency to "promulgate such rules and regulations as may be necessary" (or similar formulations) provides the authority to issue legislative rules unless doing so would counter congressional intent or otherwise violate the statute.[103] Because the final rule would have no such effect,[104] the Department retains the authority to promulgate a legislative rule.

("The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies:. . . Indians.'').

[101] Similar grants of rulemaking authority have been held to presumptively authorize agencies to issue regulations addressing matters covered by the statute unless there is clear Congressional intent to withhold authority in a particular area. *See, e.g., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-78 (1999); *Am. Hosp. Ass'n v. Nat'l Labor Relations Bd.*, 499 U.S. 606, 609-10 (1991) (general grant of rulemaking authority "was unquestionably sufficient to authorize the rule at issue in this case unless limited by some other provision in the Act"); *see also City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013) (finding not "a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field").

[102] *Qwest Commc'ns Int'l Inc. v. FCC*, 229 F.3d 1172, 1179 (D.C. Cir. 2000) (citations omitted); *accord S.J. Groves & Sons Co. v. Fulton Cty.*, 920 F.2d 752, 764 (11th Cir. 1991). In *Chrysler Corporation v. Brown*, 441 U.S. 281 (1979), the Court also held that the legislative rule must affect binding rights and responsibilities and comply with applicable procedural requirements, *id.* at 302-03, both of which are satisfied here.

[103] *See, e.g., United States v. Mitchell*, 39 F.3d 465, 471 (4th Cir. 1994) (finding agency authority to promulgate detailed regulations pursuant to statutes stating that agencies can "prescribe rules and regulations for the declaration and entry of . . . articles carried on the person or contained in the baggage of a person arriving in the United States," "promulgate such regulations as may be appropriate to enforce [chapter 35 of Title 16 of the U.S. Code]," and "make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of [communicable diseases]"); *Pharm. Research & Mfrs. of Am. v. FTC*, 44 F. Supp. 3d 95, 123 (D.D.C. 2014) (FTC regulations pursuant to agency authorization to "prescribe such other rules as may be necessary and appropriate to carry out the purposes" of various antitrust statutes); *Am. Med. Ass'n. v. Heckler*, 606 F. Supp. 1422, 1440 (S.D. Ind. 1985) (statue authorizing the Department of Health and Human Services (HHS) to "prescribe such regulations as may be necessary to carry out the administration" of Medicare).

[104] Congress passed ICWA to counter the "alarmingly high percentage of Indian families . . . broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and [the] alarmingly high percentage of such children . . . placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C. § 1901(4); *accord* 124 CONG. REC. at 38,102. As discussed above, that goal has proven difficult to achieve in the absence of regulatory standards consistently applied among State jurisdictions. The final rule is a

To whatever extent a court determines that the scope of the Department's rulemaking authority under ICWA is ambiguous, ICWA's legislative history further suggests that such authority is broad and inclusive.[105] The original versions of the House and Senate bills that led to the enactment of ICWA, as well as the version passed by the Senate, qualified the current grant of rulemaking authority with additional procedural requirements.[106] In particular, the bills required that within six months, the Secretary consult with Tribes and Indian organizations "in the consideration and formulation of rules and regulations to implement the provisions of this Act"; within seven months, the Secretary present the proposed rules to congressional committees; within eight months, the Secretary publish proposed rules for notice and comment; and within ten months, the Secretary promulgate final rules and regulations to implement the provisions of the Act.[107] The bills authorized the Secretary to revise the rules and regulations, but required that they be presented to the Congressional committees first.[108] These requirements were considered during hearings held in 1978 before the House of Representatives Committee on Interior and Insular Affairs.[109]

The fact Congress introduced and considered bills throughout the 95th Congress that imposed burdensome procedural requirements on the Department strongly suggests that Congress intended that Section 1952 provide the Department with a broad grant of rulemaking authority. During House floor debate, the bill's sponsor, Representative Udall, offered an amendment to remove the procedural steps set out above and change the rulemaking grant to its current text. However, Representative Udall did not indicate any intent to change the scope of ICWA's broad grant of rulemaking authority, but instead explained that this amendment was designed to remove the burdens of submitting regulations to congressional committees.[110] By ultimately deleting these provisions, Congress demonstrated that it did not intend to unduly restrict the Department's rulemaking capability, and instead sought to vest the Department with exclusive authority over ICWA regulations.

As discussed in the preamble to the final rule, the Department has determined that this regulation is "necessary to carry out the provisions" of ICWA.[111] Although the Department initially hoped

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necessary exercise of the Department's statutorily-delegated authority to ensure that ICWA is administered efficiently and effectively.

[105] In addition, courts have described ICWA as "a remedial statute in that it was enacted to stem the 'alarmingly high percentage of Indian families being separated by removal of children through custody proceedings. § 1901(4). We interpret remedial statutes 'liberally to facilitate and accomplish [their] purposes and intent.'" *State ex rel. Children, Youth & Families Dep't v. Marlene C. (In re Esther V.)*, 248 P.3d 863, 869 (N.M. 2011) (citation omitted); *accord Gomez v. Toledo*, 446 U.S. 635, 639 (1980) ("R]emedial legislation . . . is to be construed generously to further its primary purpose."). ICWA's grant of regulatory authority could be read as broadly authorizing the Department to take necessary action to effectuate congressional intent.

[106] *See* S. 1214, 95th Cong. § 205; *see also* Senate Report at 8-9

[107] *See* S. 1214 § 205(b).

[108] *Id.* at § 205(c).

[109] *See* 1978 House Hearing, *supra* note 3, at 47.

[110] *See* 124 CONG. REC. 38,107.

[111] 25 U.S.C. § 1952. Where the empowering provision of a statute states simply that the agency promulgate "such rules and regulations as may be necessary" to carry out the Act, courts will uphold the regulation as "necessary" so long "as it is reasonably related to the purposes of the enabling legislation," *Mourning v. Family Publ'ns Serv.*, 411

that binding regulations would not be necessary, a third of a century of experience has established the need for more uniformity in the interpretation and application of this important Federal law. For example, various State courts and agencies have interpreted the Act in different, and sometimes conflicting, ways. This has resulted in different standards being applied to ICWA adjudications across the United States, contrary to Congress's intent.[112] The Department further has determined that the current nonbinding guidelines are insufficient to fully vindicate Congress's goal of nationwide protections for Indian children, families, and Tribes.[113] While State courts sometimes defer to the guidelines in ICWA cases, the guidelines lack the force of law and State courts may depart from the guidelines as they see fit.[114] These State-specific determinations about the meaning of key terms in the Federal law will continue absent a legislative rule, with potentially devastating consequences for the Indian children, families, and Tribes that ICWA was designed to protect.

Nor does the fact that the current final rule will be issued after ICWA's 180 day deadline impede this action. Courts generally uphold regulations enacted after the passage of a statutory deadline so long as the statute, as is the case with ICWA, does not spell out explicit consequences for late action. That is, "'if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction.'"[115] As there is no such "consequence" language in ICWA, the Department retains the authority to carry out its statutorily-delegated rulemaking authority, even to the present day.

B. Statements Made in the 1979 Guidelines

At the outset, the fact that the Department now has decided to publish comprehensive regulations, even though the agency chose not to in 1979, is legally permissible.[116] Agencies

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U.S. 356, 369 (1973) (citations omitted), and does not "render nugatory [whatever] restrictions that Congress has imposed." *AFL-CIO v. Chao*, 409 F.3d 377, 384 (D.C. Cir. 2005).

[112] *See Holyfield*, 490 U.S. at 43-46; *see also* 25 U.S.C. § 1902; House Report at 19.

[113] *See* 80 Fed. Reg. at 14,881.

[114] *See, e.g., Gila River Indian Cmty. v. Dep't of Child Safety*, 363 P.3d 148, 153 (Ariz. Ct. App. 2015).

[115] *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003) (quoting *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993)). *See also Bhd. of Ry. Carmen Div., Transp. Commc'ns. Int'l Union v. Pena*, 64 F.3d 702, 704 (D.C. Cir. 1995) (applying *Barnhart*'s underlying rule, as set out in *Brock v. Pierce County*, 476 U.S. 253 (1986), and by association, *Barnhart*, to discretionary agency actions). In *Pena*, the court held that even if a statutory deadline used the word "shall" in the context of requiring agency action, the requirement was still discretionary and the agency could not be enjoined from taking that action past the deadline. *Id.* In particular, the court reasoned that the availability of alternative remedies such as an APA challenge to the rule would be preferable to invalidating the agency action outright on technical grounds. *Id.* at 704-05. *See also Friends of the Aquifer, Inc. v. Mineta*, 150 F. Supp. 2d 1297, 1301 (N.D. Fla. 2001) (citing *Pena* for proposition that missing discretionary statutory deadline is not fatal absent evidence "1) that compliance with the deadlines was or is essential to the effective operation of the statute, (2) that Congress intended the deadlines to be anything other than directory, or (3) that Congress has been concerned with the Secretary's failure to act within the specified deadlines").

[116] *See Natural Res. Def. Council, Inc. v. EPA*, 22 F.3d 1125, 1145 (D.C. Cir. 1994) (upholding EPA's reaction to ongoing State failure to satisfy EPA's non-mandatory guidance on ambient air quality standards by using statutory authority to "issue regulations as are necessary to carry out [its] duties under the [Clean Air] Act" and replace the guidance with a binding legislative rule, and applying test set out in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984)); *accord Citizens Coal Council v. EPA*, 447 F.3d 879, 892-93 (6th Cir. 2006) (regulations published under "agency shall promulgate" statutory clause permissible under *Chevron*

may reevaluate a previous decision and determine that what may have worked decades earlier is no longer viable, or that an agency's previous interpretation of law was simply incorrect.[117] As the Supreme Court has observed, "'[regulatory] agencies do not establish rules of conduct to last forever,' . . . and . . . an agency must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'"[118] So, while an agency must show that there are good reasons for the new policy, it need not demonstrate that the reasons for the new policy *are better* than the reasons for the old one; rather, it suffices that the new policy is permissible under the statute and that the agency *believes it to be better* than the previous policy.[119] In such cases, the agency need only explain why it is disregarding the facts and circumstances that underlay or were engendered by the prior policy.[120]

Furthermore, not only has the Department described its reasons for departing from the statements it made in 1979 both in this M-Opinion and in the preamble to the final rule,[121] I believe that the Department's prior position that it lacked the authority to issue binding regulations was incorrect in 1979 and remains incorrect at present. In 1979, the Department cited a number of reasons for issuing nonbinding guidelines, a course of action that was opposed by numerous commenters.[122] As described below, these reasons are not persuasive.

First, the Department's statement in 1979 that binding regulations were "not necessary to carry out the Act" has now been firmly contradicted by thirty-seven years of real-world ICWA application. The intervening years have shown that contradictory State court application of the statute has impeded Congress's goal of providing minimum Federal standards that would protect Indian children, families, and Tribes. This, in turn, has allowed problems identified in the 1970s to remain in the present day. The lack of clarity and uniformity regarding the meaning of key ICWA provisions also creates confusion, delays, and appeals in individual cases involving Indian children.

Second, the Department's 1979 statements were made prior to the Supreme Court's carefully reasoned decision in *Holyfield* in 1989. There, the Supreme Court addressed whether a State court had jurisdiction over a child custody proceeding involving two Indian children. As the sole disputed issue in the case was whether the children were "domiciled" on a reservation for ICWA purposes, the Court confronted the initial question of whether Congress intended the definition of "domicile" to be a matter of State law. The Court noted that "the meaning of a federal statute is necessarily a federal question in the sense that its construction remains subject to this Court's supervision."[123] The Court further noted the rule of statutory construction that "Congress when

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in light of agency's demonstration that real-world considerations established necessity of regulations to effectuate congressional intent).

[117] 5 U.S.C. § 551(5) ("'rule making' means agency process for formulating, *amending*, or repealing a rule") (emphasis added).

[118] *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (quoting *Am. Trucking Ass'ns, Inc. v. Atchison, Topeka & Santa Fe R.R. Co.*, 387 U.S. 397, 416 (1967) *and Permian Basin Area Rate Cases*, 390 U.S., 747, 784 (1968)) (alteration in original).

[119] *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515-16 (2009).

[120] *Id.*

[121] *See generally* Section II.C-D and Section III of the preamble to the final rule.

[122] *See supra* notes 85-91 and accompanying text.

[123] 490 U.S. at 43.

it enacts a statute is not making the application of the federal act dependent on state law."[124] The Court gave two justifications for this rule of statutory construction. One, "federal statutes are generally intended to have uniform nationwide application."[125] Two, allowing the application of State law to control would create "the danger that the federal program would be impaired. . . ."[126]

The Court then discussed its prior holding in *NLRB v. Hearst Publications Inc.*,[127] where the Supreme Court rejected an argument that the term "employee" in the Wagner Act should be defined by State law by reasoning that "[t]he Wagner Act is . . . intended to solve a national problem on a national scale."[128] The Court concluded that what it said of the Wagner Act "applies equally well to the ICWA."[129] In explaining the reasons for this conclusion, the Court noted, *inter alia*, that "Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities" and "that Congress perceived the States and their courts as partly responsible for the problem it intended to correct."[130] The *Holyfield* Court also recognized that Congress intended the implementation of ICWA to have nationwide consistency, so "Congress could hardly have intended the lack of nationwide uniformity that would result from state-law definitions of domicile."[131]

In 1979, the Department had neither the benefit of the Court's decision nor the opportunity to observe how a lack of uniformity in the interpretation of ICWA by State courts could undermine the Act's underlying purposes. But in current practice, what was intended to be a uniform Federal minimum standard now varies in its application based on the State, or even the judicial district.[132] The Department thus has reasonably sought to model its action on the *Holyfield* Court's observation that "a statute under which different rules apply from time to time to the same child, simply as a result of his or her transport from one State to another, cannot be what Congress had in mind."[133]

Third, I disagree with the Department's 1979 statement that "primary responsibility" for interpreting portions of ICWA that do not expressly delegate responsibility to the Department "rests with the courts that decide Indian child custody cases." The Department based this assumption by citing a portion of ICWA's legislative history indicating that the statutory term "good cause" was "designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child."[134] However, this conclusion takes the cited legislative history out of context: the "good cause" language at issue merely was designed

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[124] *Id.*
[125] *Id.*
[126] *Id.* at 44 (citations omitted).
[127] 322 U.S. 111 (1944).
[128] 490 U.S. at 44 (citing *Hearst*, 322 U.S. at 123).
[129] *Id.*
[130] *Id.* at 45.
[131] *Id.*
[132] *See, e.g., Dinwiddie Dep't of Soc. Servs. v. Nunnally*, 764 S.E.2d 526, 527 (Va. 2014) (Millette, J., concurring in part and dissenting in part) (arguing that the majority opinion's "best interests of the child" ICWA analysis "disregards precedent from the Supreme Court of the United States, substitutes its judgment for that of Congress, and embraces an entirely novel analysis").
[133] *Holyfield*, 490 U.S. at 46.
[134] 44 Fed. Reg. at 67,584.

to provide State courts with flexibility when making certain jurisdictional determinations based on the facts presented in each particular case.[135] That phrase was not addressing the reach of the Department's rulemaking authority.[136]

Moreover, the Department was incorrect to whatever extent it then believed that providing *any* regulatory guidance on the meaning of terms such as "good cause" improperly intrudes on a State court's flexibility to address particular factual scenarios. Other statements in the legislative history, which the Department did not reference in 1979, suggest Congress desired Federal agencies to be more involved in State removals of Indian children.[137] And again, the Department did not have the benefit of the Supreme Court's decision in *Holyfield*, which recognized that Congress "perceived the States and their courts as partly responsible for the problem it intended to correct."[138] The Court concluded that "[u]nder these circumstances it is most improbable that Congress would have intended to leave the scope of the statute's key jurisdictional provision subject to definition by state courts as a matter of state law."[139] The Department similarly concludes here that "[u]nder these circumstances," it is improbable that Congress intended the broad grant of rulemaking authority in Section 1952 to authorize the Department to issue binding rules that interpret only certain portions of ICWA.

Fourth, I am not persuaded by the Department's 1979 statements that due to federalism concerns, it would have been extraordinary for Congress to have authorized the Department to exercise supervisory authority over State or Tribal courts or to legislate for them with respect to Indian child custody matters in the absence of an express Congressional declaration to that effect.[140] As discussed above, ICWA expressly *directs* the Department to adopt "such rules and regulations as may be necessary to carry out the provisions of" ICWA.[141] And as Congress noted, ICWA does not "oust the State from the exercise of its legitimate police powers in regulating domestic relations,"[142] but instead establishes "minimum Federal standards and procedural safeguards *in State Indian child custody proceedings* designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe."[143] In light of these statutory goals, it would be illogical to read ICWA as prohibiting the Department from issuing rules applicable to State courts – the very entities that Congress passed ICWA to regulate.[144]

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[135] S. REP. NO. 95-597 at 17.
[136] *Id.*
[137] *See, e.g.*, 1974 Senate Hearing, *supra* note 3, at 463-65 (statement of Raymond Butler, Acting Dir., Office of Indian Servs., Chief of Div. of Social Servs., D.C.) (suggesting that the Federal government oversee State child welfare proceedings involving Indian children through additional staff, withholding Federal funding, and other means).
[138] 490 U.S. at 45.
[139] *Id.*
[140] *See* 44 Fed. Reg. 67,584.
[141] 25 U.S.C. § 1952.
[142] House Report, *supra* note 3, at 17.
[143] *Id.* at 19 (emphasis added); *accord* 25 U.S.C. § 1902 (purpose of ICWA is 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").
[144] *See, e.g., New York v. FCC*, 486 U.S. 57, 66-67 (1988) (finding congressional authority for agency to issue rules applicable to States pursuant to statute tasking agency with making "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter"); *see also Garrelts v. Smithkline Beecham Corp.*, 943 F. Supp. 1023, 1062 (N.D. Iowa 1996) (statutory

The Supreme Court has repeatedly reaffirmed the power of Congress to pass laws enforceable in State courts.[145] The Court also has explained that States are "not immune under the Tenth Amendment from laws passed by the Federal government which are, as is the law here, necessary and proper to the exercise of a [constitutionally] delegated power," even when such laws touch on areas usually left to the States.[146] Here, Congress enacted ICWA in part under the authority of the Indian Commerce Clause, which provides Congress with "plenary power over Indian affairs."[147] In clarifying ICWA's requirements, the Department is merely exercising the authority that Congress delegated to it.[148]

This sound exercise of congressional delegation is emphasized by the fact that ICWA serves as partial fulfillment of the Federal "trust responsibility owed to the Indian tribes by the United States to protect their resources and future,"[149] and was enacted pursuant to Congress's "plenary power over Indian affairs."[150] Critically, Congress did not apply ICWA wholesale to any and all State child custody proceedings; rather, it limited the statutory reach to proceedings involving an Indian child. States, whose sovereignty ICWA leaves entirely intact where there are no Federal or Tribal interests at stake (i.e., an "Indian child" is not involved), must necessarily defer in such cases unless the State chooses to "provide[] a higher standard of protection" than that required by ICWA.[151]

In this regard, the Department's final rule is not an "extraordinary" exercise of authority involving an assertion of "supervisory control" over State courts.[152] While the final rule may override what some States believed to be the best interpretation of ICWA, the Supreme Court has reasoned that such a scenario is not equivalent to making State "judicial decisions subject to reversal by executive officers."[153] Rather, the final rule simply clarifies a limited set of substantive standards and related procedural safeguards that courts will apply to the particular

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authorization that agency "'make and promulgate from time to time such rules and regulations as may be necessary' is a congressional authorization for the agency to preempt state law" to the extent that "it was Congress's intent that the agency act in a particular field") (citations and quotations omitted).

[145] *See, e.g., F.E.R.C. v. Mississippi*, 456 U.S. 742, 760-61 (1982); *Testa v. Katt*, 330 U.S. 386, 394 (1947).

[146] *United States v. Oregon*, 366 U.S. 643, 649 (1961).

[147] 25 U.S.C. § 1901(1).

[148] ICWA is not the only statute that authorizes Federal agencies to set minimum standards binding on States. *See, e.g.*, 42 U.S.C. § 652(a)(1) (requiring the HHS Secretary to "establish such standards for State programs for locating noncustodial parents, establishing paternity, and obtaining child support and support for the spouse (or former spouse) with whom the noncustodial parent's child is living as he determines to be necessary to assure that such programs will be effective").

[149] 124 CONG. REC. at 38,102; *accord* 25 U.S.C. § 1901(2) (noting "that 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").

[150] 25 U.S.C. § 1901(1).

[151] 25 U.S.C. § 1921. *See also Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996) (States "have been divested of virtually all authority over Indian commerce and Indian tribes"); *accord Worcester v. Georgia*, 31 Pet. 515, 560-61 (1832).

[152] 44 Fed. Reg. 67,584.

[153] *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005).

cases before them involving an area over which congressional authority is plenary.[154] These standards and safeguards, in turn, will provide clear guidance for State courts to follow that will help ensure consistent and accurate interpretation of the minimal Federal standards established in ICWA. For these reasons, and because Congress provided the Department the authority to issue this rule, I find that the issuance of this rule is consistent with federalism principles.

Conclusion

The Department possesses the requisite authority to issue regulations that implement the substantive provisions in ICWA by prescribing uniform minimum federal standards and procedures for States to follow.[155]

Hilary C. Tompkins

[154] The Supreme Court has explained that "[v]alid regulations establish legal norms. Courts can give them proper effect even while applying the law to new-found facts, just as any court conducting a trial in the first instance must conform its rulings to controlling statutes, rules, and judicial precedents." *United States v. Haggar Apparel Co.*, 526 U.S. 380, 391 (1999). Of course, the construction of ICWA by State courts will "remain[] subject to [the Supreme] Court's supervision. . . ." *Holyfield*, 490 U.S. at 43.

[155] This Opinion would not have been possible without the committed legal research and drafting of Attorney-Advisors Sam Ennis and Dan Lewerenz, and Assistant Solicitor – Branch of Tribal Government Services, Division of Indian Affairs, Rebekah Krispinsky.

CASES

Indian Child Welfare Act

Key California Cases 2013 to present

Active Efforts

In re A.L., (2015) 243 Cal.App.4th 628

This appeal addresses substantive provisions of the Indian Child Welfare Act (ICWA). The appellate court holds the juvenile court erred during the Welfare and Institutions Code section 366.26 hearing when it precluded mother's attorney from eliciting evidence related to active efforts under ICWA. Welfare and Institutions Code section 366.26(c)(2)(B)(i) contemplates consideration of the ICWA active efforts requirement. The juvenile court's decision to preclude evidence on the issue and its failure to make a finding on active efforts was error. The appellate court acknowledges that making the active efforts finding at two different hearings is inefficient but states that it is both statutory and appropriate where the permanency planning hearing is delayed well past the time reunification services are terminated. However, the juvenile court's error was harmless; consequently, the juvenile court orders terminating parental rights are affirmed.

In re Miguel S., (2016) 248 Cal.App.4th 164

The juvenile court terminated parental rights and found brothers Miguel and Robert adoptable. The presumed father of the boys and the biological father of Robert appeal the juvenile court's order, arguing that it failed to comply with the Indian Child Welfare Act (ICWA). The Court of Appeal agrees with the fathers and reverses termination of parental rights for the limited purpose of allowing Orange County Social Services Agency (SSA) to make active efforts to secure tribal membership for the children.

The children were made dependents of the court after their mother, a minor dependent herself, ran away leaving the children without any support. Previously, the mother informed SSA that she had Native American ancestry through the Chippewa tribe. SSA spoke with relatives and two different Chippewa tribes. Ultimately, both tribes stated that the children would be eligible for membership. SSA determined that mother would have to come forward and choose a tribe in which to enroll the children. As mother was not around, SSA recommended that the court find ICWA did not apply. The juvenile court made that finding and terminated parental rights. The fathers timely appealed.

California Rules of Court, rules 5.482 and 5.484 require SSA to make active efforts to obtain tribal membership for children before parental rights are terminated. The appellate court rejects SSA's argument that the California Rules of Court impermissibly expand the definition of an Indian Child. The court cites In re Jack C., (2011) 192 Cal.App.4th 967, which held that ICWA permits states to provide a higher standard of protection to the rights of Indian children. Consequently, rules 5.482 and 5.484 of the California Rules of Court are not impermissibly overbroad. Here insufficient evidence shows that active efforts were made.

The Court of Appeal also rejects SSA's argument that the fathers forfeited the ICWA argument. The court has a continuing duty to comply with ICWA noticing; as such, parental inaction does not constitute waiver. It was error for the juvenile court to find that ICWA did not apply. The order terminating parental rights is reversed so that SSA can pursue membership in the tribe for the children. If the children are eligible for membership, all future proceedings must be held in compliance with ICWA.

Application

***In re Abbigail A.*, (2016) 1 Cal.5th 83**
In this challenge to the validity of two California Rules of Court that relate to the Indian Child Welfare Act (ICWA) the California Supreme Court holds that rule 5.482(c) is invalid but upholds rule 5.484(c)(2).

Abbigail and her brother were removed from their mother and John was found to be their presumed father. When asked about Indian ancestry, John related that he was not a member of a tribe but believed that he had Cherokee ancestry. The Cherokee nation confirmed that the children and John were eligible for membership and recommended that Abbigail and her brother be treated as Indian children, even though under the definition in ICWA the children would not be considered Indian children because their parents were not enrolled in a tribe. The juvenile court followed this recommendation and pointed to rule 5.482(c) for further support. Rule 5.482(c) states that if a tribe indicates a child is eligible for membership the court must treat the child like an Indian child and the agency must take steps to secure the child's enrollment in the tribe. The Sacramento Department of Health and Human Services (DHHS) objected on the grounds that the children did not meet the definition in ICWA.

The juvenile court treated the children like Indian children, which included holding a hearing to establish it would be detrimental to return them to their parents. Ultimately, the court followed the recommendation to place with the maternal grandmother. DHHS appealed the juvenile court's decision to treat the children as Indian children and the Court of Appeal held that rule 5.482(c) was invalid. John, father of the children, requested review of the Court of Appeal's decision.

The Court holds that rule 5.482(c) is invalid because it is inconsistent with ICWA and the Welfare and Institutions Code sections implementing ICWA. A rule is inconsistent with statute if it conflicts with the statute's express language or its underlying legislative intent. Here, the legislative intent of SB 678, which incorporated ICWA into the Welfare and Institutions Code, was to increase compliance with ICWA. Contrary to John's arguments, nothing in the legislative history suggests that it was intended to apply to cases involving children who are not Indian children.

The Court also rejects the argument that rule 5.482(c) encourages prompt resolution of cases because it avoids the possibility of additional jurisdiction and disposition hearings upon discovery that the case does involve an Indian child. In fact, the Court states that rule 5.482(c) causes unnecessary delay by requiring the department to enroll children who are not Indian Children and may never become Indian children, without regard to the family's wishes. The Court holds that rule 5.482(c) is invalid as a matter of state law.

As to rule 5.484(c)(2), which requires the agency to take steps to enroll an Indian child in the tribe, the Court holds that it is valid because its provisions only apply to cases involving an Indian child as defined by law. As such, it is not inconsistent with state law implementing ICWA.

The judgement of the Court of Appeal is reversed to the extent it holds that rule 5.484(c)(2) is invalid but the remainder of the judgment is affirmed.

***Adoptive Couple v. Baby Girl*, (2013) 133 S.Ct. 2552**
The Court ruled in favor of the adoptive parents, and against the biological father and the Tribe. The court found that sections 1912(f) and 1912(d) of ICWA did not bar the termination of father's parental rights. These sections address "continued custody" and "breakup of an Indian Family", two concepts that the court found inapplicable because the father had never had legal or physical custody of the child. The court also held that the adoption-placement preferences in section 1915(a) were inapplicable, since no alternative party had formally sought to adopt the child.

***In re Francisco D.*, (2014) 230 Cal.App.4th 73**
Jurisdiction under WIC 300(j) and dispositional findings affirmed where substantial evidence supports both findings. Also, evidence indicated that the child was not a member of an Indian tribe, nor was he the biological child of a member of a tribe. Thus, the child cannot satisfy the definition of an Indian child. Based on the plain language of the statute, ICWA is inapplicable to this dependency case, regardless of adoptive parent's own Indian tribal membership.

***In re H.G.*, (2015) 234 Cal.App.4th 906**
The order terminating parental rights was reversed and the case remanded for a new Welf. & Inst. Code section 366.26 hearing based on the juvenile court's error in finding that the Indian Child Welfare Act (ICWA) did not apply. At the beginning of the case, Father alerted the court and HSA to his possible Eskimo heritage. The juvenile court held that ICWA does not apply to Eskimo families; however, this was error because the federal definition of "Indian" includes "Eskimos and other aboriginal peoples of Alaska." Because the juvenile court found ICWA inapplicable, it did not afford the tribe an opportunity to intervene or apply the heightened requirements for termination of parental rights that apply in ICWA cases. The heightened requirements apply whether or not the tribe intervenes in the case. Failure to apply the appropriate standard requires reversal of the order terminating parental rights and a new Welf. & Inst. Code section 366.26 hearing. In a footnote, the court notes parents' request to reverse the dispositional order but states that it does not have the authority to do so.

***In re K.P.*, (2015) 242 Cal.App.4th 1063**
Mother appeals termination of her parental rights at the Welfare and Institutions Code section 366.26 hearing, claiming that even though her children were dis-enrolled from the Pala Band of Indians the heightened ICWA standards should have been applied. The Court of Appeal affirms the juvenile court order terminating mother's parental rights.

Mother has 10 children. Her two youngest children, twins K.P. and Kristopher, were detained in 2009 when they were nine months old. Mother had already lost custody of her 8 older children due to her substance abuse. After the children were removed, the Pala Band of Indians was noticed and formally intervened in the proceedings. The children were subsequently enrolled in the Tribe.

The Tribe did not agree with the San Diego County Health and Human Services Agency's (the Agency) recommendation of tribal customary adoption; instead, guardianship was ordered as the permanent plan and jurisdiction was terminated in 2011.

Two years after termination of jurisdiction, Mother began visiting the children monthly. She told the guardians she wanted to visit weekly and she began telling the children not to call the guardian "mom." At the request of the guardians who wanted more control over visitation, the Agency requested that dependency jurisdiction be reinstated. The Agency contacted the Pala Band of Indians and asked for their position on adoption. At that time the Tribe informed the Agency that the twins had been dis-enrolled from the tribe due to a change in membership requirements. The juvenile court reinstated dependency jurisdiction, set a Welfare and Institutions Code section 366.26 hearing and after confirming that the children were no longer enrolled in the Tribe, terminated mother's parental rights.

The Court of Appeal rejects all of mother's arguments as to the applicability of the Indian Child Welfare Act. Mother's argument that lack of enrollment in a tribe is not determinative of a child's membership fails because the inquiry is whether the child is an enrolled member or is eligible for membership. Here, the children were neither enrolled nor eligible for membership. The fact that the children remain on the federal enrollment rolls pending the federal appeal is also not determinative of ICWA applicability. The juvenile court correctly deferred to the Tribe in ruling that the children are not Indian children within the meaning with ICWA. The order terminating parental rights is affirmed.

Forfeiture

***In re Isaiah W.*, (2016) 1 Cal.5th 1**
The California Supreme Court overturned a Court of Appeal decision that affirmed an order terminating parental rights in the face of a challenge based on a lack of Indian Child Welfare Act (ICWA) notice. In the proceeding placing newborn Isaiah W. in foster care, the juvenile court concluded there was no reason to know Isaiah was an Indian child and found ICWA

inapplicable. Isaiah's mother did not appeal from this order placing Isaiah in foster care. More than a year later, the mother appealed from the order terminating parental rights, citing the court's failure to order the Los Angeles County Department of Children and Family Services to comply with ICWA's notice requirements. The Supreme Court granted review to decide whether a parent who does not bring a timely appeal from a juvenile court order that subsumes a finding of ICWA's inapplicability may challenge such a finding in the course of appealing from a subsequent order terminating parental rights.

The majority opinion found that because the juvenile court had an affirmative and continuing duty to inquire whether a child is or may be an Indian child in all dependency proceedings, the mother was not foreclosed from raising the issue on appeal from the order terminating her parental rights. The plain language of section 224.3(a) means that the juvenile court in this case had a present duty to inquire whether Isaiah was an Indian child at the proceeding to terminate parental rights, even though the court had previously found no reason to know Isaiah was an Indian child at the earlier proceeding placing Isaiah in foster care. ICWA's notice requirements are intended to protect the interests of Indian children and tribes despite the parents' inaction. The court expressed no view as to the determination of whether the juvenile court erroneously concluded from the record that it had no reason to know Isaiah was an Indian child. The issue presented was whether the mother may challenge the order terminating parental rights on the ground that the juvenile court erred in finding ICWA notice unnecessary at a hearing over a year earlier in which she did not bring a timely challenge.

A dissenting opinion cited the court's past history of noting evidence that children suffer long-term serious emotional damage if a bond with foster parents is severed, and that the court should not adopt a rule that there is no time limit on a parent's right to raise the issue of ICWA compliance. To allow a parent unlimited time within which to raise this challenge would violate the child's constitutional right to a stable and permanent home. Requiring a parent to appeal an ICWA issue at the soonest possible opportunity furthers the policy of providing tribes with notice under ICWA at the soonest possible opportunity.

Indian Custodian

***In re E.R.*, (2016) 244 Cal.App.4th 866**

The children's maternal uncle, Rafael, was designated the Indian custodian of the children; he appeals the juvenile court orders placing the children in foster care. The juvenile court orders are affirmed.

The four children who are subjects of this dependency action were removed from their mother based on allegations of extreme neglect. Mother, an active methamphetamine user, left the children alone for days at a time. They were hungry, dirty, and had not ever been to school. Upon learning that the Mendocino County Health and Human Services Agency (agency) was investigating her in October of 2012, mother executed an Indian custodian designation making

Rafael the custodian of her children. The children were removed a few days after mother made the Indian custodian designation. The agency was aware that the children were Indian children and the social worker was in close contact with Cloverdale Rancheria's tribal representative. The tribal representative said that the tribe would not acknowledge the Indian custodian designation and did not support placing the children with Rafael. That fact remained true throughout the pendency of the dependency case.

The children were detained from mother and mother was offered reunification services. No real investigation into the Indian custodian designation was done until February of 2013. At that time, the court appointed an attorney for Rafael. Rafael continued to argue for placement of the children with him. The juvenile court ultimately decided it would be detrimental to place the children with Rafael because he suffered from severe cognitive delays as a result of a traumatic brain injury. Rafael timely appealed.

Addressing the Indian custodian designation, the appellate court notes that Cloverdale Rancheria believes the writing designating Rafael as the Indian custody was invalid because it was not signed by an Indian Child Welfare Act (ICWA) representative and not supported by Cloverdale Rancheria. The court disagrees and notes that the statutory authority for designation of an Indian custodian does not even require a writing. The court holds that Rafael became the Indian custodian for the children in October 2012. The failure of the agency and the juvenile court to inquire further into the Indian custodian designation at the early stages of the case was error. However, mother revoked the Indian custodian designation in January 2013 when she told the social worker she did not want the children placed with Rafael because there were drugs in the home. Since the parent can establish the Indian custodian informally, he/she can also revoke it informally.

However, the Court of Appeal goes on to hold that mother did not have the authority to reinstate the custody designation in February of 2013, when she stated that she did not want it revoked. The Court of Appeal finds that the mother no longer had the authority because the agency had been given the responsibility for placement and care of the minors in October 2012 and January 2013, so mother did not have the ability to informally transfer care and control of the minors to a third party. The appellate court also points out that it seems that mother never actually transferred custody to Rafael because the children were found to be living in the house mother occupied with maternal grandmother. Moreover, since an Indian custodian stands in the shoes of the parent it is not clear that both the parent and Indian custodian could be involved in a dependency proceeding at the same time. As such, the act of accepting reunification services may have been enough to revoke Rafael's designation as the Indian custodian.

Rafael claims that the agency failed to properly notice him of the dependency proceedings. The appellate court notes that Rafael had actual notice of the proceedings since he was present when the children were removed and appeared at several of the early hearings. However, ICWA requires that notice be provided to both the parent and the Indian custodian. Here, Rafael was not formally noticed and did not receive the services of an appointed attorney until several months

after the proceedings commenced. The failure to notice is not jurisdictional and is subject to a harmless error review. The notice error was harmless under the facts of this case because there was no reasonable probability the minors would have been placed with Rafael even if he had been noticed earlier.

Rafael next claims that the agency did not apply the correct standard for active efforts to prevent the breakup of an Indian family at the placement hearing in September 2013. The Court of Appeals notes that since Rafael's Indian custodian designation was terminated months prior, in January 2013, what he was actually seeking at the September 2013 hearing was preferred placement as an extended family member under ICWA. The Court of Appeal holds that there was good cause to deny placement with Rafael based on the children's special needs and Rafael's limited cognitive abilities. The juvenile court orders are affirmed.

Notice

***In re Albert A.*, (2016) 243 Cal.App.4th 1220**
Mother appeals jurisdiction and termination of her parental rights at the Welfare and Institutions Code section 366.26 hearing. The Court of Appeal holds that mother waived her right to challenge the jurisdictional findings and further finds that there was sufficient evidence to support termination of parental rights. However, the juvenile court overlooked a barrier to adoption when it terminated parental rights and Indian Child Welfare Act (ICWA) noticing was inadequate. The case is reversed and remanded to reconsider whether there are barriers to adoption and to comply with ICWA noticing.

The children were removed from the parents based on the parents' drug use and mother's untreated mental health issues. The juvenile court took jurisdiction and, at disposition, placed the children with the paternal grandmother. Mother did not engage in any services or visit in the six months between disposition and the review hearing. Consequently, the agency recommended and the court ordered termination of services and the setting of a Welfare and Institutions Code section 366.26 hearing. The recommended permanent plan was adoption by the paternal grandmother. At the 366.26 hearing the court terminated parental rights and found the children adoptable, despite that the grandmother remained married to estranged husband and would need a written consent to adopt from him to complete the adoption. Mother appealed the order terminating parental rights and the original jurisdiction order.

The court holds that the mother waived her right to challenge the jurisdictional findings when she failed to appeal them after the disposition orders were made. The Court of Appeal does not agree that failure to notice mother of her appeal rights excuses her from timely filing an appeal to the jurisdictional findings. The juvenile court was not required to advise mother of her right to appeal because mother was not present at the jurisdiction hearing.

On the other hand, the appellate court finds that mother should be allowed to challenge the order

terminating her parental rights even though she did not seek writ review of the orders setting the hearing at which her rights were terminated. Unlike the rules regarding notice of the right to appeal jurisdictional findings, the rules related to notice of the right to challenge the order setting a 366.26 hearing state that even parents who are not present at the hearing must be noticed. Specifically, California Rule of Court 5.590(b)(2) states that the court clerk must serve notice of the writ review rights within one day of setting the permanency hearing. Here, the clerk waited five days before sending the notice and sent it to an address where mother was not likely to receive it. It was well-known that the address on file was no longer a valid address for mother and the court failed to advise mother of the importance of keeping the court informed of her address. In light of the delay in notice and the court's failure to give the address advice, the Court of Appeal holds that mother was not provided with "timely and adequate notice" of her writ rights.

The Court of Appeal finds that it was not abuse of discretion to terminated reunification services but agrees with mother that the juvenile court failed to consider a potential impediment to adoption when it terminated parental rights. When a child is adoptable based only on a particular family member's willingness to adopt the child, the court must consider whether there are legal impediments to adoption. Here, the paternal grandmother was still married to her estranged husband and had not received written consent to adopt from him. Consequently, the adoptability findings were not supported by substantial evidence.

Lastly, mother argues that ICWA noticing provisions were not complied with. The notices sent to the tribe did not include mother's birth place nor maternal grandfather's date of birth or birth place. On remand, San Bernardino County Children and Family Services is directed to obtain the omitted information and include it on the ICWA notices. The case is also remanded for a new permanency hearing wherein the juvenile court will consider whether legal impediments to adoption exist.

***In re D.C.*, (2015) 243 Cal.App.4th 41**

The parents, C.C. and M.J., appeal the jurisdiction and disposition orders concerning D.C. and her siblings, Ce.C. and F.J. The family came to the attention of the San Diego County Health and Human Services Agency (the Agency) based on reports that C.C. was sexually abusing D.C. The sexual abuse allegations were eventually sustained and the children were removed from the parents. The appellate court affirms jurisdiction and disposition but remands the case for compliance with Indian Child Welfare Act (ICWA) noticing requirements.

M.J. argues that the court erred when it found ICWA does not apply. C.C. joins M.J.'s argument. The juvenile court found that ICWA did not apply based on a finding in the children's previous dependency case. However, C.C., who is the children's adoptive father, filled out an ICWA notification form and stated that he had Native American ancestry. The Court of Appeal notes that the ICWA definition of "Indian Child" does not require that the child's biological parents be members of the tribe or that one of the child's biological parents have tribal ancestry. The determination of a child's Indian status is up to the tribe. The question here is whether an adoptive father's potential Indian ancestry triggers ICWA noticing requirements. This is a novel

issue for California courts. The Court of Appeal holds that C.C.'s disclosure was sufficient to trigger ICWA noticing requirements. The notice requirement applies even if the Indian status of the child is uncertain because it is the tribe who determines membership. Because notice pursuant to ICWA was not provided, the ICWA findings are vacated and the case is remanded for proper notice. The Court of Appeal does not reverse the jurisdiction and disposition findings but states that if the children are Indian children, an interested party can petition the court to invalidate orders shown to have violated ICWA.

***In re I.B.*, (2015) 239 Cal.App.4th 367**

In this case the Court of Appeal holds that the Indian Child Welfare Act (ICWA) establishes a continuing obligation to provide updated notice to tribes when new or additional information is received about relatives who may have Indian ancestry. In the instant case, mother claimed Indian ancestry, naming the Blackfeet and Cherokee tribes. The Los Angeles County Department of Children and Family Services (the Department) noticed the relevant tribes pursuant to ICWA in April of 2013 with the information provided by the mother. In June 2013, the Department discovered additional information about mother's Indian ancestors and sent this information to one of the tribes. However, the Department failed to notice all of the tribes that had been previously noticed in April. The trial court found that I.B. was not an Indian child.

In September 2014, the court terminated the mother's parental rights and she appealed, claiming that the Department failed to comply with the noticing provisions of ICWA. The Department argued that any error was harmless because the notices sent in April 2013 were correct and were received by all the identified tribes. The Court of Appeal agreed with mother, stating that even when it has been determined that ICWA does not apply, Welfare and Institutions Code section 224.2 obligates social workers to provide information received subsequent to the noticing process to the tribes. Here, the Department was required to provide the newly discovered information to all of the tribes, not just one. The Court of Appeal held that the Department's failure to comply with its duty to provide relevant tribes with all the information it obtained regarding I.B.'s relatives mandated reversal and remand for the limited purpose of providing proper notice under ICWA.

***In re Kadence P.*, (2015) 241 Cal.App.4th 1376**

Dependency jurisdiction assumed based on mother's substance abuse and untreated mental health issues. Mother and father appeal jurisdiction and disposition, alleging the findings were not supported by substantial evidence. Mother and father also allege that the court failed to comply with the Indian Child Welfare Act (ICWA). Remanded for compliance with ICWA, otherwise conditionally affirmed.

When Kadence was four months old, the Los Angeles Department of Children and Family Services (the Department) received a referral that mother was using drugs and had untreated mental health problems. Investigation revealed that mother had an open dependency case as to her older children in Washoe, Nevada. The Department found Kadence and mother in Nevada.

At that time (September 2014), mother claimed she had no Indian ancestry. Mother also failed to comply with the Department's requests to drug test and failed to keep in contact with the Department. As a result, the Department filed a dependency petition in October of 2014. Neither mother nor father appeared at the detention hearing. An arrest warrant for mother was issued and a protective custody warrant for Kadence was issued. Mother and Kadence were found in December of 2014.

At the initial hearing in December 2014, mother changed course as to ICWA and stated that she had Blackfeet ancestry. The court ordered the Department to interview family members. Father denied Indian ancestry at the December 2014 hearing.

During the January 2015 hearing, the maternal grandmother stated that her father's side of the family had Blackfeet Indian ancestry but she had limited knowledge of the specifics. She said she would reach out to family members for additional information.

The parties returned to court in February 2015 and the maternal grandmother reported that her relatives confirmed Creek Indian ancestry and possibly Seminole ancestry. The court expressed confusion as to the Blackfeet ancestry, which now seemed to be unconfirmed. During the February 2015 jurisdiction hearing, father also now claimed Indian ancestry. The court continued the jurisdiction hearing and requested the Department obtain additional information.

At the March 2015 jurisdiction hearing, the Department stated it had no further information about Blackfeet ancestry and stated that father's relatives believed they were Cherokee. The court found that the claim of Blackfeet ancestry could not be substantiated and therefore the court had no reason to know Kadence was an Indian child. The court did not discuss the possible Seminole or Creek ancestry. The court ordered that the Cherokee tribe be noticed.

The appellate court first finds that substantial evidence supported the jurisdictional orders because mother failed to test one single time between initiation of the dependency and the jurisdiction hearing. There was substantial evidence mother continued to use drugs and the case law establishes that a finding of substance abuse by a parent of a child under six years old is prima facie evidence of that parent's inability to provide regular care, resulting in a substantial risk of harm.

As to ICWA, the appellate court holds that the failure to notice the Blackfeet, Creek, and Seminole tribes was error. Once the juvenile court has reason to know a child may be an Indian child, it is required to notice the tribe(s). Here the juvenile court was informed by various relatives that the child could have Blackfeet, Creek, or Seminole ancestry. As such, notice should have been provided to those tribes and failure to notice was error. While the juvenile court properly noticed the Cherokee tribe, disposition findings should not have been made prior to noticing the tribe. However, subsequent to disposition notice was properly provided and that issue is moot. The case is remanded to the juvenile court with directions to notice the Blackfeet, Creek, and Seminole tribes in accordance with ICWA.

***In re K.M.*, (2015) 242 Cal.App.4th 450**
Mother and father appeal the Welfare and Institutions Code section 366.26 order terminating their parental rights, on the basis that the Orange County Social Services Agency (SSA) failed to comply with Indian Child Welfare Act (ICWA) noticing requirements. The order terminating parental rights is reversed and the case is remanded to the juvenile court for the limited purpose of properly noticing the relevant tribes pursuant to ICWA.

On appeal, SSA admits that it failed to properly notice ICWA. During the pendency of the appeal, SSA attempted to remedy its error and claims that its efforts render the present appeal moot. As such, the focus of the appeal is on SSA's efforts to augment the record on appeal and obtain dismissal of the appeal, rather than on the ICWA noticing error.

It is undisputed that mother informed SSA that she had Native American heritage on her maternal side. It is also undisputed that SSA failed to investigate or notice the tribes. During the pendency of the appeal, SSA noticed the appropriate tribes and lodged the responses with the juvenile court. SSA then filed a motion to augment the record on appeal and dismiss the appeal as moot.

The appellate court first addresses whether it may review new evidence and, if so, through what mechanism. The Court of Appeal denies SSA's request to augment the record, holding that augmentation cannot be used to raise matters that occurred during the appeal because those matters were not before the lower court. Nor is taking judicial notice an appropriate solution. Generally, the reviewing court does not take judicial notice of evidence not presented to the trial court unless there are exceptional circumstances.

The appellate court does hold that Code of Civil Procedure section 909 allows the appellate court to made independent factual findings and take additional evidence on appeal and that evidence may be used to show that the appeal is moot. However, the evidence SSA seeks to introduce - the juvenile court's finding that ICWA does not apply - does not render the appeal moot because the juvenile court lacked jurisdiction to rule on a collateral dispute of the termination order. Once an order terminating parental rights has become final, the juvenile court lacks jurisdiction to modify or revoke it.

In the case at bar, the juvenile court lacked jurisdiction to consider SSA's belated ICWA efforts because it was a collateral attack on the termination order. Compliance with ICWA is required before parental rights are terminated. As such, the juvenile court's ICWA order is void. The appellate court holds that the juvenile court acted in excess of its jurisdiction when it revisited the ICWA issue while the appeal was pending. The order terminating parental rights is reversed and remanded with directions to properly notice the appropriate tribes.

***In re Natalie A.*, (2015) 243 Cal.App.4th 178**
Father appeals the jurisidictional finding based on his marijuana use and further argues that the Los Angeles Children and Family Services Department (the Department) failed to comply with the noticing provisions of the Indian Child Welfare Act (ICWA). The Court of Appeal affirms

the jurisdictional finding but agrees that the ICWA noticing requirements were not complied with and remands for proper noticing to the tribes.

The children were involved in a prior dependency action stemming from mother's drug use. Children had been placed with father, who resided at paternal grandmother's home. A dependency petition was filed while the children were in father's care because the youngest children, who were one and two years old, had been left without adult supervision on more than one occasion. Father submitted to detention of the children and agreed to drug test and enroll in a drug rehabilitation program. Father failed to test and did not enroll in a program. Father did not appear at the jurisdiction hearing but his counsel objected to jurisdiction. The court sustained the allegations in the petition. Father appeals.

Father contends that there was insufficient evidence to sustain the drug abuse count under the standard set forth in In re Drake M. (2012) 211 Cal.App.4th 754 (Drake M.). The father in the Drake M. case used medicinal marijuana to treat chronic knee pain. The father in that case had a job, no criminal history, and did not drive or care for his child within four hours of using marijuana. Here, the evidence shows that father's drug use has resulted in a failure to fulfill major obligations at home, such as ensuring that his children were safely cared for and supervised.

Father further argues that the disposition order requiring him to participate in drug testing and a treatment program was an abuse of discretion. The Court of Appeal holds that the disposition order was a reasonable exercise of discretion, rationally tailored to advance the children's best interests.

As to ICWA, the father argues that the Department failed to notice the Chumash tribe of the dependency action. The Department concedes that father provided sufficient information to trigger ICWA noticing requirements. The appellate court finds that the appropriate remedy is not to reverse the jurisdiction finding because there is not a sufficient showing that the children are Indian children; rather, the appropriate course is to remand the case for ICWA noticing. If after noticing a tribe claims that the children are Indian children, the interested parties can petition the juvenile court to invalidate any orders that violate ICWA.

***In re S.E.*, (2013) 217 Cal.App.4th 610**

Both mother and father appealed from an order of the juvenile court establishing guardianship of their son. Both parents contended that the department failed to comply with the inquiry and notice requirements of ICWA and the analogous California statutes governing custody proceedings involving Indian children per WIC 224. Detention report noted mother claimed Native American Indian ancestry through the Cherokee tribe and that the child's maternal grandmother was half Cherokee. Maternal grandmother confirmed Cherokee Indian heritage, saying her maternal grandfather was also Cherokee, but she did not know if he was registered or of any specific tribal affiliation. The name of the maternal grandmother's grandfather was not stated anywhere on the ICWA-030 form. Father also indicated on the ICWA 20 form that he might have Indian ancestry. Father said he had Sioux and Choctaw Indian heritage through his maternal grandmother or the child's paternal great-grandmother. Court ordered the department to

investigate the parent's claims and provide ICWA notice to the appropriate tribes. Department later reported that notice under the ICWA was given to the Cherokee tribes, but the notice was erroneous and would have to be corrected. Department then filed an interim review report including the ICWA notice provided to the Cherokee tribes and response letters from two tribes indicating child was not an Indian child. The court found that ICWA did not apply to the case. Father's Indian ancestry was never investigated. Subsequent reports, simply reiterated that ICWA did not apply. Parents timely appealed. Mother contended department's failure to state the name of child's great-great-grandfather rendered the notice given inadequate. Father contended guardianship order must be reversed and matter remanded to the juvenile court with directions to ensure compliance with the ICWA notice provisions.

Reversed in part, remanded in part. The inquiry and notice conducted was not in full compliance with the requisites of the statute. The order establishing guardianship is reversed. The case is remanded to the juvenile court with directions to order the department to provide notice to the tribes, in accordance with ICWA. If after proper notice the court finds the child is an Indian child, the court shall proceed in conformity with ICWA. If, after proper inquiry and notice, the court finds the child is not an Indian child, the order establishing guardianship as the permanent plan shall be reinstated. The information which was omitted here pertained directly to the ancestor mother and the maternal grandmother affirmatively claimed was Indian. Under these circumstances the appellate could not say that the omission was harmless and that providing the ancestor's name might not have produced different results concerning the child's Indian heritage. Also the parents did not forfeit any deficiencies in the notice requirements by failing to raise them because the notice provisions are designed in part to protect the potential tribe's interests.

Permanency

***In re A.M.*, (2013) 215 Cal.App.4th 339**
Termination of parental rights and adoption are appropriate for an Indian child where the tribe recommended legal guardianship and did not pursue Tribal Customary Adoption.

Child was a member of an Indian tribe. Agency recommended termination of parental rights (TPR) and a permanent plan of adoption. At the initial 366.26 hearing, the court found guardianship was in the child's best interests based on evidence that TPR might result in loss of membership in the tribe. Court granted guardianship with Native American certified foster parents, asked the tribe to consider Tribal Customary Adoption (TCA) and asked the tribe to set a subsequent 366.26 hearing if TCA becomes an appropriate alternative to guardianship. At the second 366.26 hearing, agency recommended termination of parental rights and adoption. Tribe continued to express preference for a permanent plan of guardianship with possible return home. Tribe had not pursued TCA. An ICWA expert presented evidence that child would not lose tribal membership status if parental rights were terminated, that it was in child's best interest to be adopted by his current caretakers and that it would be emotionally traumatic for him to be removed from their care. Court found child to be adoptable, that TPR would not affect child's

tribal membership rights, and that a TCA had not occurred. The court terminated parental rights and set adoption as the permanent plan, noting that while the tribe identified guardianship as the preferred plan, that plan was only appropriate as a transition to TCA, which never occurred. The tribe timely appealed.

Affirmed. In the portion of the opinion certified for publication, the Court of Appeal affirmed the orders terminating mother's parental rights and denying her request for modification. There was no error in procedures used by the trial court at the second 366.26 hearing. The court has no duty to make any orders relating to TCA unless a tribe requests a 120-day continuance to complete the home study and TCA or unless it is presented with a TCA order from the tribe. Any failure to include a discussion of TCA in the assessment prepared for the 366.26 hearing was harmless error.

***In re Sadie S.*, (2015) 241 Cal.App.4th 1289**

Father appeals the judgment entered at the Welfare and Institutions Code section 366.26 hearing ordering tribal customary adoption (TCA) as the permanent plan. The court affirms the trial court judgment.

Sadie and her siblings were removed in May of 2011 due to ongoing domestic violence between the parents. The Northfork Rancheria of Mono Indians of California (Tribe) was notified of the proceedings. The Tribe stated that the children were Indian children and intervened in the dependency action.

The children were placed with a maternal aunt, and mother and father were offered reunification services. Mother did not participate and her services were terminated after six months. In May 2012, the youngest sibling was born tox positive and removed from the parents at birth. She was placed with her siblings; mother was not offered reunification services. Father, who had not participated in reunification services on behalf of his older children, received reunification services for a short period of time.

By the time of the 366.26 hearing, the department, the Tribe and the caregiver agreed that TCA was the appropriate plan. The TCA allowed father to visit the children so long as he tested drug free for six months and agreed to monitored visits, among other things.

On appeal, father argues that the TCA order was not made in conformity with ICWA's jurisdictional requirements and that the order denied him due process.

TCA is an alternative placement plan for Indian children. It allows the tribe to select the caregiver and does not require termination of parental rights. State law requires that the court afford the TCA order full faith and credit; however, the court retains discretion to select the most appropriate permanent plan. The purpose of the reference to full faith and credit is to create a legal basis for recognizing the TCA in the absence of termination of parental rights.

Father argues that the TCA order in this case was not entitled to full faith and credit because the

Tribe did not exercise subject matter jurisdiction prior to the initiation of the dependency proceedings under 25 U.S.C. section 1911(a). The appellate court dismisses this contention, noting that father has provided no authority to support his contention that the Tribe was required to petition the juvenile court to transfer the proceedings. The court points out that pursuant to section 366.24, which outlines the purpose and process of TCAs, juvenile court jurisdiction extends throughout the proceedings and does not end until the final decree of adoption is awarded. Therefore, the juvenile court did not err when it afforded the TCA order full faith and credit.

Father next contends that he was denied due process because he was not given adequate opportunity to be heard regarding the visitation orders. The appellate court finds no merit in this contention. The court points out that section 366.24 does not require that the TCA guarantee parents visitation. Section 366.24 does state that the parents should be given an opportunity to be heard on the terms of the TCA; here, father did have a chance to talk to the Tribe about the TCA, so section 366.24 was complied with. The court also notes that parental consent is not required before the TCA can be given full faith and credit. This is in keeping with the purpose of the dependency proceeding at this late stage of the case, which is to provide permanency and stability for the child. Juvenile court orders affirmed.

Placement Preferences

***In re Alexandria P.*, (2016) 1 Cal.App.5th 331**

For the third time this case came before the Court of Appeal on the issue of whether the juvenile court had correctly ordered an Indian child, Alexandria P., to be placed with her extended family in Utah, after concluding that Alexandria's foster parents and de facto parents had failed to prove by clear and convincing evidence that there was good cause to depart from the adoptive placement preferences set forth in the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). The juvenile court applied the incorrect standard on two occasions. In 2016, after the second remand, the juvenile court found that the de facto parents had not met their burden of proving by clear and convincing evidence that there was a significant risk of serious harm as a result of a change in placement and ordered Alexandria to be placed in Utah. The de facto parents appealed.

The juvenile court correctly applied the law governing good cause to depart from the adoptive placement preferences set forth in the ICWA, considering the bond Alexandria had developed over time with the de facto parents as well as a number of other factors related to her best interests, including Alexandria's relationship with her extended family and half-siblings, the capacity of her extended family to maintain and develop her sense of self-identify, including her cultural identity and connection to the Choctaw tribal culture, and the de facto parent's relative reluctance or resistance to foster Alexandria's relationship with her extended family or encourage exploration of and exposure to her Choctaw cultural identity.

The Court of Appeal discussed the non-binding 2015*Guidelines for State Courts and Agencies in Indian Child Custody Proceedings (Guidelines)* and found it in conflict with a Bureau of Indian Affairs issued final rule to govern the ICWA implementation. The court found the new rule and the continued relevance and viability of the 2015 Guidelines once the rule takes effect as not entirely clear.

The Court of Appeal however found its analysis was fully consistent with the final rule's observation that a good cause determination should not devolve into a standardless, free-ranging best interests inquiry. A child's best interest was a relevant factor in determining good cause, but one factor among a constellation of factors that a court would take into account in determining good cause. The longevity of a child's foster placement may sometimes be relevant to deciding whether good cause exists to depart from the ICWA's placement preferences, but it cannot be the sole deciding factor. Substantial evidence supported the juvenile court's decision finding a lack of good cause to depart from the ICWA's placement preferences.

Filed 7/14/16

IN THE SUPREME COURT OF CALIFORNIA

In re ABBIGAIL A. et al., Persons Coming Under the Juvenile Court Law.	
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Appellant, v. JOSEPH A., et al. Defendants and Respondents.	S220187 Ct.App. 3 C074264 Sacramento County Super. Ct. Nos. JD232871 & JD232872

The Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.) (ICWA) establishes minimum federal standards a state court must follow when removing an Indian child from his or her family. Congress has defined "Indian child" for these purposes as "any 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." (*Id.*, § 1903(4).)

We granted review to consider whether two state court rules adopted to implement ICWA are valid. When a child is eligible for tribal membership but is not an Indian child as defined in ICWA, rule 5.482(c) of the California Rules of Court requires the juvenile court to "proceed as if the child is an Indian child" and

to take steps "to secure tribal membership for the child." (*Ibid.*)[1] We conclude rule 5.482(c) is invalid because it conflicts with the Legislature's intent to enforce ICWA by codifying its provisions, including the federal definition of Indian child (see Welf. & Inst. Code, §§ 224–224.6; *id.*, § 224.1, subd. (a); 25 U.S.C. § 1903(4)), thus leaving cases not involving Indian children subject to the statutes generally applicable in dependency proceedings. Rule 5.482(c) is inconsistent with those statutes, and with the Legislature's intent, and thus invalid. In contrast, the related rule 5.484(c)(2) merely directs the juvenile court to pursue tribal membership for a child who is already an Indian child as defined in ICWA, in order to prevent the breakup of the Indian family and to qualify the child for tribal services. This rule is consistent with state law and valid.

I. BACKGROUND

This is an appeal from a child dependency proceeding involving the minors Abbigail A. (born 2008) and Justin A. (born 2007). In December 2012, the Sacramento County Department of Health and Human Services (DHHS) filed petitions in the juvenile court alleging the children were dependents of the court because their mother, Jaime S., could not adequately supervise and protect them. (See Welf. & Inst. Code, § 300, subd. (b)(1).) The court removed the children from Jamie's custody and placed them temporarily with their maternal grandmother. At a subsequent hearing Joseph A. acknowledged paternity, and the court found he was the children's biological and presumed father. Joseph, while not a member of an Indian tribe, informed the court he believed he had Cherokee ancestry. To obtain the information necessary to determine whether Abbigail and Justin were Indian children to whom ICWA applied, the court ordered DHHS to

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[1] All further references to rules are to the California Rules of Court.

notify the relevant tribes pursuant to federal and state law. (See 25 U.S.C. § 1912(a); Welf. & Inst. Code, § 224.2, subd. (a).)

In January 2013, the Cherokee Nation informed the DHHS by letter that Abbigail and Justin were "eligible for enrollment and affiliation with Cherokee Nation by having direct lineage to an enrolled member," namely Joseph's great-grandmother. However, despite their eligibility for membership in the tribe, the children were not Indian children because neither of their biological parents was a member. (See 25 U.S.C. § 1903(4).) The letter continued: "Cherokee Nation is not empowered to intervene in this matter unless the child/children or eligible parent(s) apply for and receive membership. However, when tribal enrollment of the parent or child/children occurs the tribe must be notified of their right to intervene. Due to the tribal eligibility of the children in question, Cherokee Nation recommends applying all the protections of ICWA to this matter from the beginning of the case. Hopefully this will prevent any future delays in procedural matters if or when the parents or child/children become enrolled members . . . ."

In view of the tribe's response, Joseph informed the court he intended to apply for membership. Following rule 5.482(c), the court stated it would proceed as if Abbigail and Justin were Indian children to whom ICWA applied. DHHS objected that ICWA did not apply because the children were not Indian children as defined by that law. In response, the court explained that "it seems likely [ICWA] will apply," given Joseph's intention to pursue tribal membership, and that "it would really seem to be in everyone's interest to treat this case [as] what it's likely to become" and thus avoid the need for additional, future proceedings to comply with ICWA should the children's status change before disposition. The DHHS moved for reconsideration, arguing rule 5.482(c) was invalid. The court denied the motion and, following rule 5.482(c), stated it would proceed as if ICWA applied. The court followed the same rule by directing the DHHS and counsel to

make reasonable efforts to secure tribal membership for the children. Two continuances were granted for this purpose.

In May 2013, Joseph and counsel for Abbigail and Justin reported the applications for tribal membership were still pending because the tribe required additional birth and death certificates. Continuing to proceed as if ICWA applied, the court held a jurisdictional and dispositional hearing. (See Welf. & Inst. Code, §§ 355, 358.) As ICWA would require, the court heard expert testimony to the effect that continued custody of Abbigail and Justin by their parents was likely to result in serious emotional or physical damage (see 25 U.S.C. § 1912(e), (f)) and found that fact to be true by clear and convincing evidence (see 25 U.S.C. § 1912(e), (f)). Also as ICWA would require, the court found (1) that reasonable efforts had been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts had proved unsuccessful (see 25 U.S.C. § 1912(d)), and (2) that the children's placement with their maternal grandmother met ICWA's placement preferences (see 25 U.S.C. § 1915(b)(i) ["a member of the Indian child's extended family"]). Based on these findings, the court adjudged the children to be dependents of the court and ordered them placed with their maternal grandmother.

The DHHS appealed. The agency contended that rule 5.482(c) and related rule 5.484(c)(2) were invalid, and that the juvenile court erred by proceeding as if ICWA applied and directing the agency to make efforts to secure tribal membership for the children. The Court of Appeal concluded the rules conflicted with state law and reversed. Without disturbing the juvenile court's jurisdictional and dispositional findings, which no party has challenged, the Court of Appeal ordered the juvenile court "to enter a new judgment that does not direct the application of ICWA provisions to the minors, until such time as they may qualify as Indian children under the ICWA and California definitions of the class."

We granted Joseph's petition for review.

II. DISCUSSION

Congress adopted ICWA in response to concerns " 'over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.' " (*Adoptive Couple v. Baby Girl* (2013) 570 U.S. __ [186 L.Ed.2d 729, 736, 133 S.Ct. 2552, 2557, quoting *Mississippi Choctaw Indian Band v. Holyfield* (1989) 490 U.S. 30, 32.) ICWA addresses these concerns by establishing "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.)

In any given case, ICWA applies or not depending on whether the child who is the subject of the custody proceeding is an Indian child. Congress defined "Indian child" for these purposes to mean "any 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).) When applicable, ICWA imposes specific requirements on child custody proceedings in state court. Among other things, when "the court knows or has reason to know that an Indian child is involved," the party seeking to remove the Indian child from the custody of its parent or Indian custodian, or to terminate parental rights, must "notify the parent or Indian custodian and the Indian child's tribe . . . of the pending proceedings and of their right of intervention." (25 U.S.C. § 1912(a).) If the parent, Indian custodian or tribe cannot be determined, notice must be given to the Bureau of Indian Affairs

(BIA). (*Ibid.*) The tribe may intervene "at any point in the proceeding." (*Id.*, § 1911(c).) Under certain circumstances, the court must "transfer such proceeding to the jurisdiction of the tribe." (*Id.*, subd. (b).) If the proceeding is not transferred, the party seeking to remove an Indian child must "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." (*Id.*, § 1912(d).) The court may not enter an order removing an Indian child "in the absence of 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." (*Id.*, subd. (e).) Similarly, an order terminating parental rights requires "a determination, supported by evidence beyond a reasonable doubt," that continued custody by the parent or Indian custodian is likely to result in such damage. (*Id.*, subd. (f).) Any placement of an Indian child must follow the preferences set out in ICWA. (*Id.*, § 1915.) Finally, ICWA authorizes collateral attacks: When a court removes an Indian child or terminates parental rights in violation of ICWA, "any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action . . . ." (*Id.*, § 1914.)

In California, the state with the second largest Indian population (U.S. Dept. of the Interior, BIA, 2013 American Indian Population and Labor Force Report (Jan. 16, 2014) p. 10 [281,374 Native Americans]), persistent noncompliance with ICWA led the Legislature in 2006 to "incorporate[] ICWA's requirements into California statutory law." (*In re W.B.* (2012) 55 Cal.4th 30, 52; see Welf. & Inst. Code, §§ 224–224.6.) The 2006 legislation provides, among other things, that

"Indian child" and ICWA's other critical terms "shall be defined as provided in [ICWA]." (Welf. & Inst. Code, § 224.1, subd. (a).)

A. Is Rule 5.482(c) Valid?

With that background we turn to the question whether rule 5.482(c) is valid. The rule provides: "If after notice has been provided as required by federal and state law a tribe responds indicating that the child is eligible for membership if certain steps are followed, *the court must proceed as if the child is an Indian child and direct the appropriate individual or agency to provide active efforts under rule 5.484(c) to secure tribal membership for the child.*" (Rule 5.482(c), italics added.) We conclude the rule is invalid as a matter of state law.

The California Constitution directs the Judicial Council to "adopt rules for court administration, practice and procedure." (Cal. Const., art. VI, § 6, subd. (d); see Welf. & Inst. Code, § 265 [concerning rules for juvenile courts].) Rules adopted by the Judicial Council "are entitled to a measure of judicial deference." (*Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1014.) But the Judicial Council's authority "is not unlimited, of course, and the council may not adopt rules that are inconsistent with the governing statutes." (*People v. Hall* (1994) 8 Cal.4th 950, 960; see *In re W.B.*, *supra*, 55 Cal.4th at p. 58, fn. 17; *In re Richard S.* (1991) 54 Cal.3d 857, 863; Cal. Const., art. VI, § 6, subd. (d) ["The rules adopted shall not be inconsistent with statute."].) "In this context, a rule is inconsistent with a statute if it conflicts with either the statute's express language or its underlying legislative intent." (*In re Alonzo J.* (2014) 58 Cal.4th 924, 937.)

Thus, in *In re W.B.*, *supra*, 55 Cal.4th 30, we held that a rule adopted by the Judicial Council was invalid to the extent it purported to apply ICWA's requirements to proceedings based on an Indian child's delinquent conduct. (*Id.* at p. 58, fn. 17.) ICWA excludes delinquency proceedings from the definition of

"child custody proceeding" (25 U.S.C. § 1903(1)), and a California statute incorporates that definition (Welf. & Inst. Code, § 224.1, subd. (d)). The challenged rule conflicted both with the state statute (*In re W.B., supra,* at p. 58, fn. 17) and with legislative intent (*id.* at pp. 55–57). "If our Legislature," we explained, "had intended to extend ICWA's protections to a whole new realm of juvenile delinquency cases otherwise exempted under the federal law, one would expect evidence of this intent to feature prominently in the legislative history. Yet, no mention of such a purpose appears." (*In re W.B.*, at p. 56.)

Similar reasoning supports the conclusion that rule 5.482(c) is invalid. As we have explained, "[t]he primary objective of Senate Bill No. 678," which incorporated ICWA's requirements and definitional provisions into California statutory law, "was to *increase compliance* with ICWA." (*In re W.B., supra*, 55 Cal.4th at p. 52, italics added; see Assem. Com. on Judiciary, Analysis of Sen. Bill No. 678 (2005–2006 Reg. Sess.) June 20, 2006, p. 1 [bill believed "necessary to increase compliance with ICWA"]; see also Welf. & Inst. Code, §§ 224–224.6; *id.*, § 224.1, subd.(a) [definitions]).) Nothing in the bill's language or history demonstrates the Legislature intended to apply ICWA's requirements to, or require membership applications be made on behalf of, children who are not Indian children as defined in ICWA. Instead, the Legislature left cases not involving Indian children subject to the statutes generally applicable in dependency proceedings. Rule 5.482(c) is inconsistent with those statutes, and with the Legislature's intent, and thus invalid.

Joseph offers several arguments to the contrary. None is persuasive.

First, Joseph argues rule 5.482(c) is consistent with, and even authorized by, Welfare and Institutions Code section 224. Echoing ICWA's parallel provision (25 U.S.C. § 1921), the state statute provides: "In any case in which this code or other applicable state or federal law provides *a higher standard of protection* to

the rights of the parent or Indian custodian of an Indian child, or the Indian child's tribe, than the rights provided under [ICWA], the court shall apply the higher standard." (Welf. & Inst. Code, § 224, subd. (d), italics added; cf. 25 U.S.C. § 1902 [describing ICWA as establishing "minimum Federal standards for the removal of Indian children from their families"].) Joseph contends rule 5.482(c) provides such a higher standard of protection. The short answer to his argument is that Welfare and Institutions Code section 224, like the related federal statutes, speaks only to the rights of persons and tribes connected with "*an Indian child*." (Welf. & Inst. Code, § 224, subd. (d), italics added.) Section 224 cannot reasonably be understood to authorize the adoption of, or require deference to, a rule purporting to apply ICWA's requirements in cases involving children who are not Indian children. By analogy, another court has explained that "ICWA's 'minimum federal standards' language refers to 'the *removal* of Indian children,' . . . ; it does not refer to the *definition* of an 'Indian child.' [Citations.] . . . [N]othing in ICWA suggests that the definition of 'Indian child' . . . is a 'minimum federal standard.' " (*State ex rel. SOSCF v. Klamath Tribe* (Or.Ct.App. 2000) 11 P.3d 701, 705, italics added [rejecting county's agreement with tribe that ICWA applied to children not satisfying federal definition of Indian child].)

Second, Joseph relies on the Legislature's declaration that the "State of California has an interest in protecting Indian children who are members of, or are eligible for membership in, an Indian tribe." (Welf. & Inst. Code, § 224, subd. (a)(1).) To read this finding as broadening the definition of Indian child to include children who are merely eligible for membership is not reasonable. Having expressly incorporated ICWA's narrower definition (Welf. & Inst. Code, § 224.1, subd. (a); see 25 U.S.C. § 1903(4)), which requires more for membership than eligibility, the Legislature would not likely have chosen to insert a conflicting definition into a preambular provision. Instead, the legislative finding is more

plausibly read as a shorthand reference to the formal definition of Indian child, which requires that a child who is merely eligible for tribal membership also have a biological parent who is already a member. Congress used the same shorthand in a similar finding accompanying ICWA, presumably without thereby intending to modify the formal definition of "Indian child." (See 25 U.S.C. § 1901(3) ["the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe"].) In any event, " 'legislative intent is not gleaned solely from the preamble of a statute; it is gleaned from the statute as a whole, which includes the particular directives.' " (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1118.)

Third, Joseph calls attention to the Legislative Counsel's summary digest of the 2006 legislation that incorporated ICWA's provisions, including the federal definition of Indian child. (Stats. 2006, ch. 838, §§ 29–30, pp. 6563-6565, codified as Welf. & Inst. Code, §§ 224–224.6.) The Legislative Counsel stated the act "would revise, recast, and expand various provisions of state law to, among other things, apply to certain children who do not come within the definition of an Indian child for purposes of [ICWA]." (Legis. Counsel's Dig., Sen. Bill No. 678 (2005–2006 Reg. Sess.), 6 Stats. 2006, Summary Dig., p. 465.) We find in this statement no authority or support for rule 5.482(c). The summary digest appears to refer to provisions giving the juvenile court discretion to permit non-federally recognized tribes, which have no rights under ICWA (see 25 U.S.C. § 1903(8)), to participate in cases involving children who would be Indian children but for the unrecognized "status of the child's tribe." (Welf. & Inst. Code, § 306.6, subd. (a); see Fam. Code, § 185, subd. (a) [same],) These statutes, however, include the admonition that they "shall not be construed to make [ICWA], or any state law implementing [ICWA], applicable to the proceedings." (Welf. & Inst. Code, § 306.6, subd. (d); see Fam. Code, § 185, subd. (d) [same].) Furthermore, the

summary digest's description of the 2006 legislation cannot be reconciled with the enactment's actual language, which simply incorporates ICWA's definition of Indian child. (Welf. & Inst. Code, § 224.1, subd. (c).) A summary digest is "not binding or persuasive where contravened by the statutory language, and by other indicia of a contrary legislative intent." (*State ex rel. Harris v. PricewaterhouseCoopers, LLP* (2006) 39 Cal.4th 1220, 1233, fn. 9; see *Heavenly Valley v. El Dorado County Bd. of Equalization* (2000) 84 Cal.App.4th 1323, 1339 [summary digest conflicting with statute "must be disregarded"].)

Fourth, Joseph argues rule 5.482(c) is not inconsistent with the federal and state definitions of "Indian child" because "there is no national standard for establishing who is an 'Indian child.' " The argument confuses membership, which is a tribe's determination based on tribal law, with a child's status as an Indian child (25 U.S.C. § 1903(4); Welf. & Inst. Code, § 224.1(a)), which is a conclusion of federal and state law based on the tribe's determination. In the case before us, rule 5.482(c) led the juvenile court to "proceed as if" (*ibid.*) Abbigail and Justin were Indian children for purposes of ICWA and to require that membership applications be made on their behalf, even though the Cherokee tribe had authoritatively informed the court that the children and their father were not members of the tribe. (See Welf. & Inst. Code, § 224.3, subd. (e)(1) ["A determination by an Indian tribe that a child is or is not a member of or eligible for membership in that tribe . . . shall be conclusive."]; see 25 C.F.R. § 23.108(b) (eff. Dec. 12, 2016) ["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."].)

Finally, Joseph contends rule 5.482(c) is consistent with state law because it promotes the prompt resolution of child custody proceedings in cases where

"imminent tribal enrollment is a virtual certainty." The possibility that a child who is not an Indian child may become one while a custody proceeding is pending is something the juvenile court certainly should consider. The court has "an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 . . . has been . . . filed is or may be an Indian child . . . ." (Welf. & Inst. Code, § 224.3, subd. (a).) Moreover, custody decisions made in violation of ICWA may be set aside on petition by the Indian child's parent, Indian custodian or tribe (25 U.S.C. § 1914), thus requiring new jurisdictional and dispositional hearings. Accordingly, to wait a few days or weeks while a parent or child pursues an application for tribal membership might in some cases save time in the long run. "Although continuances are discouraged in dependency cases" (*In re Emily D.* (2015) 234 Cal.App.4th 438, 448), the juvenile court has authority to grant brief, necessary continuances that are not inconsistent with the child's best interests, while giving "substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements." (Welf. & Inst. Code, § 352, subd. (a); see *id.*, §§ 352, subd. (b), 366.26, subd. (c)(3) [limits on continuances]; rule 5.550(a) [continuances in dependency proceedings].)

In contrast, rule 5.482(c) was not written to address the need for prompt resolution of child custody proceedings and does not effectively do so. Instead, the rule invites unnecessary delay by requiring the court to make efforts to secure tribal membership for children who are not Indian children, apparently without regard to the family's wishes, and to apply ICWA's requirements in cases involving children who are not and may never become Indian children.[2] Such a

[2] This court has not been informed that Joseph's, Abbigail's or Justin's application for tribal membership has ever been granted.

rule cannot be reconciled with state laws enacted to serve the "primary objective . . . [of] increas[ing] compliance with ICWA." (*In re W.B.*, *supra*, 55 Cal.4th at p. 52.)

For all of these reasons we conclude rule 5.482(c) is invalid as a matter of state law. This conclusion leaves no need to determine whether federal law would preempt the rule.[3]

B. Is Rule 5.484(c)(2) Valid?

As noted, the Court of Appeal concluded rules 5.482(c) and 5.484(c)(2) were both invalid. That court, however, treated the rules as essentially identical. The parties do likewise in their briefs to this court. In fact, rule 5.484(c)(2) justifies separate consideration.

Rule 5.484(c)(2) provides: "In addition to any other required findings to place an Indian child with someone other than a parent or Indian custodian, or to terminate parental rights, the court must find that active efforts have been made . . . to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, and must find that these efforts were unsuccessful. [¶] . . . [¶] (2) Efforts to provide services must include pursuit of any steps necessary to secure tribal membership for a child if the child is eligible for membership in a given tribe, as well as attempts to use the available resources of extended family members, the tribe, tribal and other Indian social service agencies, and individual Indian caregivers."

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[3] The court in *In re Jack C.* (2011) 192 Cal.App.4th 967, 981–982, applied rule 5.482(c) after concluding it was not preempted. We need not review that conclusion because we hold the rule is invalid as a matter of state law. *In re Jack C.* does not discuss the rule's validity under state law and should not, in view of our decision, be read as authority on that point.

Unlike rule 5.482(c), which directs the juvenile court to proceed in certain cases "as if" a child were an Indian child, rule 5.484(c)(2) speaks only to the court's obligations in a case involving an "Indian child" as defined by law. Read in this manner, according to its plain language, the rule is not inconsistent with any state statute implementing ICWA. We do not understand any party to argue to the contrary.

Neither do we understand any party to argue that a court may not properly direct that steps be taken to pursue tribal membership for a child who, while not a member of a tribe, is already an Indian child to whom ICWA applies because he or she is both eligible for membership and also the biological child of a member. (See 25 U.S.C. § 1903(5); see Welf. & Inst. Code, § 224.1, subd. (a).) Tribal membership offers significant benefits to an Indian child, including the opportunity to develop a political, cultural, and social relationship with the tribe, and access to federally funded programs such as Tribal Temporary Assistance for Needy Families and those offered by the Indian Health Service and the Bureau of Indian Education. Federal and state law recognize the importance of such benefits to Indian children. (See 25 U.S.C. § 1902; Welf. & Inst. Code, § 224, subd. (a)(1); cf. U.S. Dept. of the Interior, BIA, ICWA Proceedings, Discussion of Rule and Comments, 81 Fed. Reg. 38778, 38790, 38815 (June 14, 2016) ["In any particular case, . . . it may be appropriate to seek Tribal citizenship for the child, as this may make more services and programs available to the child."].) No party contends the rule, read in this manner, is inconsistent with the California statutes incorporating ICWA or preempted by federal law. (Cf. Welf. & Inst. Code, § 224, subd. (d) [when state or federal law "provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child, or an Indian child's tribe, . . . the

court shall apply the higher standard"]; 25 U.S.C. § 1921 [similar].) We thus conclude rule 5.484(c)(2) is valid.

III. DISPOSITION

The judgment of the Court of Appeal is reversed to the extent it holds that rule 5.484(c)(2) is invalid. In all other respects the judgment is affirmed and remanded for further proceedings consistent with this opinion.

WERDEGAR, J.

WE CONCUR:

CANTIL-SAKAUYE, C. J.
CHIN, J.
CORRIGAN, J.
LIU, J.
CUÉLLAR, J.
KRUGER, J.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Name of Opinion In re Abbigail A.

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Original Proceeding
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IN THE SUPREME COURT OF CALIFORNIA

In re ISAIAH W., A Person Coming Under the Juvenile Court Law.	
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,	
Plaintiff and Respondent,	S221263
v.	Ct.App. 2/3 B250231
ASHLEE R.,	Los Angeles County
Defendant and Appellant.	Super. Ct. No. CK91018

The federal Indian Child Welfare Act (ICWA) provides: "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." (25 U.S.C. § 1912(a).) This notice requirement, which is also codified in California law (Welf. & Inst. Code, § 224.2; all undesignated statutory references are to this code), enables a tribe to determine whether the child is an Indian child and, if so, whether to intervene in or exercise jurisdiction over the proceeding. No foster care placement or termination of parental rights proceeding may be held until at

~ SEE DISSENTING OPINION ~

least 10 days after the tribe receives the required notice. (25 U.S.C. § 1912(a); see § 224.2, subd. (d).)

In this case, a juvenile court removed newborn Isaiah W. from his parents' care and placed him in foster care. In that proceeding, the court concluded there was no reason to know Isaiah was an Indian child. The court thus found ICWA inapplicable and did not order the Los Angeles County Department of Children and Family Services (the Department) to notify any tribe or the federal Bureau of Indian Affairs (BIA). Isaiah's mother, defendant Ashlee R., did not appeal from this order placing Isaiah in foster care. More than a year later, the juvenile court terminated Ashlee's parental rights. Ashlee appealed from that order, citing the court's failure to order the Department to comply with ICWA's notice requirements. We granted review to decide whether a parent who does not bring a timely appeal from a juvenile court order that subsumes a finding of ICWA's inapplicability may challenge such a finding in the course of appealing from a subsequent order terminating parental rights. Because ICWA imposes on the juvenile court a continuing duty to inquire whether the child is an Indian child, we hold that the parent may a challenge a finding of ICWA's inapplicability in an appeal from the subsequent order, even if she did not raise such a challenge in an appeal from the initial order.

I.

Isaiah was born in November 2011, with a positive toxicology for marijuana, and he showed signs of withdrawal. The Department filed a petition in juvenile court pursuant to section 300, subdivision (b), alleging that parental drug use placed Isaiah at risk of harm. At a hearing on December 8, 2011, the court removed Isaiah from his parents' care and granted temporary custody to the Department. The court also ordered reunification services, drug rehabilitation, and counseling for Isaiah's parents. During the hearing, Ashlee told the court she may

have American Indian ancestry. The court concluded it had no reason to know that Isaiah was an Indian child but ordered the Department to investigate Ashlee's claims.

On January 20, 2012, the juvenile court held a jurisdictional and dispositional hearing. The court placed Isaiah in foster care and again ordered the Department to offer reunification services to Isaiah's parents, including monitored visitation and substance abuse treatment. At this hearing, the court reviewed an ICWA report prepared by the Department indicating that Isaiah's grandfather may have had Blackfeet ancestry and his great-great-grandmother may have been a member of a Cherokee tribe. The court concluded that "any possibility [that Isaiah is an Indian child] is really too attenuated and remote for it to suggest to this court or . . . for this court to know that the child would fall under the Indian Child Welfare Act." Accordingly, the court did not order the Department to provide notice to any tribe or to the BIA. Ashlee did not appeal from this order placing Isaiah in foster care or otherwise object to the court's finding that ICWA was inapplicable.

Over the next several months, Ashlee visited Isaiah weekly. But she did not complete her drug treatment program or attend her scheduled drug tests. As a result, the juvenile court terminated reunification services in September 2012 and set a hearing on the termination of parental rights. The court ordered a permanent placement plan according to which Isaiah would be adopted by his foster mother.

On April 10, 2013, the juvenile court terminated Ashlee's parental rights and again said it had no reason to know that Isaiah was an Indian child. The court cleared Isaiah for permanent and final adoption.

On June 5, 2013, Ashlee appealed from the order terminating her parental rights on the ground that the juvenile court had reason to know Isaiah was an Indian child yet failed to order the Department to comply with ICWA's notice

requirements. The Court of Appeal denied relief, explaining: "Mother had the right to appeal the juvenile court's order at the dispositional hearing. She did not do so, and only challenged the court's failure to provide notice under the ICWA approximately one and a half years later which was after the court terminated parental rights. However, the juvenile court's dispositional findings and orders had become final 60 days after the court's announcement of the order. (Cal. Rules of Court, rule 8.406(a)(1).) 'Appellate jurisdiction to review an appealable order is dependent upon a timely notice of appeal. [Citation.]' (*In re Elizabeth G.* (1988) 205 Cal.App.3d 1327, 1331.) 'An appeal from the most recent order entered in a dependency matter may not challenge prior orders for which the statutory time for filing an appeal has passed.' (*In re Pedro N.* (1995) 35 Cal.App.4th 183, 189 [(*Pedro N.*)].) Here, because mother failed to timely appeal from the ICWA finding in the juvenile court's dispositional order, 'she is foreclosed from raising the issue now on appeal from the order terminating her parental rights.' (*Ibid.*; see *In re Elizabeth G.*, *supra*, 205 Cal.App.3d at p. 1331.)" In relying on *Pedro N.*, the Court of Appeal took an approach contrary to *In re B.R.* (2009) 176 Cal.App.4th 773, 779, *Dwayne P. v. Superior Court* (2003) 103 Cal.App.4th 247 (*Dwayne P.*), and *In re Marinna J.* (2001) 90 Cal.App.4th 731 (*Marinna J.*). We granted review to resolve this conflict among the Courts of Appeal.

II.

Congress enacted ICWA in 1978 in response to "rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." (*Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 32 (*Holyfield*).) ICWA declared 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 . . . ." (25 U.S.C. § 1902.)

The minimum standards established by ICWA include the requirement of notice to Indian tribes in any involuntary proceeding in state court to place a child in foster care or to terminate parental rights "where the court knows or has reason to know that an Indian child is involved." (25 U.S.C. § 1912(a).) "If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe." (*Ibid.*) The "Secretary" refers to the United States Secretary of the Interior (25 U.S.C. § 1903(11)), whose department includes the BIA.

ICWA's notice requirements serve two purposes. First, they facilitate a determination of whether the child is an Indian child under ICWA. (25 U.S.C. § 1903(4) [defining Indian child as "any 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"].) BIA guidelines in effect at the time of Isaiah's placement in foster care "ma[de] clear that the best source of information on whether a particular child is Indian is the tribe itself." (U.S. Dept. of the Interior, BIA, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed.Reg. 67584, 67586 (Nov. 26, 1979); see U.S. Dept. of the Interior, BIA, Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed.Reg. 10146, 10153 (Feb. 25, 2015) ["Only the Indian tribe(s) . . . may make the determination whether the child" is an Indian child under ICWA].)

Second, ICWA notice ensures that an Indian tribe is aware of its right to intervene in or, where appropriate, exercise jurisdiction over a child custody proceeding involving an Indian child. (See 25 U.S.C. § 1911(c) ["In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, . . . the Indian child's tribe shall have a right to intervene at any point in the proceeding."]; 25 U.S.C. § 1911(a) ["An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law."].) "No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe . . . ." (25 U.S.C. § 1912(a).) In enacting these provisions, "Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians." (*Holyfield*, *supra*, 490 U.S. at p. 49; see *id.* at p. 52 [ICWA " 'recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents' "].)

In 2006, our Legislature enacted provisions that affirm ICWA's purposes (§ 224, subd. (a)) and mandate compliance with ICWA "[i]n all Indian child custody proceedings" (*id.*, subd. (b)). Section 224.2 codifies and elaborates on ICWA's requirements of notice to a child's parents or legal guardian, Indian custodian, and Indian tribe, and to the BIA. In addition to requiring notice to the BIA "to the extent required by federal law," the statute requires any notice sent to a child's parents, Indian custodians, or tribe to "also be sent directly to the Secretary of the Interior" unless the Secretary has waived notice in writing. (§ 224.2, subd. (a)(4).) Section 224.3, subdivision (e)(1) provides that an Indian tribe's determination of a child's membership or eligibility for membership in the

tribe "shall be conclusive," and subdivision (e)(2) says that a determination by the BIA of tribal membership or eligibility for membership "is conclusive" in the absence of a contrary determination by the tribe. Section 224.4 affirms that "[t]he Indian child's tribe and Indian custodian have the right to intervene at any point in an Indian child custody proceeding." And importantly for our purposes, section 224.3, subdivision (a) (section 224.3(a)) provides that courts and county welfare departments "have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 . . . is to be, or has been, filed is or may be an Indian child in all dependency proceedings and in any judicial wardship proceedings if the child is at risk of entering foster care or is in foster care."

The question before us is not whether the juvenile court erroneously concluded from the record that it had no reason to know Isaiah was an Indian child. We express no view on that determination. Moreover, the Department does not contend that Ashlee's failure to object to the juvenile court's finding of ICWA's inapplicability at the April 2013 proceeding to terminate her parental rights precludes her from raising the issue for the first time in this appeal. (See *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267–1268 (*Samuel P.*) [failure to raise ICWA notice error at juvenile court hearing does not waive the claim for purposes of appeal from an order issued at that hearing]; *Marinna J., supra*, 90 Cal.App.4th at p. 733 [same].) The issue presented here is whether Ashlee — having brought no timely challenge to the January 2012 foster care placement order, which subsumed a finding by the juvenile court that ICWA notice was unnecessary — may now challenge the April 2013 order terminating her parental rights on the ground that the juvenile court erred in finding ICWA notice unnecessary. This question requires us to interpret the federal and California statutes governing ICWA's applicability to dependency proceedings, and we apply independent review. (*Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 840.)

The Court of Appeal was correct to observe that under rule 8.406(a)(1) of the California Rules of Court, the juvenile court's January 2012 order became final 60 days after it was announced. Ashlee did not appeal from that order during the 60-day period. Section 395 provides in relevant part: "A judgment in a proceeding under Section 300 may be appealed in the same manner as any final judgment, and any subsequent order may be appealed as an order after judgment." In *Sara M. v. Superior Court* (2005) 36 Cal.4th 998 (*Sara M.*), we said that " '[a] consequence of section 395 is that an unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order.' [Citation.] An appeal from the most recent order in a dependency matter may not challenge earlier orders for which the time for filing an appeal has passed." (*Id.* at p. 1018.) Under section 395 and *Sara M.*, Ashlee may not challenge the January 2012 dispositional order through an appeal from the April 2013 order terminating her parental rights.

But it does not follow, as the Court of Appeal believed, that "because [Ashlee] failed to timely appeal from the ICWA finding in the juvenile court's dispositional order, 'she is foreclosed from raising the issue now on appeal from the order terminating her parental rights.' " The reason is that the juvenile court had a *continuing* duty to inquire whether Isaiah was an Indian child in all dependency proceedings, including a proceeding to terminate parental rights. In light of this continuing duty, the April 2013 order terminating Ashlee's parental rights was necessarily premised on a *current* finding by the juvenile court that it had no reason to know Isaiah was an Indian child and thus ICWA notice was not required. Here, the juvenile court made that finding explicit in the course of the April 2013 hearing when it said, "the Court is once again making a finding [that] I have no reason to know the child would fall under the Indian Child Welfare Act." Properly understood, Ashlee's present appeal does not seek to challenge the

juvenile court's finding of ICWA's inapplicability underlying the January 2012 dispositional order. It instead seeks to challenge the juvenile court's finding of ICWA's inapplicability underlying the April 2013 order terminating her parental rights. Ashlee's inaction in the face of the earlier order does not preclude her from now claiming in this appeal that the juvenile court erred in finding ICWA notice unnecessary.

The continuing nature of a juvenile court's duty to inquire into a child's Indian status appears on the face of section 224.3(a). As noted, that provision reads: "The court . . . ha[s] an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 . . . has been . . . filed is or may be an Indian child in all dependency proceedings and in any juvenile wardship proceedings if the child is at risk of entering foster care or is in foster care." (§ 224.3(a).) The plain language of this provision — declaring an "affirmative and continuing duty" that applies to "all dependency proceedings" — means that the juvenile court in this case had a *present* duty to inquire whether Isaiah was an Indian child at the April 2013 proceeding to terminate Ashlee's parental rights, even though the court had previously found no reason to know Isaiah was an Indian child at the January 2012 proceeding to place Isaiah in foster care. Because the validity of the April 2013 order is necessarily premised on the juvenile court's fulfillment of that duty, there is nothing improper or untimely about Ashlee's contention in this appeal that the juvenile court erred in discharging that duty.

Reading section 224.3(a) together with section 224.3, subdivision (e)(3) (section 224.3(e)(3)) underscores the continuing nature of the juvenile court's duty. The latter provision says: "If proper and adequate notice has been provided pursuant to Section 224.2, and neither a tribe nor the Bureau of Indian Affairs has provided a determinative response within 60 days after receiving that notice, the court may determine that the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et

seq.) does not apply to the proceedings, provided that the court shall reverse its determination of the inapplicability of the Indian Child Welfare Act and apply the act prospectively if a tribe or the Bureau of Indian Affairs subsequently confirms that the child is an Indian child." (§ 224.3(e)(3).)

Section 224.3(e)(3) implicitly recognizes that any finding of ICWA's inapplicability before proper and adequate ICWA notice has been given is not conclusive and does not relieve the court of its continuing duty under section 224.3(a) to inquire into a child's Indian status in all dependency proceedings. (See *Dwayne P.*, *supra*, 103 Cal.App.4th at p. 261 ["Because the court's duty continues until proper notice is given, an error in not giving notice is also of a continuing nature and may be challenged at any time during the dependency proceedings."].) Only after proper and adequate notice has been given and neither a tribe nor the BIA has provided a determinative response within 60 days does section 224.3(e)(3) authorize the court to determine that ICWA does not apply. The effect of that determination is to relieve the court of the duty it would otherwise have under section 224.2, subdivision (b) to provide ICWA notice "whenever it is known or there is reason to know that an Indian child is involved, and for every hearing thereafter." Nevertheless, "the court shall reverse its determination of [ICWA's] inapplicability . . . if a tribe or the [BIA] subsequently confirms that the child is an Indian child." (§ 224.3(e)(3); see § 224.3, subd. (f) [notwithstanding a finding of ICWA's inapplicability under § 224.3(e), any information subsequently received by the court, social worker, or probation officer that would be subject to ICWA notice must be provided to any tribes entitled to notice and to the BIA].)

The Court of Appeal observed that at the January 2012 dispositional hearing, "all of the information provided by [Ashlee] and her relatives about their American Indian heritage was before the juvenile court, and the court considered the Department's report on its investigation into mother's heritage." It does not

appear that Ashlee submitted any additional information bearing on Isaiah's status between January 2012 and April 2013. But section 224.3(a), which establishes a juvenile court's "affirmative and continuing duty" to inquire into a child's Indian status, does not contain an exception for situations where no new information is submitted between one proceeding and the next. Unlike a determination of ICWA's inapplicability that is made *after* "proper and adequate notice has been provided" and "neither a tribe nor the [BIA] has provided a determinative response within 60 days" (§ 224.3(e)(3)), the juvenile court's determination of ICWA's inapplicability at the January 2012 hearing had no effect on its ongoing inquiry and notice obligations under sections 224.2 and 224.3(a). That is true even though Ashlee did not submit any new information between January 2012 and the April 2013 hearing to terminate her parental rights.

The Department, echoing concerns expressed by the Court of Appeal, contends that ICWA notice issues are best resolved "at the beginning of any dependency proceeding" and that "allowing ICWA issues to be determined in an appeal from a hearing to terminate parental rights encourages the practice of ignoring ICWA violations for years while a dependency case creeps through the proceedings." Amicus curiae California State Association of Counties similarly contends that "it is in the best interests of the all [*sic*] children to have a child's Indian status determined early in the child proceedings rather than waiting to raise the issue after parental rights have been terminated." We are mindful of the child's need for a permanent and stable home, and we agree that swift and early resolution of ICWA notice issues is ideal. But the federal and state statutes were clearly written to protect the integrity and stability of Indian tribes despite the potential for delay in placing a child. The provisions of the California statute just discussed, as well as others, recognize the importance of properly determining a child's Indian status, even when a dependency proceeding has progressed beyond

the initial stages. (See *ante*, at pp. 9–11 [discussing §§ 224.2, subd. (b), 224.3, subds. (a), (e)(3), (f)]; see also § 224.4 ["The Indian child's tribe and Indian custodian have the right to intervene at any point in an Indian child custody proceeding."]; § 224, subd. (b) [requiring judicial compliance with ICWA "[i]n all Indian child custody proceedings"].) The federal statute similarly provides: "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).) ICWA also provides: "Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title." (25 U.S.C. § 1914.) This latter provision contemplates that ICWA's notice requirements may be enforced *after* the issuance of an order terminating parental rights. Allowing ICWA notice error to be raised for the first time in a direct appeal from an order terminating parental rights seems unlikely to cause greater delay than allowing the parent to litigate the same issue in a separate and collateral proceeding.

In construing statutes, we consider " 'the context of the statute as a whole and the overall statutory scheme . . . .' [Citation.] In other words, ' "we do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citation.]" ' [Citation.]" (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83.) The provisions above, considered as a whole, make clear that Indian tribes have interests protected by ICWA that are separate and distinct from the interests of parents of Indian children. (See *Holyfield*, *supra*, 490 U.S. at

pp. 49, 52.) ICWA's notice requirements are "intended to protect the interests of Indian children and tribes despite the parents' inaction." (*Dwayne P.*, *supra*, 103 Cal.App.4th at p. 261; see *Samuel P.*, *supra*, 99 Cal.App.4th at p. 1267 ["The notice requirements serve the interests of the Indian tribes 'irrespective of the position of the parents' and cannot be waived by the parent."].) We agree with the majority view among the Courts of Appeal that "given the court's continuing duty throughout the dependency proceedings to ensure the requisite notice is given [citation], and the protections the ICWA affords Indian children and tribes, the parents' inaction does not constitute a waiver or otherwise preclude appellate review." (*Dwayne P.*, at p. 251; accord, *In re B.R.*, *supra*, 176 Cal.App.4th at p. 779; *Marinna J.*, *supra*, 90 Cal.App.4th at p. 737.)

In reaching a contrary holding, the Court of Appeal, relying on *Pedro N.*, said, "we are only addressing the rights of [Ashlee], not the rights of a tribe under the ICWA." *Pedro N.* reasoned that whereas ICWA authorizes a tribe to intervene in a dependency action "at any point in the proceeding" (25 U.S.C. § 1911(c)), it authorizes parents to "petition any court of competent jurisdiction to invalidate" a dependency action (25 U.S.C. § 1914) but does not expressly permit a parent to allege an ICWA violation at any point in the proceeding. (*Pedro N.*, *supra*, 35 Cal.App.4th at p. 190.) As other authorities have observed, however, "the tribe's right to assert jurisdiction over the proceeding or to intervene in it is meaningless if the tribe has no notice that the action is pending." (*In re Junious M.* (1983) 144 Cal.App.3d 786, 790–791; see *Samuel P.*, *supra*, 99 Cal.App.4th at p. 1267 ["If a tribe which may have an interest in a proceeding does not have notice of that proceeding, the tribe will be unable to assert its rights under the ICWA."]; *Marinna J.*, *supra*, 90 Cal.App.4th at p. 739 ["As a result [of lack of notice to relevant tribes], it is unlikely that those tribes had notice of the dependency proceeding, and thus virtually certain that they were unable to assert their rights

under [ICWA].”].) As a practical matter, the approach taken by *Pedro N.* makes the statutory right of Indian tribes to intervene “at any point in the proceeding” (25 U.S.C. § 1911(c); see § 224.4) largely contingent upon a parent’s alleging ICWA notice error at the earliest possible opportunity in a dependency action. Such an approach cannot be reconciled with the statutory scheme, and we hereby disapprove *In re Pedro N.*, *supra*, 35 Cal.App.4th 183.

The Court of Appeal also said, “The principles enunciated in [*In re X.V.* (2005) 132 Cal.App.4th 794] support our conclusion that a dependent child’s interest in permanency and stability requires that there be a time limit to a parent’s right to raise the issue of ICWA compliance.” But *In re X.V.* is distinguishable. There the Court of Appeal, relying on *Dwayne P.*, granted the parents’ first appeal challenging ICWA notice violations and ordered the juvenile court to conditionally reverse its order terminating parental rights and to provide ICWA notice. (*In re X.V.*, at p. 798.) The juvenile court gave notice to several tribes and, after receiving responses, concluded at a special hearing that ICWA did not apply. The parents did not attend the special hearing, and their counsel raised no objection to the court’s ICWA findings. (*In re X.V.*, at pp. 799–800.) The parents then appealed again, citing ICWA notice irregularities. Dismissing the appeal, the Court of Appeal said: “We do not believe Congress anticipated or intended to require successive or serial appeals challenging ICWA notices for the first time on appeal.” (*Id.* at p. 804.) Because the case before us does not involve a second or successive appeal, we have no occasion here to decide whether a parent would be precluded from raising an ICWA notice violation in a second or successive appeal.

In sum, a juvenile court has an affirmative and continuing duty in all dependency proceedings to inquire into a child’s Indian status. (§ 224.3(a).) If a court determines it has reason to know a child is an Indian child, the court must notify the BIA and any relevant tribe so that the tribe may determine the child’s

status and decide whether to intervene. (§ 224.2.) If adequate and proper notice has been given, and if neither the BIA nor any tribe provides a determinative response within 60 days, then the court may determine that ICWA does not apply to the proceedings. (§ 224.3(e)(3).) At that point, the court is relieved of its duties of inquiry and notice (§ 224.2, subd. (b)), unless the BIA or a tribe subsequently confirms that the child is an Indian child (§ 224.3(e)(3)). Although the juvenile court in this case found ICWA inapplicable at the January 2012 dispositional hearing, the court had an affirmative and continuing duty to determine ICWA's applicability at the April 2013 hearing to terminate Ashlee's parental rights. The court's April 2013 termination order necessarily subsumed a present determination of ICWA's inapplicability, and Ashlee brought a timely appeal from the April 2013 order challenging that determination. The fact that Ashlee did not allege ICWA notice error in an appeal from the January 2012 dispositional order does not preclude her from raising the claim in this appeal.

Notwithstanding our holding today, we emphasize that social services departments and juvenile courts should inquire about a child's Indian status early in the proceedings and should provide notice at the soonest possible opportunity. Notice must be provided "where the court knows or has reason to know that an Indian child is involved" (25 U.S.C. § 1912(a)), and section 224.3, subdivision (b) sets forth a nonexhaustive list of "circumstances that may provide reason to know the child is an Indian child." Importantly, "[t]he relevant question is not whether the evidence . . . supports a finding that the minor[] [is an] Indian child[]; it is whether the evidence triggers the notice requirement of ICWA so that the tribes themselves may make that determination." (*In re D.C.* (2015) 243 Cal.App.4th 41, 63.) After proper notice has been given, if the tribes respond that the minor is not a member or not eligible for membership, or if neither the BIA nor any tribe

provides a determinative response within 60 days, then the court may find that ICWA does not apply to the proceedings. At that point, the court is relieved of its duties of inquiry and notice unless the BIA or a tribe subsequently confirms that the child is an Indian child. " 'To maintain stability in placements of children in juvenile proceedings, it is preferable to err on the side of giving notice and examining thoroughly whether the juvenile is an Indian child.' [Citations.]" (*In re D.C.*, at p. 63.)

CONCLUSION

For the reasons above, we reverse the judgment of the Court of Appeal and remand for further proceedings not inconsistent with this opinion.

LIU, J.

WE CONCUR:

CANTIL-SAKAUYE, C. J.
WERDEGAR, J.
CORRIGAN, J.
CUÉLLAR, J.
KRUGER, J.

DISSENTING OPINION BY CHIN, J.

I agree with the Court of Appeal in this case and *In re Pedro N.* (1995) 35 Cal.App.4th 183. As with all child dependency matters, issues concerning the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.) should be resolved as early in the process as possible. Permitting a party to delay an appeal that could have been taken earlier does not further the purposes behind the ICWA and can substantially harm the child. Accordingly, and unlike the majority, I would not carve out an exception for ICWA issues to the general California rule in dependency matters requiring an issue to be raised on appeal at the first opportunity.

Mother Ashlee R. could have, and should have, raised the issue under the ICWA by appeal after the January 2012 jurisdictional and dispositional hearing, but she did not do so. In child dependency cases, it is settled in California that a parent must appeal an issue at the earliest opportunity or forfeit the right to raise the issue later. (*Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1018.) The reason for this rule is compelling. It is necessary to fulfill the state's role as *parens patriae* to protect and care for children who cannot protect and care for themselves. "Childhood is fleeting and '[i]t is axiomatic, of course, that the longer children remain in foster homes, the more difficult it is to find families willing to adopt them.' " (*In re Heather B.* (1992) 9 Cal.App.4th 535, 558, quoting *In re Laura F.* (1983) 33 Cal.3d 826, 837, fn. 10.) " 'Permitting a parent to raise issues

going to the validity of a final earlier appealable order would directly undermine dominant concerns of finality and reasonable expedition,' including 'the predominant interest of the child and state . . . .' " (*Sara M.*, at p. 1018, quoting *In re Janee J.* (1999) 74 Cal.App.4th 198, 207.)

In various contexts, this court has explained and emphasized the critical importance of reasonably prompt resolution of a child's placement, especially after reunification efforts have failed, as they have in this case. "After reunification efforts have failed, it is not only important to seek an appropriate permanent solution — usually adoption when possible — it is also important to *implement* that solution reasonably promptly to minimize the time during which the child is in legal limbo. A child has a compelling right to a stable, permanent placement that allows a caretaker to make a full emotional commitment to the child. [Citation.] Courts should strive to give the child this stable, permanent placement, and this full emotional commitment, as promptly as reasonably possible consistent with protecting the parties' rights and making a reasoned decision." (*In re Celine R.* (2003) 31 Cal.4th 45, 59.) After reunification efforts have failed, " ' "[t]he overriding concern . . . is to provide a stable, permanent home in which a child can develop a lasting emotional attachment to his or her caretakers." ' " (*In re Jasmon O.* (1994) 8 Cal.4th 398, 421.) "Because these proceedings involve the well-being of children, considerations such as permanency and stability are of paramount importance." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) "[L]engthy and unnecessary delay in providing permanency for children [is] the very evil the Legislature intended to correct." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) Once reunification efforts have failed, "it becomes inimical to the interests of the minor to heavily burden efforts to place the child in a permanent alternative home." (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 256.)

This is not just the courts' view. It is the Legislature's. "In considering the minor's interests, the court shall give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements." (Welf. & Inst. Code, § 352, subd. (a); see *In re Marilyn H., supra*, 5 Cal.4th at p. 308.)

These abstract policy concerns become concrete in this case. If mother had appealed the ICWA issue in January 2102, as she should have, the appeal could have been resolved before the April 2013 hearing at which the court terminated mother's parental rights and cleared Isaiah W. for final adoption. In that event, the court could have considered any questions under the ICWA, including any tribe's position, and considered all of the alternatives *at that time*. If there were no ICWA issue, Isaiah could have been finally adopted when he was a year and a half old, and he could then have received and given a full, permanent emotional commitment. Instead, mother waited another year and a half. Isaiah is now four and a half years old, and he is still in legal limbo and still awaiting final adoption and the full emotional commitment that goes with it. Under the majority's holding, the wait for Isaiah and many other dependent children will be much longer than if we require the ICWA issue to be appealed at the earliest opportunity.

Isaiah is paying a high price, and other children will continue to pay a high price, due to the majority's permitting mother to make this delayed ICWA claim. The delay "may not seem a long period of time to an adult, [but] it can be a lifetime to a young child. Childhood does not wait for the parent to become adequate." (*In re Marilyn H., supra*, 5 Cal.4th at p. 310.) Nor does childhood wait for the appellate process.

California law provides ample opportunity to raise and litigate issues under the ICWA. (Maj. opn., *ante*, at pp. 6-7; see *In re Shane G.* (2008) 166 Cal.App.4th 1532, 1538-1539.) The trial court here investigated and made a prompt ruling, and, as noted, mother could have appealed that ruling when it was made. The majority cites nothing in the ICWA suggesting Congress wanted to prohibit a state from imposing reasonable time limits within which a parent may appeal ICWA issues. Rather, as the Court of Appeal here noted, " 'Congress's intent to not cause unnecessary delay in dependency proceedings is evidenced by the [ICWA] provision allowing a hearing on the termination of parental rights within a relatively short time, 10 days, after the [Secretary of the Interior] or tribe receives ICWA notice. (25 U.S.C. § 1912(a).)' " (Quoting *In re X.V.* (2005) 132 Cal.App.4th 794, 804.) Another provision of the ICWA allows an aggrieved party, including an Indian tribe, to "petition any court of *competent jurisdiction*" to invalidate an action that violated specified parts of the ICWA. (25 U.S.C. § 1914, italics added.) The reference to competent jurisdiction shows Congress meant the ICWA to fit in with state procedures.

Additionally, as the *Pedro N.* court noted, "[h]ad the Congress intended to permit a parent to allege an ICWA violation at any point in the proceedings, it could well have so stated. Indeed, in another portion of the ICWA (25 U.S.C. § 1911(c)), the Congress conferred the right to intervene in any dependency or termination action 'at any point in the proceeding.' [Citation.] We assume from the absence of such language in 25 United States Code section 1914, that the Congress did not intend to preempt, in the case of appellate review, state law requiring timely notices of appeal from a parent who appeared in the underlying proceedings and who had knowledge of the applicability of the ICWA." (*In re Pedro N., supra*, 35 Cal.App.4th at p. 190.) Requiring the appeal to be made in a timely fashion violates nothing in the language or spirit of the ICWA.

Indeed, prompt resolution of ICWA issues *furthers* the act's purposes and the interests of the tribe involved. The purpose behind requiring notice and permitting the tribe to intervene is to allow the court to consider a placement consistent with the ICWA such as, potentially, a placement within the tribe. This purpose is important. But, to fully effectuate this purpose, the juvenile court should consider such an alternative placement *as soon as possible*, not belatedly. Requiring the parent to appeal the ruling when made would generally permit the court to consider the tribe's interests at the same time it considers other possible placements.

Here, if mother had appealed the ICWA issue in January 2012, and if it was then determined that Isaiah was an Indian child and the tribe was notified, the tribe could have urged its interests at the April 2013 hearing, and the court could have decided what to do at that time, when Isaiah was merely a year and a half old. Instead, permitting mother to belatedly raise the issue much later will mean that Isaiah will be at least five or six years old when any tribe is notified. In that event, the tribe would be placed in the difficult position of having to urge that a child be removed from a long-standing foster care relationship — often a relationship that promises to become permanent through adoption — and placed within a tribe with individuals with whom the child has no emotional connection. A tribe should not be placed in that position.

We have noted "evidence that the child will suffer long-term, serious emotional damage if a bond with foster parents is severed." (*In re Jasmon O.*, *supra*, 8 Cal.4th at p. 421.) As the Court of Appeal here emphasized, "in California, the courts have held that" a child's constitutional interest in stability "includes the 'right to a reasonably directed early life, unmarred by unnecessary and excessive shifts in custody.' " (Quoting *In re Arturo A.* (1992) 8 Cal.App.4th 229, 241, fn. 6.) As the Court of Appeal also stated, we should not adopt a rule

"that there is no time limit on a parent's right to raise the issue of ICWA compliance. To allow a parent unlimited time within which to raise this challenge would violate the child's constitutional right to a stable and permanent home."

The majority stresses that the court's duty under the ICWA is a continuing one. I agree. Whenever the court receives reason to believe the child is, or might be, an Indian child, it must act accordingly. But the continuing duty does not mean the court must continually investigate, week after week, year after year, whether the child might be an Indian child. Here, the court investigated the question at the outset, and made its ruling in January 2012. Mother could have challenged the ruling at that time. No one suggests anything new occurred after that date to trigger a duty of further investigation or notification. If, after the January 2012 hearing, something had happened to necessitate action under the ICWA, I agree that mother could have challenged any subsequent ruling or failure to act after that something had occurred. In that situation, mother could *not* have challenged in January 2012 the court's *later* action or inaction. But here, all of mother's arguments are based on the information and record as it existed in January 2012. Mother could have made those arguments at that time.

I agree with the majority that parents may not waive a tribe's rights. We have no occasion to decide a tribe's rights if and when it receives notice belatedly and had no previous opportunity to intervene. But parents may waive their own rights to appeal an ICWA issue. Mother had no obligation *ever* to appeal on this ground. Certainly, if a tribe is not given notification, and a parent does not raise this issue on appeal, the tribe is not likely to learn that a potential Indian child is involved in the dependency proceeding. But this circumstance is not due to California's appellate time limits. Neither the ICWA nor our state statutes require notification of all possible tribes of all dependency matters, and the tribes no doubt would not want to be inundated by such notifications. Because nothing compels a

parent ever to raise an ICWA issue, condoning the belated raising of such an issue — thus depriving a tribe of the ability to intervene in a timely fashion — will not itself guarantee the tribe will receive the notice to which it is entitled. It will merely encourage unnecessary delay — delay that can harm the child.

The majority appropriately — but toothlessly — emphasizes that tribes should receive notice under the ICWA "at the soonest possible opportunity." (Maj. opn., *ante*, at p. 15.) Requiring a parent to appeal an ICWA issue at the soonest possible opportunity furthers this policy. Allowing a parent to delay the appeal harms this policy. Accordingly, I dissent.

CHIN, J.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Name of Opinion In re Isaiah W.

Unpublished Opinion
Original Appeal
Original Proceeding
Review Granted XXX 228 Cal.App.4th 981
Rehearing Granted

Opinion No. S221263
Date Filed: July 7, 2016

Court: Superior
County: Los Angeles
Judge: Jacquie H. Lewis, Commissioner

Counsel:

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Oglala Sioux Tribe v. Van Hunnik [1]

Updated:

Tuesday, March 31, 2015 - 12:00am

Related Issue Areas

Racial Justice›American Indian Rights›Indian Child Welfare Act
Criminal Law Reform›Effective Counsel›Indigent Defense

Constitutional Principle

Human Rights
Racial Equality

Summary

Three Indian parents, the Oglala Sioux Tribe, and the Rosebud Sioux Tribe filed a class-action lawsuit to challenge the continued removal of Indian children in Pennington County, South Dakota from their homes based on insufficient evidence and without proper hearings, in violation of the Indian Child Welfare Act of 1978 and the constitutional right to due process.

Description

Congress enacted ICWA to put in place federal safeguards for the removal of Indian children from their homes to both protect the interests of Indian children and give Indian tribes a voice in the process, because of an alarming number of Indian children who were removed from their homes and their tribes. Family separation can be particularly difficult for Indian children because not only are children separated from their parents, but because they are often placed with non-Indian families, they also experience separation from their culture.

When children are removed from their parents based on an allegation of neglect or abuse, a substantive hearing should normally be held in order to determine whether their children should continue to be separated from them. Instead, the lawsuit contends, Pennington County officials hold a cursory hearing in 48 hours that sometimes lasts no more than a minute, where all of the documents are kept a secret from the parents and they are not permitted to introduce any evidence, and their children are then removed for a minimum of 60 days and usually 90 days, according to the complaint. Most parents are also unfairly coerced by the court to "work with" the state Department of Social Services (DSS), which essentially authorizes the department to hold the children for at least two months under whatever terms DSS wants. DSS rarely seeks to assist the family.

The ACLU filed the lawsuit in 2013 along with the ACLU of South Dakota and Dana Hanna of the Hanna Law Office in Rapid City. The lawsuit was filed on behalf of three parents in Pennington County, as well as the Oglala Sioux Tribe and the Rosebud Sioux Tribe, which are federally recognized Indian tribes with reservations in South Dakota.

Status: On February 19, 2016, a federal court dealt another blow to defendants in an ACLU lawsuit over the rights of Native American families in South Dakota. Chief Judge Jeffrey Viken denied government officials' motions for reconsideration of his order to them last March to stop violating the rights of Native American parents and tribes in state child custody proceedings. One final outstanding claim concerns whether the state Department of Social Services is returning Native American children in foster care to their homes as quickly as federal law requires.

Case Updates

Lawsuit Can Proceed
Tuesday, January 28, 2014

A federal court ruled that the lawsuit can proceed to trial.

Victory!
Tuesday, March 31, 2015

In a sweeping victory for Indian families, a federal court ordered South Dakota officials to stop violating the rights of Indian parents and tribes in state child custody proceedings on several grounds.

Links
[1] https://www.aclu.org/cases/oglala-sioux-tribe-v-van-hunnik

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Social Work Practice Tips for Inquiry and Noticing
Reasons Why People Do Not Claim to Be American Indian[1]

There are many reasons why individuals do not claim their American Indian heritage. This has implications for ICWA compliance especially in the area of inquiry and noticing. If an Indian child is not known to be American Indian/Alaskan Native (AI/AN) how can social workers and service providers ensure culturally effective services and case plans?

Below is a brief list of responses that can be given by individuals that do not claim their American Indian heritage.

- *"I know we're part Indian but not enough."*
- *"I, my mom, or my dad was adopted."*
- *"No one knows the real history anymore, that person passed a long time ago."*
- *"No one talks about it." And/or "We don't talk about it with anyone."*
- *"I heard our family was disenrolled."*
- *"It was painful so we don't talk about it."*
- *"We heard different stories and are not sure if it's true or not."*
- *"Grandpa only talked about it late at night."*
- *"It's in the past now, you can't go back."*
- *"Someone lost the papers."*
- *"I can't prove it."*
- *"I didn't know until recently, so I don't think we qualify."*
- *"When dad came here to work we lost our history."*
- *"I don't know our history, but I heard something. We were told we didn't need to know."*
- *"No one speaks the language anymore, so we don't talk about it."*

Practice Tips to ensure effective inquiry:

1. It is important to ask every family and every child if they have American Indian/Alaska Native ancestry even though they may not "look" as though they have American Indian/Alaska Native ancestry. Remember that many American Indian families will have Spanish last-names as a result of the influence of Spanish Missions from 1769 – 1823.

[1] This document was developed as part of the American Indian Enhancement of the Annie E. Casey, Casey Family Programs, & Child and Family Policy Institute of the California Breakthrough Series (BSC) on addressing disproportionality 2009-2010 with support from the Bay Area Collaborative of American Indian Resources (BACAIR), Human Services Agency of San Francisco Family and Children Services, Alameda County Social Services, and in collaboration with the American Indian Caucus of the California ICWA Workgroup, Child and Family Policy Institute of California, Stuart Foundation, and Tribal STAR.

2. Encourage social workers/intake workers to ***state*** (*rather than ask*), "if you are AI/AN or believe you may be affiliated with a tribe, there are additional services (ICWA) that are available to you."

3. Talking to that family historian may yield a lot of information. Ask them "who are the keepers of the family history?" Usually there is one family member, or a few, who are gifted in this area.

4. Consider asking families about specific areas relatives may have lived or originated from. "Has anyone in your family ever lived on a reservation?"

5. Consider asking if they also have ever utilized Native American services, or if anyone has in the family?

6. Remember to continue to cultivate and build trust-based communication with children and families and continue to ask if they have AI/AN ancestry throughout the life of the case.

7. Document all your efforts of inquiry and document all you do to achieve proper inquiry and notice.

Background

It is a significant challenge for American Indians who have been removed from their tribe to claim tribal ties to a Native American community. This can be due to the complex process of identifying ancestors and being able to establish family blood lines. How an individual comes to know their heritage, and how much they know varies from region, to tribe, to family. With over 500 recognized tribes, over 100 terminated tribes, and countless unrecognized tribes across the United States each family has a unique history with their tribe. As a result of federal and state policies that promoted assimilation and relocation (1830s Removal Era through 1950s Termination Era), many individuals and their families lost connection to their relations, customs, and traditions. The effects of boarding schools, and religious proselytizing, left many with the perception that it was better to pass as non-Indian than to claim their tribal status. In 1952 the federal government initiated the Urban Indian Relocation Act designed to increase the American Indian workforce in eight cities (Los Angeles, San Francisco, San Jose, St. Louis, Cincinnati, Dallas, Chicago, and Denver,).

Historical and federal efforts to quantify and track the American Indian/Alaska Native populations through the census, and the establishment of "Indian Rolls" resulted in documentation of enrollment in a tribe, often verified by blood quantum (amount/percentage of documented American Indian/Alaska Native blood). Tribal nations are not uniform in determining who is a tribal member through this manner. Some tribes acknowledge descent and ancestry verified by proof of family lineage rather than 'how much Indian blood'. Conversely, in some cases, tribal enrollment policies exclude many individuals from enrollment for political, historical, and reasons known only to their tribal membership. Enrollment in a tribe may only be open at certain times, which can also affect an individual's eligibility for enrollment.

Many descendants have only bits and pieces of information, sometimes passed along with quiet dignity, often with a longing to know more. What information was passed along may have been

shrouded in shame or secrecy for unknown reasons resulting in reluctance to share the information. The number of families that are disconnected from their ancestral homeland grows exponentially each generation and many individuals find connection to Native American communities through intertribal, regional, and local cultural events. These community events enable a sense of belonging and kinship, and provide support for resilience through access to programs such as Title VII Indian Education, and Tribal TANF, that do not require proof of enrollment.

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Indian Child Welfare Act (ICWA) Information Sheet –

ICWA Inquiry (DEPENDENCY)

1. Initial Inquiry

In every dependency case, the court and child welfare agency share an affirmative and continuing duty to inquire whether the child is or may be an Indian child. (WIC 224.3(a).) ICWA inquiry can be thought of as having two stages: (1) initial inquiry which is done in each and every case in which a dependency petition is filed or may be filed, and (2) further inquiry which is required in those cases in which initial inquiry gives "reason to know" that an Indian child may be involved.

Initial inquiry is fairly simple. It consists of asking the following people: (1) the child (if old enough); (2) the parents; (3) guardians; and (4) custodians whether the child is or may be an Indian child. (CRC 5.481 (a)(1)). Newly issued Bureau of Indian Affairs "Guidelines for State Courts and Agencies in Indian Child Custody Proceedings" suggest that the court ask each party to certify on the record whether they have discovered or know of any information that suggests or indicates the child is an Indian child.[1] Although not explicitly required by statute, it is best practice to ask about Indian ancestry from all available family members. This helps lessen the chance that ICWA information could emerge late in the case and delay permanency.

2. Document Initial Inquiry in Case File

The initial ICWA inquiry must be documented in the juvenile court case file in a number of ways: (1) the appropriate box should be checked on the petition; (2) a completed judicial council form ICWA-010(A) *Indian Child Inquiry Attachment* should either be attached to the petition, or if not available when the petition is filed, completed and submitted to the court separately; and (3) Judicial Council form ICWA-020 *Parental Notification of Indian Status* for

[1] These guidelines are published in the Federal Register/Vol. 80, No. 37/Wednesday, February 25, 2015 at page 10146. You can view them here http://www.courts.ca.gov/documents/Tribal_2015_federal_register.pdf

each of the child's parents, completed and signed by the parents should be in the court file. If one or both parents are not available to complete and sign the ICWA-020, the file should clearly document this. If one parent is not available, the other parent and other available family members should be asked about the missing parent's possible Indian ancestry and this noted in the court file.

Note : the duty of ICWA inquiry is affirmative and continuing. This means that whatever stage in the case a parent or family member becomes available they should be asked about Indian status. As soon as there is information suggesting that the child is or may be an Indian child, there is an obligation to comply with ICWA requirements.

3. Further Inquiry /Do you have "reason to know"?

According to WIC 224.3, information "suggesting" that the child is or may be an Indian child is sufficient to give you "reason to know the child is an Indian child". This information can come from any source. It can come as the result of the initial inquiry conducted by the agency and the court, or it can come from a relative, other individual, caretaker or agency interested in the child. Where ever the information comes from, a "reason to know" triggers the duty to do further inquiry.

Further inquiry requires at a minimum interviewing the following people: (1) the parents; (2) extended family members; and (3) any other person that reasonably can be expected to have information regarding the child's membership status or eligibility (i.e. extended family) and contacting the following: (1) California Department of Social Services; (2) Bureau of Indian Affairs; and (3) tribe(s) (WIC§ 224.3, subd. (c); see also Cal. Rules of Court, rule 5.481(a)(4).) The purpose and goal of further inquiry is to obtain the information required by WIC 224.2 (a) and the ICWA-030 form.

Caution –the court and the social workers have the duty of further inquiry; the court can order the parties to cooperate with ICWA inquiry, but cannot shift the duty to complete ICWA inquiry to another party (WIC 224.3(c).) It is fine to provide them with a questionnaire to complete as part of "further inquiry". However, the duty of further inquiry belongs to the court and the agency and cannot be entirely shifted to the parents. If extended family members and other sources of information are available to you, parent's failure to return a questionnaire or provide information does not excuse failure to obtain information from other available sources..[2]

Very little information is required in order to trigger the obligation to do further inquiry.

[2] See *In re. A.G.* (2012) 204 Cal.App.4th 1390 and *Guardianship of the Person of D.W.* (2013) 221 Cal.App.4th 242.

4. Required Extent of Inquiry

The goal of ICWA inquiry is to obtain all of the information necessary to complete the ICWA-030 *Notice of Child Custody Proceeding for Indian Child* (http://www.courts.ca.gov/documents/icwa030.pdf) It is rare that you will be able to gather all of the information to complete the form entirely. The question then in each case is whether the inquiry was sufficient. This is very fact specific. The court and the agency are not required to "cast about" after vague information, but must make all "reasonable efforts" to obtain complete information. The agency does not need to do genealogical research or order birth or death records, but does need to ask for contact information for relatives or others who might have information and make reasonable efforts to contact them. At a minimum the agency must: interview parents; Indian custodian; relatives; extended family members and others who might reasonably be able to provide the information required to complete the ICWA-030 (WIC 224.3 (c)).

5. Document Further Inquiry in the Court file

Efforts at further inquiry should be documented in the court file. This can be done as part of court reports or separate declarations or other filings. It is best practice to clearly document in court reports the name of the people who have been contacted, the exact information provided and the date(s). It is important to remember that Indian Child Welfare Act findings must be based on proper evidence contained in the court file.

6. Judicial Findings

Once ICWA has been raised as a possible issue by a parent or other interest person saying the child may have Indian ancestry, it is important for the court to ensure that the matter is properly resolved and the correct judicial findings are made based on evidence in the court file or on the record.

The proper outcome of the ICWA issues, will depend upon the results of the "further inquiry". If, as a result of inquiry, there is only vague information that some distant ancestor "may" have had Indian ancestry, such that the information falls more into the category of "family lore", and no specific tribe can be identified, then ICWA notice may not be required. However, before making such a finding, the court should ask whether all available relatives have been questioned. The court should also ask both parents and their counsel whether any further information is available.

Based on the results of further inquiry, the judicial officer may consider doing any of the following:

a) Decide that no notice is necessary and that ICWA does not apply.

This situation should be rare and only appropriate if nothing emerged during further inquiry to support tribal affiliation and no specific tribal information could be identified. If you believe this is the appropriate option best practice dictates the following:

- Tell all parties that, based on the available information, the claim of Indian ancestry is too vague and speculative. There is no specific tribal information. Accordingly based on this information ICWA notice is not required.
- Confirm with parties that they have no further information and there are no other individuals who could be contacted for information.
- Order that without further information, there is no need for ICWA notice and ICWA does not apply.

Note – because the duty of inquiry is affirmative and continuing, if more information emerges at a later point, the ICWA issue may have to be revisited.

b) Decide that ICWA notice is required and that ICWA may apply.

This will be the usual outcome where a claim of Indian ancestry is made on initial inquiry. Notice itself is discussed in a separate information sheet. However, inquiry and notice are closely linked. As a final piece of "inquiry" the court should ensure that when notice is sent, all parties, particularly parents and their counsel (per *In re S.B.* 174 Cal.App.4th 808, 94 Cal. Rptr.3d 645 appointed counsel should be able to review ICWA notice and advise the court of any defects) are asked to confirm that the contents of the notice are accurate and complete and that they have no further information to add.

Tip – in these cases you must apply all of the ICWA's procedural, evidentiary and substantive provisions until the ICWA issues are resolved.

c) Decide that ICWA notice is required and that ICWA does apply.

Sometimes you will know that ICWA applies even before notice has been sent and a response received from a tribe. In these cases, you should immediately apply ICWA. Such cases include situations where the child's tribal enrollment card[3] is produced or the court has previously found ICWA applicable to the child. In these cases, notice must be sent to the child's tribe.

Caution- If you wait until after receiving a tribal response to notice before treating the case as an ICWA case you may cause delays in permanency.

[3] Note that not all tribes issue such cards, but where they do it is *prima facie* proof of tribal membership.

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Judicial ICWA (Indian Child Welfare Act)
Step 1: Initial Inquiry Checklist[1]

1. Have the parties certified on the record whether they have discovered or know of any information that suggests or indicates the child is an Indian child? ☐ yes ☐ no

2. Is the ICWA-010(A) *Indian Child Inquiry Attachment* completed and in the file? ☐ yes ☐ no

3. Does the completed ICWA-010(A) indicate who was questioned regarding the child's possible Indian status? ☐ yes ☐ no

4. Do the persons questioned (as shown in the ICWA-010(A) and any attachments to it) include:

    a. the child(ren)'s parent 1? ☐ yes ☐ no
    b. the child(ren)'s parent 2? ☐ yes ☐ no
    c. the child(ren)'s Indian custodian (if there is one)? ☐ yes ☐ no
    d. the child(ren)'s available relatives? ☐ yes ☐ no

5. Is there a completed and signed ICWA-020 for parent 1? ☐ yes ☐ no

6. Is there a completed and signed ICWA-020 for parent 2? ☐ yes ☐ no

[1] The above list represents the basic requirements of "Initial Inquiry". If you answered no to any of the above, you should either ensure that the step is completed, or that the record reflects the reason this step was not completed before moving forward with an ICWA determination. For instance there may be no completed ICWA-020 for a parent because the parent is unknown or unavailable. You will want this on the record and will also want the record to reflect the efforts made to locate the parent and have the parent complete the ICWA-020. For instance if the parent is incarcerated, was there an effort to have the parent complete the ICWA-020? Was it sent to the parent in prison with a return, stamped envelope?

Judicial ICWA (Indian Child Welfare Act) Checklist
Step 2: Assessing whether you have "Reason to Know"[2]

1. Is there any information suggesting:

    a. The child is a member of a tribe or eligible for membership in a tribe?
    ☐yes ☐no

    b. One of the child's biological parents is or was a member of a tribe?
    ☐yes ☐no

    c. One of the child's grandparents is or was a member of a tribe?[3]
    ☐yes ☐no

2. Is the residence or domicile of the child, the child's parents, or Indian custodian in a predominantly Indian community? ☐yes ☐no

3. Has the child or the child's family received services or benefits from a tribe or services that are available to Indians from tribes or the federal government, such as the Indian Health Service? ☐yes ☐no

If you checked yes to any one of the above, then you have "reason to know" that the child is an Indian child and you should:

- find that ICWA may apply; AND
- order the agency to complete "further inquiry" is completed as soon as possible.[4]

If you did not check yes to any one of the above, then you should rule that based on current information ICWA does not apply. NOTE – later information could give you "reason to know" and require further ICWA compliance.

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[2] WIC 224.3 (b) defines the circumstances that may provide reason to know the child is an Indian.

[3] Remember that information "suggesting" is a fairly low threshold. Further "membership" does not require "enrollment" unless the tribe specifically states that enrollment is required. WIC 224.3(e)(1). Further, whether someone is a member or eligible for membership is a legal conclusion that many litigants may not know the answer to. The best course is to do thorough inquiry – in other words father the information necessary to have an expert – the tribe – determine eligibility and send that information to the tribe via the ICWA-030 Notice.

[4] NOTE – per WIC 224.3 (c) the duty of further inquiry falls on the social worker or probation officer. In a family law or probate code case, it is the petitioner who is primarily responsible for inquiry. You may not shift this burden of further inquiry to another party to the case. See *In re. A.G.* (2012) 204 Cal.App.4th 1390 and *Guardianship of the Person of D.W.* (2013) 221 Cal.App.4th 242.

Judicial ICWA (Indian Child Welfare Act) Checklist
Step 3: Further Inquiry

CAUTION – If you have "reason to know" then the social worker or probation officer is required to make further inquiry.[5] You cannot shift this duty to another party in the case.[6]

TIP – You should require the agency to submit evidence as to the further inquiry efforts made including names and dates of relatives and others contacted and the results of those contacts. Be particularly careful to ensure that all relatives who are in any way participating in the case or otherwise known to be available are interviewed.

1. Does the record support a finding that the agency interviewed the mother to gather all of the information required to complete the ICWA-030 *Notice of Child Custody Proceeding for Indian Child*? ☐ yes ☐ no

2. Does the record support a finding that the agency interviewed the father to gather all of the information required to complete the ICWA-030 *Notice of Child Custody Proceeding for Indian Child*? ☐ yes ☐ no

3. Does the record support a finding that the agency interviewed the Indian custodian (if there is one) to gather all of the information required to complete the ICWA-030 *Notice of Child Custody Proceeding for Indian Child*? ☐ yes ☐ no ☐ not applicable

4. Does the record support a finding that the agency interviewed available relatives to gather all of the information required to complete the ICWA-030 *Notice of Child Custody Proceeding for Indian Child*? ☐ yes ☐ no

[5] Welf. & Inst. Code 224.3(c). In cases governed by the *Family Code or Probate Code* per *Family Code* § 177 (b) and *Probate Code* § 1459.5(b) the duty of inquiry falls to the petitioner

[6] See *In re. A.G.* (2012) 204 Cal.App.4th 1390 and *Guardianship of the Person of D.W.* (2013) 221 Cal.App.4th 242.

5. Does the record support a finding that the agency interviewed other individuals who might have this information to gather all of the information required to complete the ICWA-030 *Notice of Child Custody Proceeding for Indian Child*? ☐ yes ☐ no

TIP – Many cases turn on failure to make full inquiry of available relatives and other individuals. There are cases where an agency was in touch with relatives about placement but failed to ask them questions related to ICWA inquiry. There are cases where relatives were in touch with the agency or appeared in Court but no one asked them questions related to ICWA inquiry. All these failures can result in a case being overturned on appeal based on inadequate ICWA inquiry and notice.

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ICWA Information Sheet - NOTICE (DEPENDENCY)

1. Overview

State and federal law require notice under the *Indian Child Welfare Act* (ICWA) in all dependency proceedings whenever it is known or there is reason to know that an Indian child is involved (WIC 224.2 (b)). Lack of, or errors in ICWA notice is a very common reason for cases to be over turned on appeal. Although there are published cases in which appellate courts have held that notice was not required on the facts of a specific case, by far the majority of reported cases find that the juvenile court needs only a suggestion of Indian ancestry to trigger the notice requirement of the ICWA in a child dependency proceeding (see eg. *In re Christian P*., (2012) WL 2990034). The ultimate determination of whether or not a particular child is a member of a tribe or eligible for membership is for the tribe(s) entitled to notice. (WIC 224.3 (e)(1); *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 F.R. 10146 (Feb. 25, 2015) at B.3 pg. 10153) Complete, timely and accurate notice is essential in order for tribes to exercise their authority to make this determination, as well as exercise all of the other rights given to the tribe under ICWA. Therefore we strongly recommend that the court err on the side of ensuring that ICWA notices are sent in all cases in which there is substantive information suggesting possible tribal membership or eligibility. Although there is no bright line and ICWA notice cases are very fact specific, a good rule of thumb is that if a particular ancestor (no matter how far back) or ancestors is identified as the source of tribal affiliation and a particular tribe or tribes are identified, ICWA notice is required.

The court must exercise supervision over the ICWA noticing process to ensure that the legal requirements are met and to minimize the possibility of appeal. In California, ICWA notice must be sent on Judicial Council form ICWA-030 *Notice of Child Custody Proceeding for an Indian Child* and must comply with the requirements of WIC 224.2 and CRC 5.481 (b). The things that the court must look at to ensure compliance with the notice provisions include:

- Content – is the notice as complete and accurate as it can reasonably be given the available information?
- Distribution – did the notice go to all of the individuals, tribes and governmental entities who are required to receive the notice?

- Method – did the notice go by certified mail, return receipt requested and is the necessary documentary proof in the court file? and
- Timing – was the notice timely **received** and is there proof of this in the court file?

2. How to review a notice and assess whether it is adequate

a) Content

The required content of the ICWA notice is set out in federal regulations[1] and state law[2]. Those requirements are reflected in mandatory Judicial Council form ICWA-030 *Notice of Child Custody Proceeding for an Indian Child.* The required content includes:

> All names known of the Indian child's biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if known.[3]

The court and the child welfare department have an affirmative and continuing duty to seek to obtain this information throughout the life of a case where they know or have reason to know that the child is or may be an Indian child.[4] This includes an obligation to interview the child's parents, extended family, relatives and other available individuals who may have the information necessary to complete the ICWA-030. Although the statute only requires that the court and agency affirmatively seek out ancestry information as far back as great-grandparents, these are **minimum federal standards** and case law holds that where relevant information is available or provided about ancestors further back than great-grandparents, that information must be included in the ICWA notice.[5] This information can be included in item 7 d. at page 7 of the ICWA-030 *Notice of Child Custody Proceeding for an Indian Child.*

The court must be diligent in ensuring that all available information is obtained and included in the ICWA-030 and that it is as complete and accurate as possible because this information is essential to a tribe's determination of whether the child is or may be a member or eligible for membership in the tribe. Cases have been overturned on appeal for missing middle names, misspellings, wrong birthdays and for failure to include information which could have (reasonably) been obtained from available individuals. (see ICWA-030 review checklist for review steps and suggestions).

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[1] 25 CFR 23.11
[2] WIC 224.2
[3] WIC 224.2 (a)(5)(C).
[4] See WIC 224.3 and ICWA Inquiry factsheet for more information on nature and scope of duty of inquiry.
[5] *In re S.E.* (2013) 217 Cal. App. 4th 610.

The court should discourage the practice of leaving fields blank and instead ask the agency to indicate (where appropriate) that the information was not known by any of the available sources. Beware of notices where the parents or other available relatives birth dates and place of birth are left blank despite the parents or relatives participation in the proceedings.

Be careful to ensure that birth names, maiden names, and all other former names are included as well as an individual's current name.

b) Distribution

The ICWA notice must be sent to:

- The child's parents or legal guardian;
- The child's Indian custodian (if there is one); and
- All tribes of which the child may be a member or eligible for membership, until the court makes a determination as to which tribe is the child's tribe after which notice need only be sent to that tribe.[6]

Many ICWA notice appeals arise from a failure to provide notice to all the tribes that should be noticed, or to provide notice to the correct address for service for one or more tribes.

(a) How do you know which tribe's must be given notice?

The tribe or tribes that must be noticed depends upon the information obtained during inquiry and further inquiry and recorded on the ICWA-030. Review the information on the ICWA-030 and in particular the information in 5 (a) through (f), pages 2 through 6. For each individual look at the information in the box "Tribe or band, and location:"

The information contained here is generally of three kinds: (1) name of a specific tribe which may be federally recognized or may be an unrecognized tribe; (2) name of a larger historical tribal nation which may contain a number of different tribes or bands which may be federally recognized or unrecognized[7]; or (3) location (ie. a state).

If the information contains the name of a specific tribe the court should ensure that the agency has:

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[6] See WIC 224.2 (a).

[7] For a discussion of some of the issues around tribal identification refer to *Understanding ICWA Noticing Issues in California* http://www.courts.ca.gov/documents/ICWANoticingIssues.pdf

- Consulted the list of *Indian Entities Recognized and Eligible to Receive Services from the United State Bureau of Indian Affairs* published by the Department of the Interior: Bureau of Indian Affairs and located on the BIA website at http://www.bia.gov/cs/groups/public/documents/text/idc006989.pdf to determine if the tribe is listed there; and
- Contacted the appropriate Bureau of Indian Affairs office to determine whether there are federally recognized tribes associated with that name or a similar name;

TIP - Beware of variations of spelling or incorrect spelling that the parents or other individuals involved in the case may have provided. Cases have been overturned on appeal where the information provided during inquiry misspelled the tribal name and the agency neglected to send notice to tribe with very similar phonetic name. WIC 224.3(c) specifically requires the agency to contact "…the Bureau of Indian Affairs and State Department of Social Services for assistance in identifying the names and contact information of the tribes in which the child may be a member or eligible for membership." The Bureau of Indian Affairs in Sacramento has a regional social worker who can be reached by telephone at (916) 978-6000 and by fax at (916) 978-6099. The California Department of Social Services has an ICWA specialty unit. Contact information for that unit is available at http://www.childsworld.ca.gov/PG1322.htm.

- If the information provided contains the name of a larger historical tribal entity (in California such as Pomo or Cahuilla outside of California such as Cherokee) which a number of tribes or bands may identify with, ensure that in addition to consulting the list of Indian Entities referenced above, the agency has consulted and cross-referenced the tribal government list maintained by the California Department of Social Services at http://www.childsworld.ca.gov/res/pdf/CDSSTribes.pdf This list includes the historical tribal information and lists the federally recognized tribes associated with those historical tribal nations.
- If the information provided contains only location (ie. ancestor born on a reservation in Oklahoma or member of a tribe in Arizona), ensure that the agency has consulted both the Bureau of Indian Affairs regional office responsible for that state, and the index of tribal entities by state found in the tribal leader's directory published by the Bureau of Indian Affairs and available at: http://www.bia.gov/cs/groups/webteam/documents/document/idc1-028053.pdf

Once all steps have been taken to identify the tribes which must be noticed, ensure that notices are sent to all tribes at the address for service listed on the *Indian Child Welfare Act; Designated Tribal Agents for Service of Notice* published by the Bureau of Indian Affairs and available at: http://www.bia.gov/cs/groups/public/documents/text/idc012540.pdf . Ensure that for each tribe the notice is addressed to the correct individual and the exact address as shown on this list.

TIP – At some time preferably prior to disposition the Court should ask all parties for their position on whether or not the content of the notice is complete and accurate and whether or not it has been sent to all of the correct tribes that are entitled to notice. Be sure that parents' counsel have reviewed the content of the notice with their clients and that their clients have no corrections and no further information which should be contained in the notices.

c) Method

Federal and state law require that ICWA notice be provided by certified or registered mail, return receipt requested.[8] California law specifically requires that "proof of the notice, including copies of notices sent and all return receipts and responses received, shall be filed with the court in advance of the hearing…"[9] The agency may have less formal communications with a tribe or tribal representative in relation to a case. Such communications are encouraged in order to ensure that ICWA issues may be promptly and appropriately addressed. However, such informal communications do not take the place of the formal notice required by law.

TIP – While informal contacts between the agency and identified tribes is encouraged in order to provide information and assist with tribal engagement, these information contacts do not take the place of formal notice required under state and federal law. Beware of accepting representations from the agency as to what a tribal representative said about eligibility or membership. You must ensure that adequate and complete notice was provided as required by the law.

d) Timing

Generally, federal and state law require that ICWA notice **BE RECEIVED** at least 10 days before a hearing can take place.[10] California law makes an exception for the detention hearing, but requires that notice of the hearing be given as soon as possible after the filing of the petition initiating the proceeding and also requires that proof of the notice be filed with the court within 10 days after the filing of the petition.[11] Note that federal law governing the timing of notice does not make such a distinction between hearing types, although 25 U.S.C. § 1922 does say that the provisions of the subchapter do not "…prevent the emergency removal of an Indian child…" to prevent imminent physical damage or harm to the child.

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[8] The federal statute (25 U.S.C. § 1912 (a)) states that notice must be sent "…by registered mail with return receipt requested…". Implementing federal regulations (25 CFR § 23.11) state that notice must be sent "…by certified mail with return receipt requested…" California law (WIC § 224.2(a)(1) states "notice shall be sent by registered or certified mail with return receipt requested. Additional notice by first-class mail is recommended, but not required."
[9] WIC 224.2(c).
[10] 25 U.S.C. §1912 (a); WIC § 224.2 (d).
[11] WIC § 224.2 (d).

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Judicial ICWA (Indian Child Welfare Act)
Checklist - Evaluating sufficiency of ICWA Notice

1. Has a copy of the ICWA notice been filed with the court? ☐ yes ☐ no

2. Was ICWA notice provided using mandatory Judicial Council form ICWA-030 *Notice of Child Custody Proceeding for an Indian Child*? ☐ yes ☐ no

3. Does the ICWA notice contain all of the information obtained during "initial inquiry" and "further inquiry" (see requirements in Inquiry Checklists)? ☐ yes ☐ no

4. For any fields left blank, does the record support a finding that the Agency took all reasonable steps to obtain the information? ☐ yes ☐ no

5. For any fields left blank, have you asked the parent(s) whether they are able to provide the information or whether there are other available individuals who can provide the information? ☐ yes ☐ no

6. Does the service list starting at page 10 of the form, and continuing onto ICWA-030(A) if necessary, include all of the tribes which were identified during Inquiry and Further Inquiry as entitled to notice? ☐ yes ☐ no

7. Has proof of mailing by certified or registered mail return receipt requested to all of the parties (including all tribes) entitled to notice been filed with the court? ☐ yes ☐ no

8. Has proof that the notices were received by all of the parties (including all tribes) entitled to notice at least 10 days prior to the hearing been filed with the court? □ yes □ no

9. If the agency says that it has received response(s) from tribe(s), have copies of the response(s) been filed with the court? □ yes □ no

10. Has any tribe requested further information? □ yes □ no

11. If yes, is there evidence to support a finding that the agency made all reasonable efforts to provide this information? □ yes □ no

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ICWA Information Sheet: Delinquency, Native American Identification and ICWA

Duty of Inquiry

The court and the probation department have a duty to inquire about the child's Indian status at the outset of all juvenile proceedings. (*In re. W.B.* (2012) 55 Cal. 4th 30, 40)
This duty is affirmative and continuing, and is triggered as soon as they determine that the child is in foster care or at risk of entering foster care (Welf. & Inst. Code § 224.3; CRC 5.480; CRC 5.481(a))

Significance of Native American Identification (regardless of ICWA application)

Following inquiry, if a child and his/her family identify as Native American this is important **in all cases** for case planning and placement purposes. Native American children and their families may be entitled to a broad range of services which should be used whenever possible when developing case plans. You can find these services in your area by looking here http://www.courts.ca.gov/5807.htm . Further, you are required to look to tribal members when seeking a foster care placement for an Indian child (ie a child who is a member or eligible for membership in a tribe) regardless of whether ICWA applies to the case. (Welf. & Inst. Code §§ 727.1 (a); 16501.1 (c))

When do ICWA requirements beyond inquiry apply?

All of the remaining ICWA requirements such as notice, active efforts, qualified expert witness testimony and heightened evidentiary standards apply only when a child is either in foster care or at risk of entering foster care and one of the three additional factors apply:

1. The petition under Welfare and Institutions Code section 601 or 602 alleges only status offenses and no conduct which would be criminal if the child were over age 18. (This includes allegations such as a child refuses to obey the orders of a parent or guardian, is beyond parental control, violates age-based curfew ordinances, or is truant or disobedient in school or has engaged in underage drinking or underage possession of alcohol or tobacco because even though this conduct is prohibited in the Penal Code, such conduct would not be a crime if committed by an adult.) (*In re. W.B.* at 42);

2. The court has set a hearing to terminate parental rights (regardless of whether or not there was "criminal" conduct) (*In re. W.B.* at 59); or

3. The court has placed the child in foster care, or in an adoptive or pre-adoptive placement, due to abuse or neglect in the child's home. (*In re. W.B.* at 60). In these situations, the court must makes a specific finding that placement outside the home of the parent or legal guardian is based entirely on harmful conditions within the child's home. (*In re. W.B.* at 59) Without such a specific finding it is presumed that the placement is based at least in part on the child's criminal conduct. (*In re. W.B.* at 60) If there is such a finding, then ICWA requirements apply regardless of whether the conduct which brought the child before the court was criminal in nature.

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Revised January 2015

Juvenile Delinquency Courts

Recommended Legal Findings and Orders for Cases Involving the Indian Child Welfare Act (ICWA)*

I. Inquiry (at every hearing when the child is in foster care or at risk of entering foster care) (Welf. & Inst. Code, § 224.3; Cal. Rules of Court, rule 5.481(a))

A. The court finds that the agency and the court have inquired whether the child is or may be an Indian child.
If any of the following are true, then the additional requirements B through F must also be complied with:
- The proceedings are based on conduct that would not be a crime if committed by an adult;
- The court is considering or has set a hearing to terminate parental rights; or
- The court has made a specific finding that the foster care placement is based entirely upon conditions within the child's home.

B. The court finds that the ICWA-010(A) attachment has been completed and is in the court file; and

C. The court finds that both parents and the Indian Custodian (if any) have completed the ICWA-020 and those documents are in the court file; and

D. The court finds, after the agency has inquired and the court has inquired,
1. that there is reason to believe the child may be an Indian child; or
2. that there is no reason to believe the child may be an Indian child; and

E. If there is reason to know that the child is an Indian child, the court finds that the agency has interviewed the parents, Indian custodian, and extended family and has contacted the BIA to obtain information contained in Welfare and Institutions Code section 224.2(a)(5).

F. If there is reason to believe that the child is an Indian child:
1. The court finds that the agency has inquired whether the child may be resident or domiciled on a reserve.
2. The court finds that the agency has inquired whether the child is the ward of a tribal court.

II. Application (ICWA § 1903(1) & (4); Welf. & Inst. Code, § 224.1(a) & (c); Cal. Rules of Court, rule 5.480)
At every hearing when the child is in foster care or at risk of entering foster care and any one of the following applies:
- **the proceeding is based on conduct that would not be a crime if committed by an adult;**
- **the court is considering or has a set a hearing to terminate parental rights; or**
- **the court has made a specific finding that the foster care placement is based entirely upon conditions within the child's home.**

A. The child may be an Indian child, and therefore the act may apply.

B. The child is an Indian child, because the court has proof of tribal membership or the tribal determination received by the court indicates that the child is a member or is eligible for membership.

C. The child is not an Indian child, because the tribal determination received by the court indicates that the child is not a member and is not eligible for membership.

D. The court will proceed as if the act does not apply, because proper notice was sent to the tribe(s) with which the child is affiliated and/or to the Bureau of Indian Affairs (BIA), and 60 days have elapsed with no determinative response from the tribe(s) and/or BIA. However:
1. If the court receives information on the child's Indian heritage, it will send the information to the tribe(s) and/or BIA.
2. If the court later receives evidence of the applicability of the act, then the court will apply the act.

*All citations in this chart are to the Indian Child Welfare Act (ICWA) (25 U.S.C. 1901 et seq.), California Welfare and Institutions Code (WIC), and California Rules of Court.

III. Tribal Representative/Intervention (at every hearing when ICWA applies) (ICWA § 1911(c); Welf. & Inst. Code, § 224.2(5)(G)(i); Cal. Rules of Court, rule 5.482(e))

A. The *(name of tribe)* _____ Tribe has acknowledged that the child is a member of or is eligible for membership in the tribe and will monitor the case.

B. The *(name of tribe)* _____ Tribe has designated *(name of representative)* _____ to be the tribe's representative.

C. The *tribe's represe*ntative is entitled to the rights li*sted in Judicial Council* form ICWA-040, *Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child.*

D. The *(name of tribe)* _____ *Tribe has intervened in this case and will be treated as a party to the proceedings.*

IV. *Continu*ances (all hearings when ICWA applies except detention, the jurisdiction hearing if it would conflict with speedy trial considerations, and the disposition in if there is good cause to deny the continuance) (ICWA § 1912(a); Welf. & Inst. Code, § 224.2(d); Cal. Rules of Court, rule 5.482(a)

Upon request, this court grants the parent, Indian custodian, **or** tribe a continuance of up to 20 days to prepare for the hearing.

V. Appointment of Counsel (at every hearing when ICWA applies) (ICWA § 1912(b); Welf. & Inst. Code, § 317(a)(2))

A. The Court finds that the parent(s) and/or Indian custodian appear to be indigent; and

B. The Court hereby appoints counsel to represent the parent(s) and/or Indian custodian; or

C. The Court finds that the parent(s) and/or Indian custodian do not appear to be indigent.

VI. Tribal Consultation (Dispositional Hearing when ICWA applies) (Cal. Rules of Court Rules 5.690(c) & 5.785(c))

A. The Court finds that in developing the case plan the agency has:

1. Solicited and integrated into the case plan the input of the child's identified Indian tribe; **or**
2. Not solicited and integrated into the case plan input from the child's identified Indian tribe; **and**
   a) the Court orders the agency to solicit and integrate into the case plan input from the child's identified Indian tribe, **or**
   b) the Court finds that the child's identified Indian tribe was unable, unavailable or unwilling to participate in development of the case plan.

VII. Notice (at every hearing when ICWA applies) (ICWA § 1912(a); Welf. & Inst. Code, § 224.2; Cal. Rules of Court, rule 5.481(b))

A. The court finds that notice has been provided by certified mail with return receipt requested to all tribes of which the child may be a member or eligible for membership and to the BIA. Notice to the tribe(s) was addressed to the tribal chairperson unless the tribe has designated another agent for service of ICWA notice.

B. The court finds that proof of notice has been filed with the court and includes a copy of the notices sent and the return receipt, as well as any correspondence received from the Indian entity relevant to the minor's Indian status.

C. The court finds *either* that the identity or location of the parent or Indian custodian or tribe cannot be determined *or* that the child has Indian ancestry but is not a member of an identified tribe or eligible for membership in an identified tribe; notice has been provided to the specified office of the Secretary of the Interior. A copy of the notice sent and the return receipt have been filed with the court.

D. The court finds that notice has been provided by sending Judicial Council form ICWA-030, *Notice of Child Custody Proceeding for Indian Child*,, with a copy of the petition, by registered or certified mail with return receipt requested, and additional notice by first-class mail, to the parent, tribe, Indian custodian, and Bureau of Indian Affairs (BIA).

VIII. Detriment and Standard of Proof (at disposition when ICWA applies and all termination of parental rights hearings) (ICWA § 1912(e) & (f); Welf. & Inst. Code, §§ 361(a)(6), 361.7, 366.26(c)(2)(B); Cal. Rules of Court, rules 5.484(a), 5.484(a))

A. For a foster-care placement, the court finds by *clear and convincing* evidence, including the testimony of one or more qualified expert witnesses, that the continued custody of the child by the parent, legal guardian, or Indian custodian is likely to result in serious emotional or physical danger to the child.

B. For termination of parental rights, the court finds by evidence *beyond a reasonable doubt*, including the testimony of one or more 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.

IX. Active Efforts (at every hearing when ICWA applies where the child is out of the custody of his or her parents, Indian custodians, or

legal guardians and is placed in foster care [stranger or relative or group home]) (ICWA § 1912(d); Welf. & Inst. Code, §§ 361(d), 361.7; Cal. Rules of Court, rules 5.484(c), 5.485(a)(1))

A. If a tribe has indicated that the child would be eligible for enrollment if certain steps are followed, the court finds that the agency has made active efforts by taking steps to secure tribal membership. (Cal. Rules of Court, rules 5.482(c), 5.484(c).)

B. The court finds, after reviewing the report, that active efforts have been made to provide culturally appropriate services and rehabilitative programs designed to prevent the breakup of the Indian family.

C. The court finds that the agency has incorporated culturally appropriate services into the case plan for the child and the parent(s) or Indian custodian.

D. The court finds that the agency has consulted with the child's tribe in development of the case plan for the child and the parent(s) or Indian custodian.

X. Placement Preferences (at every hearing when ICWA applies where the child is out of the custody of his or her parents, Indian custodians, or legal guardians and is placed in foster care [stranger or relative or group home]) (ICWA § 1915; Welf. & Inst. Code, § 361.31; Cal. Rules of Court, rule 5.484(b))

A. The court finds that
the agency adhered to the placement preferences under the act when placing the child;
the child is detained in a placement that adheres to the placement preferences under the act; and
the agency has consulted with the child's tribe and Indian organizations concerning the appropriate placement of the child.

B. The court finds good cause to deviate from the placement preferences under the act on the grounds that _____.

XI. Jurisdiction and Transfer (at any hearing when ICWA applies) (ICWA § 1911; Welf. & Inst. Code, § 305.5; Cal. Rules of Court, rule 5.483)

A. The court finds that the child resides or is domiciled on the reservation of the _____ Tribe or that the child is the ward of the _____ Tribe, and, accordingly, the _____ Tribe has exclusive jurisdiction.

B. The court finds that this juvenile court and the court of the child's tribe have concurrent jurisdiction.

C. The *(specify tribe or parent or Indian custodian)* _____ has petitioned this court to transfer the proceedings to the tribal court, and finding no good cause not to transfer, this court transfers the case to the tribal court of *(name of tribe)* _____ Tribe.

D. After holding an evidentiary hearing, this court finds that the *(specify tribe or parent or Indian custodian)* _____ has petitioned this court to transfer the proceedings to the tribal court, and the court finds that the following reason is good cause not to transfer the case to the tribal court:
1. The child's parent objects to the transfer;
2. The child's tribe does not have a tribal court or any other administrative body as defined in section 1903 of the act; or
3. The tribal court of the child's tribe declined the transfer.

E. After holding an evidentiary hearing, this court finds that the *(specify tribe or parent or Indian custodian)* _____ has petitioned this court to transfer the proceedings to the tribal court, and the court finds that the following circumstances in the case constitute in the court's discretion good cause not to transfer the case to the tribal court:
1. The evidence necessary to decide the case cannot be presented in tribal court without undue hardship to the parties;
2. This proceeding is at an advanced stage, and petitioner did not make the request within a reasonable time after receiving notice of this proceeding;
3. The child is over 12 and objects to the transfer; or
4. The child is over 5 and has had little or no contact with his or her tribe or members of the child's tribe, and the child's parents are not available.

JUDICIAL COUNCIL
OF CALIFORNIA
OPERATIONS AND PROGRAMS DIVISION
CENTER FOR FAMILIES, CHILDREN & THE COURTS

Revised January 2015

Probation Departments
Requirements — Indian Child Welfare Act and Senate Bill 678 *

I. Investigation/Intake Requirements

A. *Initial inquiry:* Whenever a petition is or has been filed for a child under WIC sections 601 or 602, the probation officer must ask the child, if at risk of entering foster care, (whether in custody or at home), parents, guardians, Indian custodians (if the child is living with an Indian person), and relatives whether the child may have Indian ancestry. (WIC, § 224.3(a); Cal. Rules of Court, rule 5.481(a).)

Practice Tip: If there is a determination that the child is at risk of entering foster care for the purposes of drawing down title IV-E funding, then the ICWA inquiry should be made.

Practice Tip: If inquiry reveals Indian ancestry, as part of your general duty to obtain services for the child and family, you should contact the child's identified Indian tribe to see if there are possible resources. You can find culturally relevant services at http://www.courts.ca.gov/5807.htm. You are also required to contact the child's tribe concerning placement options when foster care placement is or may be required.[1] Other ICWA requirements apply in the very limited set of circumstances described below.

ICWA's requirements other than inquiry apply only to delinquency proceedings where the child is in foster care or at risk of entering foster care AND one of the following:

1. The proceeding arises out of conduct which would not be criminal if committed by an adult;
2. The court is setting or considering setting a hearing to terminate parental rights; or
3. The court makes a specific finding that the foster care placement is based entirely on conditions within the child's home.

In these cases, and only in these cases, you must comply with all the ICWA requirements[2].

II. Further Inquiry

A. *Further inquiry:* If, as a result of this inquiry or from any other source, you have reason to know the child is an Indian child, then ask more questions to learn about the child's Indian heritage. Ask family members, the Bureau of Indian Affairs (BIA), and the tribe(s). Locate the tribal contact information if the tribe(s) are known. (WIC, § 224.3(c); Cal. Rules of Court, rule 5.481(a)(4).)

B. *How do I know? Tips to help figure out if you have reason to know the child is an Indian child:*

4. If the child, an Indian tribe, an Indian organization, an attorney, a public or private agency, or a member of the child's extended family says or provides information to anyone involved in the case that the child is an Indian child;
5. If the child, the child's parents, or an Indian custodian live in a predominantly Indian community; or
6. The child or the child's family has received services or benefits from a tribe or services that are available to Indians from tribes or the federal government, such as the Indian Health Service. (WIC, § 224.3(b); Cal. Rules of Court, rule 5.481(a)(5).)

C. *Document inquiry on Juvenile Wardship Petition (Form JV-600) and ICWA-010(A):*

1. Item 2 on form JV-600 requires you to have conducted an initial inquiry and further inquiry if it is warranted.
2. You are also responsible for documenting your investigation on ICWA-010(A) and having the parents complete the ICWA-020 forms. If the child is an Indian child, you and the court will need to take specific steps to prevent the breakup of the child's Indian family.

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[1] *Welfare and Institutions Code* §727.1(a)

[2] See *In re W.B.* (2012) 55 Cal.4th 30.

*All citations in this chart are to the Indian Child Welfare Act (ICWA) (25 U.S.C. 1901 et seq.), California Probation Code, California Welfare and Institutions Code (WIC), and California Rules of Court.

D. *Document active efforts if child taken into custody:* If you have reason to believe the child is an Indian child AND the child is already in foster care, or you think the child is at risk of entering foster care, then you must find resources and services that are culturally specific to the Indian child's family. These resources and services are the *active efforts* that you must document to show that you are actively trying to prevent the breakup of the child's Indian family. Just as you would document *reasonable efforts* in non-ICWA cases, you must also document these *active efforts* in the detention report. You can find resources to help fulfill the active efforts requirement at http://www.courts.ca.gov/5807.htm (25 U.S.C. § 1912(d); WIC, §§ 361.7; 727.4(d)(5)(D); Cal. Rules of Court, rule 5.484(c).)

III. ICWA Notice Requirements

A. You must send notice in form ICWA-030 to the child's parents or guardians, the Indian custodian (if any), the tribe(s), the Sacramento office of the BIA, and/or the Secretary of the Interior as early as possible. While you are not required to delay the detention hearing to provide such notice, early notice to and contact with the child's tribe(s) will allow a more speedy determination of the child's tribal status and early identification of tribal resources that may be available to meet the *active efforts* requirements of ICWA. (25 USC § 1912(a); WIC, §§ 224.2, 727.4(a)(2);; Cal. Rules of Court, rule 5.481(b).)

B. *What to send:* Send mandatory form ICWA-030, *Notice of Child Custody Proceeding for Indian Child*, including attachments and a copy of the petition and the report prepared for the hearing. (25 U.S.C. § 1912(c); Welf & Inst. Code § 224.2(a)(5))

C. *Where/who to notice:* Notice must be sent to the child's parents, including the adoptive parents, the guardian(s), the Indian custodian (if any), the child's potential tribe(s), and either the Sacramento area director of the BIA if you do not know the child's tribe or the Secretary of the Interior if you do. (See F. below).

D. *How to send notice:* Notice must be sent by registered or certified mail, return receipt requested, but if a tribe intervenes in the case you may thereafter send notice to it in the same manner as to other parties.

E. *Where to send tribal notice:* When sending notices to the child's tribe(s), the notices must be addressed to the tribal chair or other tribal representative designated for receipt of ICWA notice. The list of designated agents for service of ICWA notice may be found at http://www.bia.gov/cs/groups/public/documents/text/idc012540.pdf . The tribal information list maintained by the California State Department of Social Services can be found at: http://www.childsworld.ca.gov/res/pdf/CDSSTribes.pdf Send notice to all tribes of which the child may be a member or eligible for membership until the court makes a determination as to which tribe is the child's tribe, after which notice need only be sent to that tribe. (WIC, §§ 224.2, 224.3; Cal. Rules of Court, rule 5.481(b).)

F. If you know the child's tribe (i.e. the child is an enrolled member), you do not need to send notice to the regional BIA office, but you must send a copy of the notice to the Secretary of the Interior.

G. *Purpose of notice:* The purpose of notice is to let the tribe(s) know of the involuntary child custody proceeding potentially involving an Indian child and allow the tribes to investigate to determine whether the child is a tribal member or eligible for membership and whether or not to participate in the proceedings. Therefore, it is important that the information you provide be complete and accurate. If it is not, your notice may be held to be inadequate. (25 USC § 1912(a); WIC, § 224.2; Cal. Rules of Court, rule 5.481(b).)

H. *How to prove notice:* File with the court copies of all notices, with the certified mail receipts, any return receipts, and all responses from a tribe or the BIA.

NOTE: It is not sufficient for you to state on the report that notice was sent.

IV. Detention Report Requirements for Indian Child in case when ICWA requirements apply (25 U.S.C. § 1912(d); WIC, §§ 361.7, 636(c)(2); Cal. Rules of Court, rule 5.484(c).)

A. Documentation to support your inquiry as to possible Indian ancestry and results of inquiry; and

B. Documentation to support the required court findings regarding *reasonable efforts* and *active efforts* to prevent removal.

V. Disposition Report Requirements If an Indian Child Is Involved and It Is Probable the Child Will Be Entering Foster Care or Is Already in Foster Care

A. Document any further inquiry efforts you have made to determine if an Indian child is involved by completing and attaching ICWA-010(A) to the disposition report;

B. Prepare a case plan within 60 days of removal or by the date of the dispositional hearing, whichever occurs first, that includes resources and services that are remedial, rehabilitative, and culturally specific to the Indian child's family and designed to prevent the breakup of the Indian family. (25 USC § 1912(d); WIC, § 361.7; Cal. Rules of Court, rule 5.484(c).) In preparing the case plan, you must solicit and integrate the input of the child's identified Indian tribe. (Cal. Rules of Court, Rule 5.785(c)(2));

C. Comply with ICWA notice requirements discussed in section III above;
D. Obtain a qualified expert witness (QEW) meeting the requirements of section VI(B) below to testify at the hearing;
E. Make efforts to obtain a placement that complies with the ICWA placement preferences set out in section VI(D) and (E) below and document those efforts in your dispositional report; and
F. Document in the report your active efforts and reasonable efforts and make recommended legal findings for the court to adopt. (25 U.S.C. § 1912(d); WIC, §§ 361.7, 706, 706.5(a) and (b), 706.6.)

VI. Placement Requirements

A. *ICWA preferences:* The foster care placement of an Indian child requires placement in accordance with the ICWA preferences.
B. *Evidentiary standard:* The standard is proof by clear and convincing evidence, including the testimony of at least one qualified expert witness, that, taking into account the prevailing social and cultural standards of the child's tribe, continued custody of the child with his or her parent or Indian custodian is likely to result in serious emotional or physical damage to the child. (25 U.S.C. § 1912(e); WIC, §§ 361, 361.31, 361.7(c); Cal. Rules of Court, rule 5.484(a).)
C. *Who can serve as a QEW?:* A person knowledgeable in the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and child-rearing practices can serve as a QEW. Likely persons include a member of the child's tribe, an expert with substantial experience in the delivery of services to Indians (i.e. a social worker, a sociologist, a physician, a psychologist, a traditional tribal therapist and healer, a tribal spiritual leader, a historian, or an elder), or other professional. NOTE that an employee of your probation department cannot serve as a QEW. (25 USC §1912 (e); WIC, § 224.6; Cal. Rules of Court, rule 5.484(a).)
D. *Placement Preferences:* As with any child, the placement should be the least restrictive setting that best approximates a family and where the child's special needs, if any, may be met. Unless the child's tribe has by resolution specified a different preference, preference must be given in order of priority to placement with (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 that has a program suitable to meet the Indian child's needs. If no placement is available that meets these preferences, efforts must be made to place the child with a family committed to preserving the child's family ties and tribal relations. (25 USC § 1915(b); WIC, § 361.31; Cal. Rules of Court, rule 5.484(b).)
E. *Documentation of efforts regarding placement:* Because the court must make a finding that the placement accords with ICWA, you must document in your report the efforts made to find a placement that meets the preferences of ICWA. These efforts would include contacts with members of the child's extended family, contacts with the child's tribe(s) seeking input and resources for placement, and contacts with other relevant Indian organizations. (See IID for resources.) These efforts should be made and documented each time there is a change in the Indian child's placement. (WIC, § 361.31; Cal. Rules of Court, rule 5.482(f).)

VII. Status Review, Permanency Planning, and Postpermanency Planning Hearing Requirements

A. Document further inquiry efforts you have made to determine if an Indian child is involved by completing and attaching ICWA-010(A) to the disposition report;
B. Provide notice in accordance with section III above; and
C. Prepare and file a report with recommended legal findings and orders supported by evidence of continued compliance with:
   1. Reasonable and active efforts requirement discussed in IID above; and
   2. Efforts to find a placement that complies with ICWA preferences as discussed in VID above.

VIII. Termination of Parental Rights Requirements (WIC, § 727.31)

A. Provide evidence supported by the testimony of at least one QEW **beyond a reasonable doubt** that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
B. Prepare and file a report with recommended legal findings and orders supported by evidence of continued compliance with:
   1. *Reasonable efforts* and *active efforts* requirements discussed in IID above (25 USC § 1912(d); WIC, §§ 361.7, 366.26(c)(2)(B); Cal. Rules of Court, rule 5.485(a)); and
   2. Adoptive preferences.

   Absent good cause to the contrary, for any adoptive placement of an Indian child preference of placement shall be given in priority order to (1) a member of the child's extended family, (2) other members of the Indian child's tribe or (3) other Indian families. (25 USC § 1915(a); WIC, § 727.3.)

C. *Good cause not to terminate parental rights:* State law now recognizes that many tribal cultures do not believe in the termination of parental rights. Accordingly, it is good cause not to terminate parental rights if the termination would interfere with a connection to tribal community or membership or the child's tribe has identified guardianship, long-term foster care, or another permanent plan as the preferred plan for the child. (WIC, § 366.26(c)(1)(B)(vi); Cal. Rules of Court, rule 5.725.(2)(vi).)

JUDICIAL COUNCIL
OF CALIFORNIA
OPERATIONS AND PROGRAMS DIVISION
CENTER FOR FAMILIES, CHILDREN & THE COURTS

Revised January 2015

Juvenile Dependency Courts

Recommended Legal Findings and Orders for Cases Involving the Indian Child Welfare Act (ICWA)*

I. Inquiry (at every hearing) (Welf. & Inst. Code, § 224.3; Cal. Rules of Court, rule 5.481(a))

A. The court finds that the agency and the court have inquired whether the child is or may be an Indian child; and

B. The court finds that the ICWA-010(A) attachment has been completed and is in the court file; and

C. The court finds that both parents and the Indian Custodian (if any) have completed the ICWA-020 and those documents are in the court file; and

D. The court finds, after the agency has inquired and the court has inquired,
   1. that there is reason to believe the child may be an Indian child; or
   2. that there is no reason to believe the child may be an Indian child; and

E. If there is reason to know that the child is an Indian child, the court finds that the agency has interviewed the parents, Indian custodian, and extended family and has contacted the BIA to obtain information contained in Welfare and Institutions Code section 224.2(a)(5).

F. If there is reason to believe that the child is an Indian child:
   1. The court finds that the agency has inquired whether the child may be resident or domiciled on a reserve.
   2. The court finds that the agency has inquired whether the child is the ward of a tribal court.

II. Application (at any hearing) (ICWA § 1903(1) & (4); Welf. & Inst. Code, § 224.1(a) & (c); Cal. Rules of Court, rule 5.480)

A. The child may be an Indian child, and therefore the act may apply, or.

B. The child is an Indian child, because the court has proof of tribal membership or the tribal determination received by the court indicates that the child is a member or is eligible for membership, or.

C. The child is not an Indian child, because the tribal determination received by the court indicates that the child is not a member and is not eligible for membership, or.

D. The court will proceed as if the act does not apply, because proper notice was sent to the tribe(s) with which the child is affiliated and/or to the Bureau of Indian Affairs (BIA), and 60 days have elapsed with no determinative response from the tribe(s) and/or BIA. However:
   1. If the court receives information on the child's Indian heritage, it will send the information to the tribe(s) and/or BIA.
   2. If the court later receives evidence of the applicability of the act, then the court will apply the act.

III. Tribal Representative/Intervention (at every hearing) (ICWA § 1911(c); Welf. & Inst. Code, § 224.2(5)(G)(i); Cal. Rules of Court, rule 5.482(e))

A. The *(name of tribe)* _____ Tribe has acknowledged that the child is a member of or is eligible for membership in the tribe and will monitor the case.

B. The *(name of tribe)* _____ Tribe has designated *(name of representative)* _____ to be the tribe's representative and he *tribe's represe*ntative is entitled to the rights li*sted in Judicial Council* form ICWA-040, *Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child.*

C. The *(name of tribe)* _____ *Tribe has intervened in this case and will be treated as a party to the proceedings.*

***IV. Continu*ances (all hearings except detention; the jurisdiction hearing in a delinquency case if it would conflict with speedy trial considerations; and the disposition in a delinquency case if there is good cause to deny the continuance) (ICWA § 1912(a); Welf. & Inst. Code, § 224.2(d); Cal. Rules of Court, rule 5.482(a)**

*All citations in this chart are to the Indian Child Welfare Act (ICWA) (25 U.S.C. 1901 et seq.), California Welfare and Institutions Code (WIC), and California Rules of Court.

Upon request, this court grants the parent, Indian custodian, **or** tribe a continuance of up to 20 days to prepare for the hearing.

V. Appointment of Counsel (at every hearing) (ICWA § 1912(b); Welf. & Inst. Code, § 317(a)(2))

A. The Court finds that the parent(s) and/or Indian custodian appear to be indigent; and

B. The Court hereby appoints counsel to represent the parent(s) and/or Indian custodian; or

C. The Court finds that the parent(s) and/or Indian custodian do not appear to be indigent.

VI. Tribal Consultation (Dispositional Hearing) (Cal. Rules of Court Rules 5.690(c) & 5.785(c))

A. The Court finds that in developing the case plan the agency has:

1. Solicited and integrated into the case plan the input of the child's identified Indian tribe; **or**

2. Not solicited and integrated into the case plan input from the child's identified Indian tribe; **and**

a) the Court orders the agency to solicit and integrate into the case plan input from the child's identified Indian tribe, **or**

b) the Court finds that the child's identified Indian tribe was unable, unavailable or unwilling to participate in development of the case plan.

VII. Notice (at every hearing) (ICWA § 1912(a); Welf. & Inst. Code, § 224.2; Cal. Rules of Court, rule 5.481(b))

A. The court finds that notice has been provided by certified mail with return receipt requested to all tribes of which the child may be a member or eligible for membership and to the BIA. Notice to the tribe(s) was addressed to the tribal chairperson unless the tribe has designated another agent for service of ICWA notice.

B. The court finds that proof of notice has been filed with the court and includes a copy of the notices sent and the return receipt, as well as any correspondence received from the Indian entity relevant to the minor's Indian status.

C. The court finds *either* that the identity or location of the parent or Indian custodian or tribe cannot be determined *or* that the child has Indian ancestry but is not a member of an identified tribe or eligible for membership in an identified tribe; notice has been provided to the specified office of the Secretary of the Interior. A copy of the notice sent and the return receipt have been filed with the court.

D. The court finds that notice has been provided by sending Judicial Council form ICWA-030, *Notice of Child Custody Proceeding for Indian Child*,, with a copy of the petition, by registered or certified mail with return receipt requested, and additional notice by first-class mail, to the parent, tribe, Indian custodian, and Bureau of Indian Affairs (BIA).

VIII. Detriment and Standard of Proof (at disposition and termination of parental rights hearings) (ICWA § 1912(e) & (f); Welf. & Inst. Code, §§ 361(a)(6), 361.7, 366.26(c)(2)(B); Cal. Rules of Court, rules 5.484(a), 5.484(a))

A. For a foster-care placement, the court finds by *clear and convincing* evidence, including the testimony of one or more qualified expert witnesses, that the continued custody of the child by the parent, legal guardian, or Indian custodian is likely to result in serious emotional or physical danger to the child.

B. For termination of parental rights, the court finds by evidence *beyond a reasonable doubt*, including the testimony of one or more 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.

IX. Active Efforts (at every hearing where the child is out of the custody of his or her parents, Indian custodians, or legal guardians and is placed in foster care [stranger or relative or group home]) (ICWA § 1912(d); Welf. & Inst. Code, §§ 361(d), 361.7; Cal. Rules of Court, rules 5.484(c), 5.485(a)(1))

A. If a tribe has indicated that the child would be eligible for enrollment if certain steps are followed, the court finds that the agency has made active efforts by taking steps to secure tribal membership. (Cal. Rules of Court, rules 5.482(c), 5.484(c).)

B. The court finds, after reviewing the report, that active efforts have been made to provide culturally appropriate services and rehabilitative programs designed to prevent the breakup of the Indian family, that these efforts include available resources of native agencies, the tribe and extended family, and that these efforts have been unsuccessful.

C. The court finds that the agency has incorporated culturally appropriate services into the case plan for the child and the parent(s) or Indian custodian.

D. The court finds that the agency has consulted with the child's tribe in development of the case plan for the child and the parent(s) or Indian custodian.

X. Placement Preferences (at every hearing where the child is out of the custody of his or her parents, Indian custodians, or legal

guardians and is placed in foster care [stranger or relative or group home]) (ICWA § 1915; Welf. & Inst. Code, § 361.31; Cal. Rules of Court, rule 5.484(b))

A. The court finds that
the agency adhered to the placement preferences under the act when placing the child;
the child is detained in a placement that adheres to the placement preferences under the act; and
the agency has consulted with the child's tribe and Indian organizations concerning the appropriate placement of the child.

OR

B. The court finds good cause to deviate from the placement preferences under the act on the grounds that _____.

OR

C. The court finds that the placement does not comply with the ICWA placement preferences and finds no good cause to deviate from the placement preferences and orders _____

XI. Jurisdiction and Transfer (at any hearing) (ICWA § 1911; Welf. & Inst. Code, § 305.5; Cal. Rules of Court, rule 5.483)

A. The court finds that the child resides or is domiciled on the reservation of the _____ Tribe or that the child is the ward of the _____ Tribe, and, accordingly, the _____ Tribe has exclusive jurisdiction.

B. The court finds that this juvenile court and the court of the child's tribe have concurrent jurisdiction.

C. The *(specify tribe or parent or Indian custodian)* _____ has petitioned this court to transfer the proceedings to the tribal court, and finding no good cause not to transfer, this court transfers the case to the tribal court of *(name of tribe)* _____ Tribe.

D. After holding an evidentiary hearing, this court finds that the *(specify tribe or parent or Indian custodian)* _____ has petitioned this court to transfer the proceedings to the tribal court, and the court finds that the following reason is good cause not to transfer the case to the tribal court:
1. The child's parent objects to the transfer;
2. The child's tribe does not have a tribal court or any other administrative body as defined in section 1903 of the act; or
3. The tribal court of the child's tribe declined the transfer.

E. After holding an evidentiary hearing, this court finds that the *(specify tribe or parent or Indian custodian)* _____ has petitioned this court to transfer the proceedings to the tribal court, and the court finds that the following circumstances in the case constitute in the court's discretion good cause not to transfer the case to the tribal court:
1. The evidence necessary to decide the case cannot be presented in tribal court without undue hardship to the parties;
2. This proceeding is at an advanced stage, and petitioner did not make the request within a reasonable time after receiving notice of this proceeding;
3. The child is over 12 and objects to the transfer; or
4. The child is over 5 and has had little or no contact with his or her tribe or members of the child's tribe, and the child's parents are not available.

XII. Permanency Planning (each hearing after dispo in which the child's tribe has been identified) (Welf. & Inst. Code, §§ 358.1, 361.5, 366.21, 366.22, 366.24, 366.25, 366.26; Cal. Rules of Court, rules 5.708 (c)(2), 5.715(b)(5), 5.720(b)(4), 5.722(b)(3), 5.725(d)(1), 5.725(d)(2)(c)(vi)

A. The Court finds that the proposed permanent plan and placement:
a. complies with the ICWA placement preference requirements (see X above); or
b. there is good cause to deviate from the placement preferences under the act on the grounds that _____ or
c. the plan does not comply with ICWA requirements and _____

B. The Court finds that the agency has consulted with the tribe about the appropriate permanent plan for the child, and has specifically discussed whether tribal customary adoption is an appropriate permanent plan for the child if reunification is unsuccessful; or

C. The Court finds that the agency has not consulted with the tribe about the child's permanent plan and whether tribal customary adoption is an appropriate

permanent plan for the child if reunification is unsuccessful and the agency is order to so consult with the tribe.

JUDICIAL COUNCIL
OF CALIFORNIA
OPERATIONS AND PROGRAMS DIVISION
CENTER FOR FAMILIES, CHILDREN & THE COURTS

Social Service Departments
Requirements — Indian Child Welfare Act, SB 678* & AB 1325

I. Investigation/Intake Requirements

A. *Initial inquiry:* Whenever a petition is to be or has been filed for a child under WIC § 300, the social worker must ask, whether the child is in placement or at home, the child, parents, guardians, Indian custodians, and relatives whether the child may have Indian ancestry. Do not assume a child may or may not have Indian ancestry based on appearance, family name, or generalizations. You must conduct inquiry with every child that is involved in dependency. (WIC, § 224.3(a); CRC 5.481(a).)

B. *Further inquiry:* If, as a result of this inquiry or from any other source, you have reason to know the child is an Indian child, ask more questions to learn about the child's Indian heritage. Ask family members, the Bureau of Indian Affairs (BIA), and the tribe. Locate the tribal contact information if the tribe is known. (WIC, § 224.3(c); CRC 5.481(a)(4).)

C. *When do I have "reason to know"?:*

1. Anyone with an interest in the child provides you with information suggesting the child is an Indian child;
2. If the child, the child's parents, or an Indian custodian live in a predominately Indian community; or
3. The child or the child's family has received services or benefits from a tribe or services that are available to Indians from tribes or the federal government, such as the Indian Health Service. (WIC, § 224.3(b); CRC 5.481(a)(5).)

D. *Document inquiry on* Juvenile Dependency Petition *(form JV-100 or form JV-110) and* Indian Child Inquiry Attachment *(form ICWA-010(A):*

1. Item 2 on JV-100, and JV-110 requires you to have conducted an initial inquiry and further inquiry if it is warranted.
2. You are responsible for documenting your investigation on ICWA-010(A). If the child is an Indian child, you and the court will need to take specific steps to prevent the breakup of the child's Indian family.
3. You are responsible for ensuring that both parents and the Indian custodian or guardian, if any, complete and return *Parental Notification of Indian Status* (form ICWA-020).

E. *Document active efforts if child taken into custody:* If you have reason to believe the child is an Indian child, you must find resources and services that are culturally specific to the Indian child's family. These resources and services are the *active efforts* that you must document to show that you are actively trying to prevent the breakup of the child's Indian family. Just as you would document *reasonable efforts* in non-ICWA cases, you must also document these active efforts in the report before the child can be removed from his or her parent or Indian custodian. You can find resources to help fulfill the active efforts requirement at *http://www.courts.ca.gov/5807.htm* . (ICWA § 1912(d); WIC, §§ 361; 727.4(d)(5)(D); CRC 5.484(c).) If the child is being removed you must also consult with the child's tribe on placement and comply with the ICWA placement preferences. (ICWA § 1915 (b); WIC § 361.31; CRC 5.482(g) & 5.484 (b)

II. ICWA Notice Requirements

A. If you have information suggesting the child is an Indian child, you must send a *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030) to the child's parents or guardians, Indian custodian (if any), tribe(s) with which the child may be affiliated; and the Sacramento Office of the

*All citations in this chart refer to the Indian Child Welfare Act (25 U.S.C. 1901 et seq. or "ICWA"), California Welfare and Institutions Code ("WIC") and California Rules of Court, ("CRC")

BIA; or the Secretary of the Interior as soon as possible. While you are not required to delay the detention (see WIC § 224.2(d)) hearing to provide such notice, notice should never the less be sent as early as possible and proof of notice must be filed with the court within 10 days after the filing of the petition (CRC 5.482 (a)(2)(B). Early notice to and contact with the child's tribe is essential to ICWA compliance. Further it will allow a more speedy determination of the child's tribal status and early identification of tribal resources that may be available to meet the active efforts requirements of ICWA. (ICWA § 1912(a); WIC, § 224.2; CRC 5.481(b).)

B. *What to send:* Use mandatory form ICWA-030, *Notice of Child Custody Proceeding for Indian Child*, including attachments and a copy of the child's birth certificate where available, the petition and the report prepared for the hearing.

C. *Where and whom to notice:* Notice must be sent to the child's parents, including adoptive parents, guardian, Indian custodian (if any), the child's potential tribe(s), and either the Sacramento Area Director of the BIA if you do not know the child's tribe or the Secretary of the Interior if you do know (see F below).

D. *How to send notice*: Notice must be sent via registered/certified mail, return receipt requested. If a tribe intervenes in the case, you may thereafter send notice to it in the same manner as to other parties.

E. *Where to send tribal notice:* When sending notices to the child's tribe, they must be addressed to the tribal chairperson or other tribal representative designated for receipt of ICWA notice. The list of designated agents for service of ICWA notice may be found at: http://www.bia.gov/cs/groups/public/documents/text/idc012540.pdf The tribal information list maintained by the California State Department of Social Services can be found at: http://www.childsworld.ca.gov/res/pdf/CDSSTribes.pdf Send notice to all tribes of which the child may be a member or eligible for membership until the court makes a determination as to which tribe is the child's tribe, after which notice need be sent only to the tribe determined to be the Indian child's tribe. (WIC, §§ 224.2, 224.3; CRC 5.481(b).)

F. If you know the child's tribe (i.e., child is an enrolled member), notice does not need to go to other tirbes, and you do not need to send notice to the regional BIA office, but you must send a copy of the notice to the Secretary of the Interior.

G. *Purpose of notice:* The purpose of notice is to let the tribe know of the involuntary child custody proceeding potentially involving one of its children and to allow it to investigate to determine whether the child is a tribal member or eligible for membership and whether or not to participate in the proceedings. Therefore, it is important that the information you provide is complete and accurate. If it is not, your notice may be held to be inadequate. (ICWA § 1912(a); WIC, § 224.2; CRC 5.481(b).)

H. *How to prove notice:* File with the court copies of all notices, with the certified mail receipts, any return receipts, and all responses from a tribe or the BIA.

NOTE: It is not sufficient for you to state on the report that notice was sent. The green return receipt must be in the court file, with a copy in the social worker's file.

III. Detention Report Requirements for Indian Child (ICWA §§ 1912(d), 1915 (b); WIC, §§ 361.31, 361.7, 636(c)(2); CRC 5.484(b) & (c).)

A. Provide documentation to support your inquiry concerning possible Indian ancestry and results of inquiry.

B. Provide documentation to support the required court findings regarding reasonable efforts and active efforts to prevent removal.

C. Provide documentation concerning consultation with the tribe concerning placement and how the placement fits within the ICWA placement preferences.

IV. Jurisdiction Report/Hearing Requirements for Indian Child

A. Provide documentation to support your inquiry concerning possible Indian ancestry and results of inquiry.

B. Provide documentation to support the required court findings regarding reasonable efforts and active efforts to prevent removal.

C. Provide notice in accordance with section II above.

D. *Timing:* No hearing can be held until 10 days after receipt of notice by the tribe and others entitled to ICWA notice. The parents, Indian custodian

(if any), and tribe are entitled to an additional 20 days to prepare for the hearing on request. (ICWA § 1912 (a); WIC, § 224.2(d); CRC 5.482(a).)

V. Disposition Report Requirements If an Indian Child Is Involved and It Is Probable the Child Will Be Entering or Is Already in Foster Care

A. Document any further inquiry efforts you have made to determine if an Indian child is involved by completing and attaching ICWA-010(A) to the disposition report.

B. Prepare a case plan within 60 days of removal or by the date of the dispositional hearing, whichever occurs first, that includes resources and services that are remedial, rehabilitative, and culturally specific to the Indian child's family and are designed to prevent the breakup of the Indian family. (ICWA § 1912(d); WIC, § 361.7; CRC 5.484(c)). In preparing this case plan you must solicit and integrate the input of the child's identified Indian tribe. (CRC 5.690(c)) You must also discuss with the child's identified Indian tribe whether tribal customary adoption as defined in section 366.24 is an appropriate permanent plan for the child if reunification is unsuccessful and include the contents of this discussion in your report. (WIC § 358.1; 361.5(g)(1)(G))

C. Comply with ICWA notice requirements discussed in section II above.

D. If you know the child's tribe, you should consult with the tribe in developing the case plan and determining what services are appropriate for the parents and the child, and in finding an appropriate placement for the child.

E. Obtain a qualified expert witness (QEW) meeting the requirements of section VI(B) below to testify at the hearing.

F. Make efforts to obtain a placement that complies with the ICWA placement preferences set out in section VI(D) and (E) below and document those efforts in your dispositional report.

G. Document in the report your active efforts and reasonable efforts and make recommended legal findings for the court to adopt. (ICWA § 1912(d); WIC, § 361.7.)

H. Ensure that you have all the evidence necessary to support the disposition that you are recommending. In particular ensure that any foster-care placement recommendation complies with the requirements for ICWA foster placement set out in section VI below.

VI. Foster Placement Requirements

A. *ICWA preferences:* The foster-care placement of an Indian child requires placement in accordance with the ICWA preferences and must meet the heightened ICWA evidentiary standards.

B. *Evidentiary standard*: Provide proof by clear and convincing evidence, including the testimony of at least one qualified expert witness (QEW), that taking into account the prevailing social and cultural standards of the child's tribe, continued custody of the child with his or her parent, or Indian custodian is likely to result in serious emotional or physical damage to the child. (ICWA § 1912(e); WIC, §§ 361, 361.31, 361.7(c); CRC 5.484(a).)

C. *Who can serve as QEW?* A person knowledgeable in prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and child-rearing practices. Likely persons include a member of the child's tribe, an expert with substantial experience in delivery of services to Indians (e.g., social worker, sociologist, physician, psychologist, traditional tribal therapist and healer, tribal spiritual leader, historian, or elder), or other professional. (WIC § 224.6)

NOTE: An employee of your social services department cannot serve as a QEW. (ICWA § 1912 (e); WIC, § 224.6; CRC 5.484(a).)

D. *Placement preferences:* As with any child, the placement should be the least restrictive setting that most approximates a family and in which the child's special needs, if any, may be met. Unless the child's tribe has by resolution specified a different preference, preference must be given in order of priority to placement with (i) a member of the Indian child's extended family; (ii) a foster home licensed, approved, or specified by the Indian child's tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs. If no placement is available that meets these preferences, efforts must be made to place the child with a family committed to preserving the child's family

ties and tribal relations. (ICWA § 1915(b); WIC, § 361.31; CRC 5.484(b).)

E. *Consultation with tribe:* When you know the child's tribe, you must consult with the tribe and make use of tribal services when formulating your placement recommendation. (WIC § 361.31(g))

F. *Documentation of efforts regarding placement:* The court must make a finding that the placement accords with ICWA. You must document in your report what efforts were made to find a placement that meets the preferences of ICWA. These efforts would include contacts with members of the child's extended family, contacts with the child's tribe seeking input and resources for placement, and contacts with other relevant Indian organizations (see I(E) for resources). These efforts should be made and documented each time there is a change in the Indian child's placement. (ICWA § 1916(b); WIC, § 361.31; CRC 5.482(f).)

VII Status Review, Permanency Planning, and Postpermanency Planning Hearing Requirements

A. Document further inquiry efforts you have made to determine if an Indian child is involved by completing and attaching ICWA-010(A) to the report.

B. Provide notice in accordance with section II above.

C. Consult with tribe, specifically including a discussion of whether tribal customary adoption as defined in section 366.24 is an appropriate permanent plan for the child if reunification is unsuccessful and include the contents of this discussion in your report. (WIC § 358.1; 361.5(g)(1)(G)) .

D. Prepare and file a report with recommended legal findings and orders supported by evidence of continued compliance with:

1. Reasonable and active efforts requirement discussed in I(E) above; and
2. Efforts to find a placement that complies with ICWA preferences as discussed in VI(D) above.

VIII. Termination of Parental Rights Requirements (WIC, §§ 366.26, 727.31)

A.You must provide evidence supported by the testimony of at least one QEW **beyond a reasonable doubt** that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

B. You must consult with the tribe in formulating the permanent plan for the child, specifically including a discussion of whether tribal customary adoption as defined in section 366.24 is an appropriate permanent plan for the child if reunification is unsuccessful and include the contents of this discussion in your report. (WIC § 358.1; 361.5(g)(1)(G)) .

C. Prepare and file a report with recommended legal findings and orders supported by evidence of continued compliance with:

1. Reasonable efforts and active efforts requirements discussed in I(E) above (ICWA § 1912(d); WIC, §§ 361.7, 366.26(c)(2)(B); CRC 5.485(a).); and
2. Compliance with adoptive preferences of ICWA if the recommended permanent plan for the child is adoption.

Absent good cause to the contrary, for any adoptive placement of an Indian child, preference of placement shall be given in priority order to (i) a member of the child's extended family, (ii) other members of the Indian child's tribe, or (iii) other Indian families. (ICWA § 1915(a); WIC, § 727.3.)

D. *Good cause not to terminate parental rights:* State law now recognizes that at the option of the tribe, tribal customary adoption is an appropriate permanent plan. California law also recognizes other exceptions to termination of parental rights (TPR) for tribal children. Many tribal cultures do not believe in TPR. Accordingly, it is good cause not to terminate if TPR would interfere with connection to tribal community or membership or the child's tribe has identified guardianship, long-term foster care, or another permanent plan as the preferred plan for the child. (WIC, § 366.26(c)(2)(B)); CRC 5.485(b).)

STATISTICAL INFORMATION

CALIFORNIA
TRIBAL COURT–STATE COURT
FORUM

January 2012

Native American Statistical Abstract: Violence and Victimization

Introduction

The Tribal/State Programs of the Judicial Council's Center for Families, Children & the Courts has developed a series of informational abstracts that bring together the available data from various sources on American Indians and Alaskan Natives (AI/AN) nationally, statewide, and tribally specific to California's AI/AN population. The purpose of these abstracts is to develop and disseminate justice-related information and links to reports to ensure the highest quality of justice and service for California's AI/AN population. This information is intended for the state judicial branch, tribal justice systems, tribal organizations, state agencies, and local agencies to support effective collaboration and tribal justice development.

Preface

It is worth noting at the outset that while there is a great deal of research related to domestic violence and violence against women, it is often difficult to obtain statistics related to the victimization of tribal women specifically.

Very little data is available regarding tribal populations in California, and less is of recent vintage. Due to the small size of the AI/AN population (less than 2 percent of the entire U.S. population), national studies tend to obscure intertribal diversity. Finally, a historic lack of trust of authorities may often result in underreporting to both law enforcement and social service agencies, making them less reliable sources of data.

Given these limitations, one must bear in mind that the information that is available likely underestimates the scope of the problems faced by tribal populations, especially those residing in Indian Country:

> In addition to underestimating the scale of sexual violence against Indigenous women, the limited data available does not give a comprehensive picture. For example, no statistics exist specifically on sexual violence in Indian Country and available data is more likely to represent urban than rural areas.[1]

General Trends[2]

- Rates of violent victimization[3] for both males and females are higher among American Indians than for any other race.

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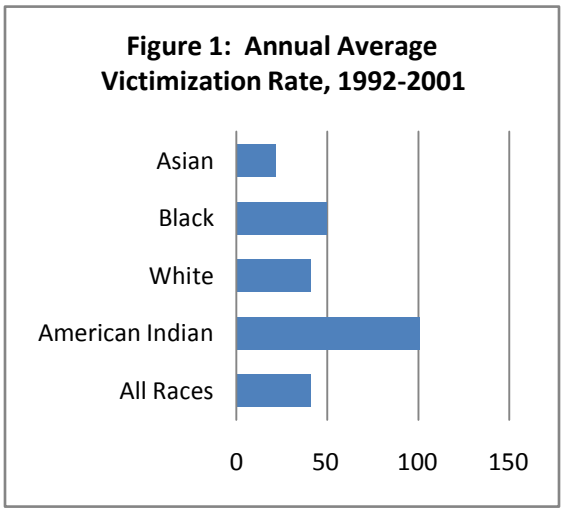
[1] Amnesty International, *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA* (2007), p. 4, http://www.amnesty.org/en/library/asset/AMR51/035/2007/en/cbd28fa9-d3ad-11dd-a329-2f46302a8cc6/amr510352007en.pdf (as of Aug. 17, 2011).

[2] Unless otherwise noted, the tables and charts in this section were created using data from Steven W. Perry, Bureau of Justice Statistics, *American Indians and Crime: A BJS Statistical Profile, 1992–2002* (NCJ 203097, Dec. 2004).

- American Indians experienced a per capita rate of violence twice that of the U.S. resident population. On average, American Indians experienced an estimated 1 violent crime for every 10 AI/AN residents age 12 or older.
- The murder rate among American Indians is 7 per 100,000, a rate similar to that found among the general population, but significantly lower than that of the black population.
- The violent crime victimization rate in every age group below age 35 was significantly higher for American Indians than for all races combined. Among American Indians age 25 to 34, the rate of violent crime victimizations was more than 2½ times the rate for persons of all races in the same age group.



- Among persons in the 55 or older category, the American Indian victimization rate was 22 per 1,000, versus the overall rate of 8 per 1,000.
- Note that the average annual victimization rate reported through 2001 has decreased substantially in younger (12–44) age groups, but stayed the same or increased slightly among older groups, compared to the rates reported from 1992-1996. During the same period of time, these rates were decreasing across the board for all other groups.

Table 1. Average Annual Victimization Rates by Age, 1992–2001

1992–1996[4]			1992–2001		
Age	**All races**	**AI/AN**	**Age**	**All races**	**AI/AN**
55/older	9	14	55/older	8	22
45–54	27	43	45–54	24	45
35–44	44	124	35–44	36	93
25–34	61	145	25–34	50	140
18–24	100	232	18–24	84	155
12–17	116	171	12–17	94	146

- The rate of violent victimization in each age group is higher among American Indians than that for all races combined. The victimization rate among American Indian males was 118 per 1,000 males age 12 or older, more than double that found among all males (49 per 1,000) ages 12 or older.

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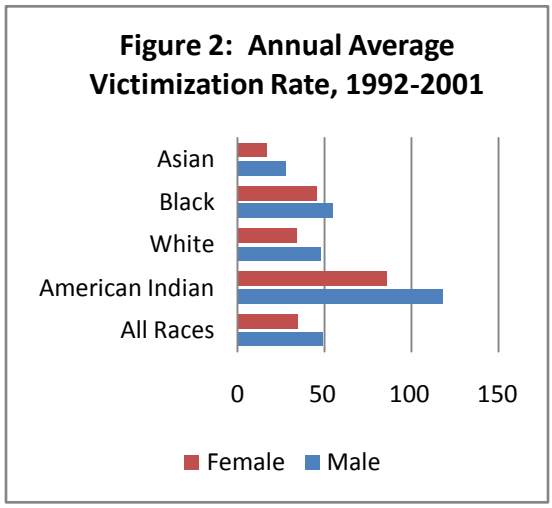
[3] Victimization rates measure the occurrence of victimizations among a specified population group. For personal crimes, this is based on the number of victimizations per 1,000 residents age 12 or older.
[4] Lawrence A. Greenfeld and Steven K. Smith, Bureau of Justice Statistics, *American Indians and Crime* (NCJ 173386, Feb. 1999).



- The violent victimization rate for American Indian females during this period (1992–2002) was 86 per 1,000 AI/AN females, a rate higher than that found among white females (34 per 1,000) or black females (46 per 1,000).
- Rates of violent victimization for both males and females are higher among American Indians than for any other race. The rate of violent crime experienced by American Indian women is nearly 50 percent higher than that reported by black males.

- At least 66 percent of the violent crimes experienced by American Indian victims are committed by persons not of the same race, a substantially higher rate of interracial violence than that experienced by white or black victims; 9 percent of offenders were described by the victim as black, 34 percent were described as American Indian, and the majority (57 percent) were described as white. This is similar to the experience of Asian/Pacific Islanders, who also suffer a substantially higher rate of interracial violence than white or black victims.
- American Indian victims of violence were more likely than all victims to report an offender who was under the influence of alcohol at the time of the crime. Overall, about 62 percent of American Indian victims experienced violence by an offender using alcohol, compared to the national average of 42 percent.
- Women of all races are more likely to be assaulted by a known person. American Indian/Alaskan Native women are more likely to be assaulted by intimate partners or family members, and less likely by strangers, than women of other races.

Table 2. Average Annual Percentage of Assault Victimizations Against Females by Race and Perceived Relationship Status of Offender(s), NCVS 1992–2005[5]

	Intimate	Other Family	Other Known	Stranger
Total Population	26%	9%	34%	30%
AI/AN	**28**	**14**	**35**	**23**
White	26	9	35	30
African American	26	9	36	29
Asian American	17	11	25	47

[5] Ronet Bachman, Heather Zaykowski, Rachel Kallmyer, Margarita Poteyeva, and Christina Lanier, U.S. Department of Justice, *Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What Is Known* (Aug. 2008), p. 50. The –NCVS‖ (noted in the table heading) is the National Crime Victimization Survey. This report is an excellent review of the research regarding violence against AI/AN women and is highly recommended.

Rape and Sexual Assault

- Federal statistics show that AI/AN women are 2.5 times more likely to be raped or sexually assaulted than women in the U.S. in general and more than one in three will be raped during their lifetimes. In 86 percent of reported rapes or sexual assaults on Native women, the perpetrators are non-Native; this disparity is not typical of any other ethnicity since perpetrators are usually found to be the same race as the victim.[6]
- A U.S. Department of Justice study on violence against women concluded that 34 percent of American Indian and Alaska Native women—more than one in three—will be raped during their lifetimes; the comparable figure for women as a whole in the United States is less than one in five.[7]
- In a 2002 study researchers interviewed 110 American Indian women at two urban and three rural American Indian agencies in California. They found that 80 percent of respondents had experienced a sexual assault in their lifetimes—26 percent had experienced forced sex in their lifetimes and 32 percent had experienced either a physical and/or sexual victimization in the past year.[8]

Domestic Violence and Stalking

- Among violence victims of all races, about 11 percent of victims of intimate partners and 5 percent of victims of other family members report the offender to have been of a different race. However, among American Indian victims of violence, 75 percent of the intimate victimizations and 25 percent of the family victimizations involved an offender of a different race.[9]
- In a report published by the Centers for Disease Control (CDC) in 2008, 39% of American Indian women surveyed reported some form of intimate partner violence in their lifetimes. This rate is higher than the rate reported by any other race/ethnic group.[10]
- American Indian victims of intimate and family violence are more likely than victims of other racial groups to be seriously injured and require hospital care. Also (according to the June 2001 National Crime Victimization Survey (NCVS) on ―Injuries from Violent Crime, 1992–1998‖), persons victimized by an intimate partner were more likely than those victimized by acquaintances or strangers to be injured (48 percent intimate partner, 32 percent family member, 20 percent stranger).

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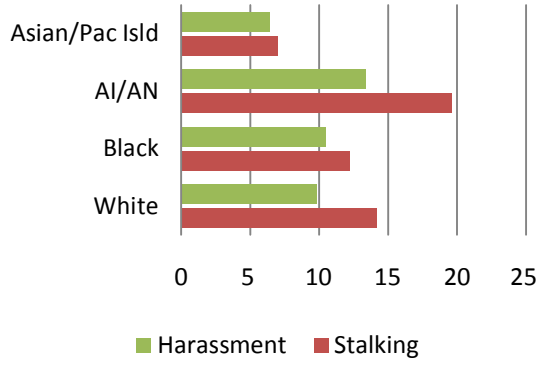
[6] Perry, *supra.*
[7] Patricia Tjaden and Nancy Thoennes, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey* (National Institute of Justice and the Centers for Disease Control and Prevention, NCJ 183781, Nov. 2000).
[8] E. Zahnd, S. Holtby, D. Klein, and C. McCain, *American Indian Women: Preventing Violence and Drinking Project Final Report* (National Institute on Alcohol Abuse and Alcoholism and the Office for Research on Women's Health, 2002), cited in Bachman et al., *supra,* at p. 55.
[9] ―Intimate victimizations‖ and ―intimate violence‖ refer to victimizations involving current and former spouses, boyfriends, and girlfriends. ―Family victimizations‖ and ―family violence‖ refer to victimizations involving parents, siblings and other relatives.
[10] U.S. Center for Disease Control, Adverse Health Conditions and Health Risk Behaviors Associated with Intimate Partner Violence — United States (2005) MMWR Weekly February 8, 2008 / 57(05);113-117.

Table 3. Average Annual Percentage of Assault Victimizations Against *Females* by Race, in Which the Victim Sustained Injuries, NCVS 1992–2005[11]

	Percent of Victimizations in Which Victim Was Injured	Percent of Injuries Requiring Medical Care
Total Population	61%	41%
AI/AN	**70%**	**56%**
White	60%	38%
African American	63%	49%
Asian American	53%	53%

- Eighty-nine percent of Native American women who reported intimate violence had suffered injuries from the violence, and 73 percent reported moderate or severe injuries, with nearly one in four (22 percent) reporting more than 20 different injury incidents. The health-related costs of violent victimization by intimates have been calculated to exceed $5.8 billion each year.[12]

Figure 3: Stalking Rate per 1,000 Victims



- The historical context of relations with government agencies may make it far less likely that AI/AN women will report sexual or intimate violence, for fear of revictimization by justice agencies.[13]
- 17 percent of American Indian and Alaska Native women are stalked in their lifetimes, compared to 8.2 percent of white women, 6.5 percent of black women, and 4.5 percent of Asian/Pacific Islander women.[14]

- The Tribal Law and Order Act of 2010 includes a requirement that protective orders issued by tribal courts be given full faith and credit by state and local agencies. In California, however, significant barriers remain. For example, tribal orders are not entered into the California Courts Protective Order Registry (CCPOR), and must be registered as foreign orders in order to be entered in CLETS (the California Law Enforcement Telecommunications System).

[11] Bachman, et al, *supra*, p. 49.
[12] Costs of Intimate Partner Violence in the United States, U.S. Centers for Disease Control and Prevention, 2003. http://www.cdc.gov/violenceprevention/pub/IPV_cost.html (as of Sept. 28, 2011).
[13] Amnesty International, *supra*, p. 49.
[14] Patricia Tjaden and Nancy Thoennes, *Stalking in America: Findings from the National Violence Against Women Survey*, Research in Brief (National Institute of Justice and the Centers for Disease Control and Prevention, NCJ 169592, Apr. 1998), http://www.ncjrs.gov/pdffiles/169592.pdf (as of Aug. 18, 2011).

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CALIFORNIA
TRIBAL COURT–STATE COURT
FORUM

March 2012

Native American Statistical Abstract: Population Characteristics

The Tribal/State Programs of the Judicial Council's Center for Families, Children & the Courts has developed a series of informational abstracts that bring together the available data from various sources on American Indians and Alaskan Natives (AI/AN) nationally, statewide, and tribally specific to California's AI/AN population. The purpose of these abstracts is to develop and disseminate justice-related information and links to reports to ensure the highest quality of justice and service for California's AI/AN population. This information is intended for the state judicial branch, tribal justice systems, tribal organizations, state agencies, and local agencies to support effective collaboration and tribal justice development.

Note: This update was originally published in July 2011, with data from the 2000 Census. It was updated in March 2012 with data from the 2010 Census.

National Tribal Population

- According to the 2010 Census, 5.2 million U.S. residents reported being AI/AN alone or in combination with some other race, and over 2.9 million reported being AI/AN alone.[1] Among counties in the United States, Los Angeles County (CA) had the highest population of AI/AN alone in 2000 (76,988).[2]
- In 2010, the majority of the AI/AN-alone population (67 percent) and the majority of the AI/AN-in-combination[3] population (92 percent) lived outside of tribal areas.[4]
- In 2010, Cherokee was the largest tribal population, representing approximately 16 percent of the total AI/AN population. The Cherokee population, at more than 819,000, is more than twice the size of the Navajo, the second-largest tribal population, at over 332,000. Other large tribal

[1] Tina Norris, Paula L. Vines, and Elizabeth M. Hoeffel, "2010 Census Briefs: The American Indian and Alaska Native Population: 2010." (Bureau of the Census, Jan. 2012), p. 4, table 1, http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf (as of March 5, 2012).
[2] U.S. Census Bureau, Census 2000, Summary File 2.
[3] AI/AN alone refers to the population that self-identifies as being only AI/AN. AI/AN in combination refers to the population that self-identifies as being AI/AN in combination with one or more other races.
[4] Norris, et al, *supra*, p. 12, figure 6.

populations (roughly 170,000 or more) include Choctaw, Mexican American Indian, Chippewa, and Sioux.[5]

California Tribal Population

- In 2010, California had the largest population of AI/AN alone (362,801); the second-largest AI/AN population was in Oklahoma (321,687), followed by Arizona (296,529). California represented 12 percent of the total AI/AN-alone population in the United States. California had more than 720,000 AI/AN citizens (alone or in combination with another race) residing in both rural and urban communities.[6]
- Although California has the largest tribal population in the United States, it has very little tribal land. (See http://www.waterplan.water.ca.gov/tribal2/docs/GW_Basins_and_Tribal_Trust_Lands_map.pdf .)
- As of 2005, only 3 percent of California's AI/AN population lived on a reservation or rancheria.[7]
- California's Native American communities include descendants or members of 108 California-based federally recognized tribes (about 20 percent of all tribes in the United States).[8] As of 2008, an additional 74 tribes in California are petitioning for federal recognition.
- The California tribal population consists of a significant number of members of tribes not based in California. More than half of the Native Americans living in California are members of tribes located outside of California.[9]
- The AI/AN-alone or -in-combination population makes up 2 percent of California's total population. Approximately 50 percent of California's AI/AN population is AI/AN in combination with one or more other races (predominantly white), and 50 percent of California's AI/AN population identifies as AI/AN alone.[10]
- Cherokee is the largest tribal population in California (approximately 18 percent), followed by Apache (6 percent), Navajo (5 percent), and Choctaw (5 percent).[11]

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[5] Norris, et al, *supra*, p. 18, figure 8. These figures are for individuals identifying as AI/AN alone or in combination with one or more other races.
[6] Norris, et al, *supra*, p. 7, table 2.
[7] National Indian Child Welfare Association, *American Indian/Alaska Native Fact Sheet for the State of California* (2005), www.nicwa.org/states/California.pdf (as of July 8, 2011).
[8] For a complete listing of tribal entities by state, see the Bureau of Indian Affairs' *Tribal Leaders Directory* (Spring 2011) at www.bia.gov/idc/groups/xois/documents/text/idc002652.pdf (as of July 8, 2011).
[9] U.S. Census Bureau, Population Division, "Table 19: American Indian and Alaska Native Alone and Alone or in Combination Population by Tribe for California: 2000," www.census.gov/population/www/cen2000/briefs/phc-t18/tables/tab019.pdf (as of July 8, 2011).
[10] Norris, et al, *supra*, p. 7, table 2.
[11] Elias S. Lopez, Ph.D., Census 2000 for California: A Friendly Guide (Cal. Research Bureau, July 2002), www.library.ca.gov/crb/02/07/02-007.pdf. (as of July 8, 2011).

County Tribal Populations

- Based on the 2000 U.S. Census, Los Angeles County (CA) has the largest AI/AN-alone population (76,988) in the United States.
- Ten California counties are included in the 50 U.S. counties with the highest AI/AN-alone populations. In addition to Los Angeles County, San Diego, San Bernardino, Orange, and Riverside Counties are among the top 20 in that group (see table 1).[12]
- Alpine County has the highest proportion of AI/AN-alone residents (19 percent), followed by Inyo County (10 percent), and Del Norte County (6 percent).[13]

Table 1. California Counties With the Largest AI/AN-Alone Populations

County	Population	U.S. Rank
Los Angeles	76,988	1
San Diego	24,337	11
San Bernardino	19,915	14
Orange	19,906	15
Riverside	18,168	17
Sacramento	13,359	24
Fresno	12,790	26
Santa Clara	11,350	30
Kern	9,999	38
Alameda	9,146	43

Source: 2000 U.S. Census

Education and Household Income

- Nationally, the AI/AN-alone population has a lower percentage of individuals with at least a high school diploma (71 percent) than does the general population (80 percent). This discrepancy is largely because the AI/AN population is less likely to have a bachelor's (or higher) degree (11 percent) than the general population (24 percent).[14]
- In California we see a similar discrepancy in educational attainment. The percentage of individuals with at least a high school diploma is lower for the AI/AN-alone population than for the California population as a whole (68 percent and 74 percent, respectively) as is the percentage of those with a Bachelor's (or higher) degree (11 percent, compared to 27 percent of California as a whole).[15]
- The median income for all California households is $47,493, whereas the median income for the AI/AN-alone population is $36,547. [16]
- Thirty-four percent of AI/AN households have an income of less than $20,000. Of those, roughly half (17 percent) have an income of less than $10,000.
- About 62 percent of all AI/AN households fall below the U.S. median household income level.

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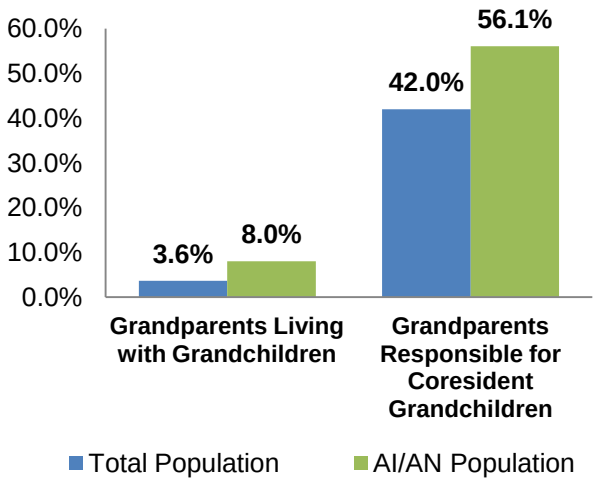
[12] U.S. Census Bureau, "Table 9: Counties with an American Indian and Alaska Native Alone Population Greater Than Zero, Ranked by Number: 2000" (Aug. 2001), www.census.gov/population/www/cen2000/briefs/phc-t14/tables/tab09.pdf (as of July 8, 2011).
[13] U.S. Census Bureau's American FactFinder, Census 2000, Summary File 1, "GCT-P6. Race and Hispanic or Latino: 2000."
[14] U.S. Census Bureau's American FactFinder, Census 2000, Summary File 2 and Summary File 4, "Census 2000 Demographic Profile Highlights: Selected Population Group: American Indian and Alaska Native alone."
[15] *Ibid*
[16] *Ibid*

Households and Families

- The AI/AN population has a lower proportion of married-couple households (45 percent) than does the U.S. population as a whole (53 percent) and a higher proportion of both male-headed and female-headed households with no spouse present (28 percent) than that of the total U.S. population (16 percent).[17]
- The AI/AN population has a higher average household size (3.06 persons) than does the U.S. population as a whole (2.59).[18]
- Nearly 4 percent of the total U.S. grandparent population (30 years old and over) live with grandchildren, whereas 8 percent of the AI/AN population of grandparents live with grandchildren.[19]
- AI/AN grandparents are more likely to be responsible for coresident grandchildren (56 percent) than is the total U.S. population (42 percent), as illustrated in figure 1.[20]

Figure 1. Grandparents Coresiding with Grandchildren



[17] Stella U. Ogunwole, U.S. Census Bureau, *We the People: American Indians and Alaska Natives in the United States* (2006).
[18] *Ibid.*
[19] U.S. Census Bureau, *Grandparents Living With Grandchildren: 2000* (Oct. 2003).
[20] *Ibid.*

The Center for Families, Children & the Courts generates and distributes research-based information that has promise for informing the work of the courts in California and nationwide. To learn more about its work and to see more *Research Updates*, visit *http://www.courts.ca.gov/cfcc-publications.htm*.

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The staff names listed above have been updated as of October 2013; otherwise the content of this research update remains unchanged.

CALIFORNIA ICWA TASK FORCE REPORT

Preliminary Final- California ICWA Compliance Task Force Report to the Bureau of Children's Justice, 2016

Table of Contents

Executive Summary

At the time of its passage, in 1978, the Indian Child Welfare Act, 25 U.S.C. §1901 et seq. ("ICWA") was considered landmark civil rights legislation. When California passed what has become known as Cal-ICWA, legislation to adopt many of the protections of the federal ICWA into state law, it was again a landmark moment for the American Indian community. Unfortunately, the promise and potential of the federal ICWA and the Cal-ICWA have not been realized, as neither the letter nor the spirit of the law have been implemented.

In 2015 the California ICWA Compliance Task Force came together, after meetings with the Bureau of Children's Justice ("BCJ"), a newly created Bureau of the California Department of Justice, Office of the Attorney General, to gather narratives and data regarding the failure of ICWA implementation. The goal was that the narratives and data be used in a concerted effort to target reform at non-compliant entities within the dependency system. The intended audience for the Task Force work began as the BCJ, but has grown to many branches of state government and other stakeholders.

This Report is the culmination of the Task Force effort thus far, but it is not the end of the effort. This Report is an essential first step, an attempt to examine the issues and frame solutions. As an epicenter of ICWA cases (with more ICWA appeals than any other state), as the home of some of the most divisive and controversial cases involving the ICWA and as a state at the cutting edge of innovation and reform, California has a monumental task ahead in order to fulfill the promises made to Indian tribes, Indian communities and Indian families in 1978. We, as the Co-Chairs of the Taskforce, believe the important work has started with the presentation of this Report but we as tribal leaders must demand that the work continue with our partners in the Governor's office, the Office of the Attorney General, the Judicial Council, the California Bar Association and the California Department of Social Services to get beyond this first step.

It is essential to make clear that this Report and the Task Force itself does not state or hold as true that there has been no effort or progress in ICWA implementation

over the last decades; there has been incremental progress with sincere and innovative means to address concerns that tribal leaders and stakeholders have brought forward. The work of the Tribal-State Workgroup, the passage of a number of new statutes, and the growing use of Tribal Customary Adoption as a culturally appropriate plan are all exceptional examples of innovation. But as we near the 40th anniversary of the ICWA, we cannot celebrate limited progress - we must hold ourselves to a higher standard so we do not look back on only incremental progress, but look forward to achieving the articulated national and state policies to protect Indian children and preserve Indian tribes through compliance with this landmark legislation.

From the work of the Task Force there are specific areas of ICWA violations that emerged as the most frequent, pointing to where the system is most critically flawed; lack of funding creating essentially an unfunded mandate of ICWA compliance for under resourced tribes, lack of pre-removal remedial services and robust active reunification efforts, failure to complete diligent inquiry and notice, resistance to tribal court jurisdiction, barriers to tribal participation in court processes, lack of competency within court systems, deviation from or violation of placement preferences. Tribal leaders, tribal social workers and tribal attorneys disclosed instances all over the state and at all stages of cases where non-compliance with the ICWA had devastating effects on tribes and tribal families.

Tribal representatives shared many profound and deeply troubling stories on a private basis with the Task Force; however, those stories are not included here because the Native American community is effectively silenced by cultural custom. Tribes have shared that it is not appropriate to include a family's tragedy in a public document. In addition, tribes and Task Force participants feared retaliation for divulging ICWA violations and therefore requested privacy. The Task Force also vigilantly protected confidentiality of children.

Beyond the individual instances of non-compliance what emerged is a narrative that is no less than a denial of the civil rights that the ICWA and Cal-ICWA were meant to safe-guard. Unfortunately, the civil rights violations visited upon California Indians in

the dependency system are a small microcosm of a fundamental breakdown of the systems that are failing tribal families and children across the country; one need only look at the underfunding of legal counsel for indigent tribal families, mental health crises with native youth,[1] the epidemic of sex trafficking of native girls,[2] and the federal court litigation in Pennington County, South Dakota,[3] which could be replicated in California.

As a result of the work of the Task Force, the Co-Chairs are requesting immediate action on the following issues, to be augmented by additional findings and recommendations as this process moves forward.

A) BCJ must develop a concrete action plan for investigating every California county utilizing the agency's subpoena power to look at source documents.
B) BCJ must create and maintain an internal investigative unit to vigilantly track ICWA compliance and non-compliance and consistently bring to bear the power of the Attorney General for non-compliance.
C) There must be a reframing and reconsideration of the lack of resources provided to tribes for ICWA compliance, specifically the lack of appointed counsel or resources to retain counsel for tribes, as a violation of the civil rights of tribes and tribal families.
D) There must be an investigation into state agencies' relationships with lobbying entities to ensure objectivity and independence so that CDSS remains unfettered and untethered to the whim of political forces especially forces that historically undermine full implementation of ICWA.
E) The state must dedicate resources to fund authentic and robust ICWA compliance, including tribal consultation consistent with Executive Order B-10-11, support for tribes that are under resourced with regard to child welfare,

[1] Anna Almendrala, *Native American Youth Suicide Rates Are at Crisis Levels*, Huffington Post (October 2, 2015) available at: http://www.huffingtonpost.com/entry/native-american-youth-suicide-rates-are-at-crisis-levels_us_560c3084e4b0768127005591 (last visited May 31, 2016).
[2] Victoria Sweet, *Trafficking in Native Communities*, Indian Country Today (May 25, 2015) available at: http://indiancountrytodaymedianetwork.com/2015/05/24/trafficking-native-communities-160475 (last visited May 31, 2016).
[3] *Oglala Sioux Tribe v. Luann Van Hunnik*, United States District Court, District of South Dakota, Western Division, Case 13-cv-05020-JLV

and building tracking and data systems that accurately account for tribal families.

It is the goal of the Task Force that this Report be a call to action for the BCJ and that it starts a conversation examining why the civil rights protected by the ICWA, the right to due process, to cultural connections and religious freedoms, to remain in one's community of origin, are routinely under attack. To achieve the promise of the ICWA there must be more than episodic rallying cries and well-meaning grant cycle initiatives; there must be a vigilant force that demands more than mere lip-service to compliance. We thank you for joining us as we address ICWA compliance and protection of the civil rights of our most vulnerable population.

RECOMMENDATIONS FOR ICWA COMPLIANCE IN CALIFORNIA

Recommendation 1: Competence of Counsel and Agency Personnel

The minimum qualifications to practice law in dependency court pursuant to California Rules of Court, rules 5.40 and 5.660 must include substantive, procedural, and cultural competence of Cal-ICWA as part of the standards of representation. Competence requirements should apply to all attorneys representing parties in ICWA cases, including county counsel, and competence standards must also apply to social workers. It bears repeating, that agency leadership, managers and supervisors, must be highly trained and knowledgeable on Cal-ICWA and ICWA in order to fully and adequately supervise and provide guidance to staff. CDSS should require proof of competency much like court administrations do (via declaration) and failure to comply would result in a disciplinary action against the employee.

Recommendation 2: Consolidated Courts

The model where all ICWA cases are heard in a single department, and by a single bench officer, creates an economy of scale and expertise that benefits everyone. It may not be feasible in all counties, particularly small counties, but it could be limited to counties which annually reach a threshold number of ICWA cases (tracked using the data collection remedy discussed further below). With respect to social workers, a consolidated ICWA unit within the agency, similar to the consolidated court approach discussed here, would be a realistic solution, with specially-qualified social workers handling all ICWA cases.

Recommendation 3: Appointed Counsel for Tribes

Welfare & Institutions Code §317 provides for appointment of legal counsel for parents or Indian custodians, and guardians who cannot afford an attorney. It also compels appointment of counsel for children in every case, subject to limited exceptions, which was an expansion over the pre-2001 rule that allowed counsel when it would benefit the child. Even de facto parents are allowed appointed counsel under California Rules of Court, rule 5.534(e)(2) at the discretion of the trial judge. The agency is always represented by one or more attorneys.

The absence of a corresponding provision for appointment of attorneys for tribes, even though many appellate reversals could have been avoided if tribes had legal representation at the early stages of those cases, is a significant breach of the mandates of due process. The multitude of errors in ICWA cases is a cost on the entire system, and could be minimized if tribes were afforded the same right to counsel as other parties.

For tribes with resources to retain their own legal counsel, tribal attorneys could substitute into a case, as is done with other proceedings, but there would not be a gap in representation that invites error.

We specifically recommend the development of a 4-year pilot project that would:
1. Provide free legal counsel to tribes in dependency cases where the ICWA applies in at least two pilot counties. Counsel shall be a non-profit organization with at least 10 years of institutional experience specializing in representing tribes in cases where the ICWA applies.

2. Require the Judicial Council to convene a working group comprised of all relevant persons, including tribal representatives and tribal advocates, state court judges, and Judicial Council staff that would provide a report to the Legislative Counsel within 12 months regarding the efficacy of the project.

3. Review opportunities to seek federal funding under the ICWA for court appointed counsel in ICWA cases.

Recommendation 4: **Attorney Fees**

If tribes are not provided counsel as suggested above, an alternative is to create clear statutory authority for recovery of attorney's fees where a party is able to demonstrate a violation of the Cal-ICWA (similar to prevailing party provisions set forth in the Code of Civil Procedure). The Legislature has made it plain that compliance with the Cal-ICWA is a matter of public policy,[232] yet at present the tribe is the party most often seeking to prevent or correct Cal-ICWA violations and is the only party paying for legal representation themselves.

[232] Welf. & Inst. §224(a)(1).

Recommendation 5: Sanctions

Juvenile judges are empowered with the same authority to impose monetary and other sanctions on parties and counsel who do not follow substantive and procedural rules. A continuing problem is the failure of agencies to give notice to tribes, serve documents and provide discovery, and to file timely reports. Because there are no filing fees in dependency actions, and county counsel is not required to sign and verify pleadings (including proof of service), the normal checks and balances of court procedure do not apply equally.

Two ways that this could be remedied are: (i) to impose monetary sanctions on social service agencies that file late reports, or neglect to serve tribes; and (ii) to require the agency's legal counsel to sign and verify pleadings or reports in the same manner as other court proceedings. By shifting responsibility to counsel, the court could ensure that an officer of the court has reviewed documents before they are filed, and in cases where the agency does not follow rules, monetary sanctions would be a tangible disincentive. Any monetary sanctions would be paid directly to the tribe and not into a court or other common fund.

Recommendation 6: Binding Pre-Dispositional Agreements

Welfare and Institutions Code §241.1 requires agencies to implement a jointly developed written protocol to ensure coordination between Probation and Social Services in designating whether a minor will be supervised by the delinquency court or dependency court. Some of the written protocols allow joint supervision, but the old model would not permit a child to have dispositions under both systems simultaneously.

For example, Los Angeles County's protocol provides that dual status assessments and case plan creation are overseen by a Multidisciplinary Team (MDT) which consists of representatives of probation, child welfare, mental health, and the education unit of child welfare. Case plans are developed at a post-dispositional planning meeting attended by the youth, the caregiver, the attorneys, and the probation officer and social worker on the case. At the meeting the MDT gets input from all present with the goal of achieving consensus on the specifics of the plan. After completion of the meeting a post

disposition hearing is held in each court to ensure that the youth, the caregiver, the probation officer, and the social worker understand their obligations.

This model could easily be adopted for ICWA cases and include tribes, tribal social services, and tribal providers as members of the MDT. If a pre-dispositional meeting and agreement were required for ICWA cases, the agreement is binding, and a prerequisite to placement and removal from an Indian home, this would facilitate tribal involvement at the earliest stages.

Recommendation 7: Foster Care Bill of Rights Amendment

Welfare and Institutions Code §16001.9 codifies the rights of foster care minors as the policy of the State of California. Included are the rights to: (i) attend religious services and activities of his or her choice (§16001.9(10)); (ii) to attend school and participate in extracurricular, *cultural*, and personal enrichment activities (§16001.9(13)); (iii) to have fair and equal access to *all available services*, placement, care, treatment, and benefits, and not to be subjected to discrimination or harassment bases on *race*, *ethnic group* identification, or *ancestry* (§16001.9(23)); and (iv) to have caregivers and child welfare personnel who have received instruction on *cultural competence* and sensitivity…(§16001.9(24)). When applied together these rights include, but do not expressly state, an Indian foster child has the right to participate in culturally-appropriate tribal services, placements, and benefits, and be able to enforce the ICWA as a foster child right.

The Bureau of Children's Justice should advocate, and obtain, an amendment to the foster care bill of rights that unequivocally codifies ICWA enforcement and application as a foster care child right.

Recommendation 8: State Monitoring/Oversight

In conjunction with recognizing Cal-ICWA enforcement as a foster child's right, the Office of the Foster Care Ombudsman should be specifically empowered to investigate and negotiate mandates for compliance in specific cases and specific counties where compliance with state mandates are systematically ignored. The director and staff of the

Office of the Ombudsman must complete and certify they have received competent and ongoing training on Cal-ICWA and ICWA.

Recommendation 9: Require County Social Worker Reports to Include ICWA Compliance Sections

Social Worker reports currently include compulsory sections on Tribal Customary Adoption, and should be required to include additional sections to document ICWA compliance.

Counties must be required to keep detailed records of efforts to comply with the Cal-ICWA's placement preferences, thus providing a court or an outside investigating agency information and data to determine whether active efforts to comply with the Cal-ICWA placement requirements occurred and what the barriers to Cal-ICWA compliant placements may be.

Counties must also be required to include sections on both placement and active efforts which states whether the tribe was consulted on active efforts and placements and whether the tribe is in agreement that active efforts took place and whether placement is in compliance with ICWA's preferences.

Recommendation 10: Data Collection

The current data system utilized by the California Department of Social Services and every California County (CWS/CMS) to track child welfare cases and systems contains inadequate data and system functionality regarding ICWA eligible children. While the majority of the problem is likely a result of inadequate inquiry regarding children's tribal affiliations, overall, the system fails to include data sets essential to tracking ICWA compliance. This lack of data makes it much more difficult for tribes to guide policy and budget allocation processes to ensure Cal-ICWA is complied with.[233] One step that must be taken is the addition of a drop down mandatory field to enter tribal affiliation when known. Implementation of such a data field would increase compliance because the data would be more routinely sought and failures to enter tribal affiliation could be

[233] See the California CFSP, page 72-73 http://www.childsworld.ca.gov/res/TitleIV-B/CFSP_2015-2019.pdf

tracked. Next, UC Berkeley Social Welfare's Center for Social Services Research, which maintains the California Child Welfare Indicators Project (CCWIP) should create a whole data set specifically for American Indian Dependents which would provide for data collection outside of that which is collected via Agency reporting, in order to create a data system that can accurately reflect the population of American Indian, Cal-ICWA eligible dependents.

Further, every county and the State are required to complete reporting to support and justify their annual funding allocations (e.g. CFSPs, APSRs). Fortunately, the various tools required to evaluate counties and states to justify their federal funding increasingly require information and narrative descriptions regarding how counties, the State and Tribes are working cooperatively. Unfortunately, these reports often misrepresent the level of collaboration and consultation occurring with the tribes. A forensic review of represented ICWA compliance as stated in these reports should be completed and discrepancies should be addressed. Each county would be publically rated for ICWA compliance and each county's successes and failures noted. Counties with high compliance ratings would be eligible for additional state funding.

Recommendation 10: Tribal Access to Records

Legislative recognition of tribe's right to access records to other areas to overcome HIPAA and other confidentiality prohibitions. Despite the amendments to §827 designating tribes, tribal representatives and tribal attorneys as "parties" the practice of denying routine paperwork, pleadings, and minutes to tribes remains. The costs of preventing access to court filings and discovery should be enforced by the Court, but if, after notice, an Agency or county counsel continue to deny production then monetary sanctions should be mandatory. In addition, the Rule of Court should be amended to clarify what "intervention" means, and what rights and privileges are afforded tribes that intervene as a party, as well as the corresponding sanctions for parties failing to treat tribes as equal parties to the litigation.

Recommendation 11: Counties Should Contract with Culturally-Appropriate Services

Counties, not Tribes, receive funding for social services; and those services should be representative of the client community – where a percentage of the children in care are Native American, a corresponding percentage of the services should be targeted at that populations. Such services might include Positive Indian Parenting, cultural mentors, trauma based services addressing intergenerational trauma, etc.

Recommendation 12: ICWA Units in Agencies

Designated social services personnel within each county agency that specializes in cases involving Native American children and families will allow for the development of expertise and relationships between tribal social workers and county social workers. This must include the option to return to a process where one social workers works with the family throughout a case, instead of having social workers change throughout the various stages of a case ("family social workers" versus "assignment social workers").

Recommendation 13: Lower Case Counts for Cal-ICWA Cases

Cases involving active efforts are intended to take additional resources, for example transporting a parent to services, rather than providing a bus pass or a simple referral. For case count purposes, ICWA cases should count as 1.25 or 1.5 cases to allow social workers the ability to provide active efforts, particularly where distance is an aggravating circumstance.

Recommendation 14: CDSS Office of Native American Affairs

Having an office of Native American Affairs within CDSS would assist tribes in communicating concerns to CDSS. Additionally, there is no longer one unit within CDSS that is targeted at tribal issues and concerns, therefore, it is also recommended that one person is designated within each unit to act in this capacity.

CDSS has oversight authority and as such must be involved and assist with protocols and agreements being negotiated between tribes and counties. When conflicts arise in a particular county, CDSS must become involved to assist as a neutral entity to assist with problem solving and resolution of issues.

Recommendation 15: CDSS Share Federal Block Grants with Tribes, as Occurs in Other States

CDSS receives federal block grant funds as part of the social services funding budget process. A portion of these funds must be allocated to Tribes or Cal-ICWA related programs to fill in gaps where compliance efforts under resourced resulting in non-compliance with the mandates of Cal-ICWA.

Recommendation 16: State Funding for Placement Recruitment Should be Shared with Tribes

Tribes are not only the primary source for identifying potential placements but are also better at developing and executing on culturally appropriate recruitment of tribal foster homes and adoptive homes.

Recommendation 17: Counties Must Make Active Efforts to Conduct Criminal Background Exemptions (*In re Julian B.*)

The system for granting exemptions for placement where a proposed placement has a criminal history must become more robust, timely and accessible. Counties often dismiss requests for exemptions without true consideration of the individual's history.

Recommendation 18: Expert Witnesses

Civil Procedure Code §2034.210 - §2034.310 sets forth the procedure for designating expert witnesses for trial, including identifying their qualifications, area of expertise, and documents relied upon in forming their opinion. One remedy to enhance Cal-ICWA compliance would be to treat "qualified expert witnesses" analogously to experts in civil cases; experts would be identified by the County twenty (20) days in advance, including identifying each and every document relied upon by the expert in forming their opinion, and making discoverable any communications made to the designated expert by the Agency or County Counsel, including emails or phone notes. As part of the process, Tribes and the courts could inquire about other cases that the expert has testified in, and for whom. If requested, the qualified expert could be deposed in advance of the hearing so that a protracted voir dire is not necessary. This is particularly critical where

a County intends to submit expert testimony by written declaration. If the county intends to use a *paper expert* then they should be required to submit the proffered testimony and *all* supporting documentation at least ten (10) days before a dispositional hearing (or termination of parental rights hearing), or else the testimony is excluded. Any delays or requests for continuances should be enforced by sanctions.

Recommendation 19: Periodic Reports and Agency Filings—Inclusion of Tribal Contacts

Most Agency reports include a detailed narrative of every event that occurred leading up to a filing, including any referrals, assessments, or voluntary plans. After jurisdiction is taken, the Agency includes a diary of events, commonly including detailed statements of the parents' actions, comments, and compliance. However, nothing in the rules requires the Agency to identify and document the efforts it has made to contact and involve Indian tribes. Specifically, we recommend that the agency be required to narrate in detail, the nature and type of communications the worker has had with the tribe or tribal agency, and what documents or reports have been submitted by the tribe for court consideration, or which were rejected by the agency and not included in their report. If the agency is required to document its ongoing Active Efforts, Placement Preferences, and Culturally Appropriate Services, including input from the tribe (or tribes) then future reports will develop a baseline for measuring agency interaction with tribes and compliance with the Act.

Recommendation 20: Pleadings Signed by County Counsel

In most cases a pleading must be reviewed and signed by an attorney, which is an implied acknowledgment that a legal review by an officer of the court has occurred. Though this may seem obvious and basic, pleadings filed in Dependency court are not always reviewed by an attorney, and not always signed off by legal counsel. The practice varies from county to county. But, if legal counsel (in Dependency cases it is County Counsel) were required to sign off on all pleadings and accept responsibility for the allegations and content, including consequences for improperly filed documents, this would go a long way toward enforcing compliance of the Cal-ICWA.

Attorneys by nature are detail oriented, and will not allow a substandard document or pleading to be filed with their name attached. Instead of delegating the legal filing to social workers, the court should require legal counsel to vouch for the accuracy and content, as is done in all other court cases.

Recommendation 21: Complete CDSS Tribal Consultation Policy

Executive Order B-10-11 was signed by the Governor in 2010 and mandated that each department of the state government develop a Tribal Consultation Policy. In 2013 a Tribal Consultation Policy development process was commenced as a joint effort between Tribes, Tribal community stakeholders and the CDSS, Children and Family Services Division, the division which has the majority of responsibility for Cal-ICWA compliance on a state level. To date that process has not been completed and CDSS, and the CFSD continue to operate without a Tribal Consultation Policy as mandated by the Governor's Executive Order. CDSS must dedicate resources to completing a Tribal Consultation Policy which includes remedies Tribes can access in the event consultation is not adequate or available consistent with the Executive Order.

Recommendation 22: Judicial Competency

Bench officers must be competently trained to preside over Cal-ICWA cases and understand ICWA cases are different from other dependency cases. Judicial training must be uniform throughout California, which will result in the uniform application of the law. This training must be legislatively mandated and include both introductory training for new bench officers and periodic training for existing bench officers.

Recommendation 23: Tribal Title IV-E Unit within CDSS

It is recommended that a unit be developed within CDSS to development and implementation of Title IV-E for tribes. This unit must include a coordinator that has decision-making sufficient to assign and enforce tasks/deliverables and deadlines. This unit must report out at the statewide ICWA workgroup meeting on their progress with regard to each tribe that has initiated a state-tribal IV-E agreement.

Recommendation 24: **Exempt ICWA Cases from De Facto Parent Provisions**

The overuse of de facto parent status flies in the face of the legislative purposes of Cal-ICWA and the federal statute. Our recommendation is to exempt ICWA cases from de facto parent status, as tribes serve in the protective capacity for the dependent Indian child. Adding an additional parental figure elevates conflict, confuses issues and rules, and is not in the child's best interest.

Recommendation 25: Criminal Penalties for Willful Violations

Where willful failure to comply with state law, including the Cal-ICWA, result in harm to Indian children, criminal penalties should be considered.

CONCLUSION

The promise of the ICWA and Cal-ICWA is attainable. California has seen progress over the last decade, moving from wholesale ignorance of the statutes, to a tentative embrace in some courts and in some cases truly innovative work to ensure that the interests of Indian families and tribes are protected. This report has highlighted issues that are most troubling and framed solutions with proposed actions that can be taken to improve ICWA compliance both in the short and long term. For example, the issue of competency in ICWA was a repeating theme throughout the data gathered and narratives shared, thus several of the proposed remedies, such as adopting Rules of Court regarding minimum standards for appointed counsel and advanced training resources for Bench Officers, address competency. The remedies presented are a start, but by no means an end, to the issues presented; the systemic denial of civil rights that ICWA provides is a symptom of the fundamental breakdown of the systems that are failing tribal families and children across the country.

We look forward to working with the BCJ to develop a concrete action plan for investigating, analyzing, pursuing and rectifying the ICWA failures of the last 40 years.

NATIONAL

INDIAN CHILD WELFARE ACT FINAL RULE - 25 CFR PART 23 SUMMARY OF KEY PROVISIONS

A publication of the National Indian Child Welfare Association
and
Native American Rights Fund

June 2016

On June 8, 2016, the Bureau of Indian Affairs (BIA) released the first comprehensive regulations for the substantive legal requirements of the Indian Child Welfare Act (ICWA). The regulations provide the first legally-binding federal guidance on how to implement ICWA. The regulations will go into effect 180 days from the date of their release, providing time for state agencies, private agencies, and state courts to prepare for their implementation. Below is a brief description of key provisions of the regulations. This summary is not exhaustive or fully comprehensive; rather it provides an overview of key provisions.

Description of Key Provisions

Active Efforts Definition

The regulations provide 11 examples of "active efforts" that can assist states, courts, and private agencies in their work to prevent the breakup of Indian families. The examples emphasize the engagement of families in accessing services as opposed to providing information or referrals to services. The definition also emphasizes using culturally appropriate services and working with the child's tribe to provide services.

Definition of Child Custody Proceedings

The regulations provide definitions of each of the four distinct child custody proceedings, including out-of-home placements for status offenses (offenses that would not be a criminal offense if committed by an adult, such as underage drinking or truancy from school). The definition does not include voluntary foster care placements where the parent can have the child returned upon demand, which is a departure from earlier guidance.

Typically, voluntary foster care is used when a parent is or expects to be unable to provide appropriate parental supervision to their child (e.g., medical event) or when a state agency does not have grounds to remove a child from their home, but works with the parent to secure a temporary, voluntary placement while the parent seeks intensive, inpatient services.

Definition of Domicile

The regulations clarify the domicile of an Indian parent or custodian as well as the fact that the domicile of the Indian child follows the parent or custodian. This clarification is critical to establishing tribal or state jurisdiction in a child welfare matter and how ICWA may apply in a particular case.

Custody and Continued Custody Definitions

The regulations provide a definition of "continued custody" that includes legal or physical custody, or both, of a parent or Indian custodian under applicable tribal law, custom, or state law. "Custody" is also defined and includes legal or physical custody, or both, of a parent or Indian custodian under applicable tribal law, custom, or state law.

These definitions respond to the United States Supreme Court's use of these terms in their decision in *Adoptive Couple v. Baby Girl*.

Definition of Indian Foster Home

A new definition is provided for Indian foster home, which was not in earlier guidance. It provides that at least one of the foster parents must be an Indian person as defined under ICWA.

Definition of Involuntary Proceeding

This definition now includes a placement where the parent or Indian custodian consents to a foster care, pre-adoptive, or adoptive placement under threat of removal by a state court or agency. Previously, these types of placements would have been treated as a voluntary proceeding.

Definition of Upon Demand

This term has not previously been defined in federal guidance. "Upon demand" is expressed as the parent or Indian custodian's ability to regain custody simply upon verbal request without any formalities or contingencies.

This is important as state child welfare agencies sometimes use voluntary placements to encourage parents to engage in services and then require contingencies in order for parents to regain custody of their children.

Notice in Child Custody Proceedings

The regulations require that notice must be provided by the party seeking placement or termination of parental rights to the parent(s), Indian custodian, and child's tribe by either registered or certified mail, return receipt requested in involuntary proceedings. Allowing certified mail to also be used decreases the cost of notice for state agencies, courts, and other private parties facilitating placement of Indian children. In addition, copies of the notices must be provided to the Regional Director in each corresponding BIA Regional office where the proceedings are taking place and the BIA will provide assistance in locating the Indian child's parents and tribe. This provision allows parties to request that the BIA make a "reasonable" effort to locate and notify the Indian child's tribe and parent or Indian custodian.

These are new and very significant requirements, which will increase the BIA's involvement as a repository of ICWA notices and engagement in work to help state agencies, courts, and other parties locate and provide notice parents, Indian custodians, and the child's tribe.

Request of Information to Establish Tribal Affiliation by Indian Adult Adoptees

The BIA has added a process for adoptees to request information from the BIA, who will operate a central file on all state Indian adoptions. The process requires either an Indian adoptee age 18 or older, the Indian adoptee's foster care or adoptive parents, or the Indian adoptee's tribe to request the information to establish the adoptee's tribal membership.

ICWA Application

The regulations exclude application of ICWA in voluntary placements where either parent, both parents, or the Indian custodian has of their own free will, without threat of removal by a state agency, chosen a placement for an Indian child that does not prohibit the child's parents or Indian custodian from regaining custody of their child by demand. This would include what is often referred to as voluntary foster care placements in many instances, but not voluntary adoptions.

The Existing Indian Family Exception

The regulations address this judicially created exception to application of ICWA, which only operates in a few states, by prohibiting state courts from considering factors in the application of ICWA in a case such as:

1. Participation of the parents in cultural, social, religious, or political activities
2. The relationship between the Indian child and his or her parents
3. Whether the parent has ever had custody of the Indian child
4. The Indian child's blood quantum

Extending Application of ICWA to Youth Beyond 18 Years of Age

In many states, child custody proceedings can now extend for youth beyond the age of 18. The regulations state that if the Indian child reaches age 18 during the proceedings, application of ICWA will not be discontinued.

Determining if a Child is an Indian Child

The regulations, like the revised guidelines, require state courts to inquire in every emergency, involuntary, and voluntary child custody proceeding if the participant (1) knows or (2) has *reason* to know that the child is an Indian child. If the court does not have sufficient evidence to confirm that the child is an Indian child, the court must make diligent efforts to work with the tribe(s) that are thought to be the Indian child's tribe(s) and proceed by applying ICWA until they have confirmation that the child is not an Indian child. The tribe believed to be the child's tribe is the only entity that can make a determination of whether a child is an Indian child or not.

Notice Requirements

The regulations state that a notice of an involuntary child custody proceeding must be provided to the child's tribe, parents, and Indian custodian if applicable. The regulations do not require notice in voluntary child custody proceedings. Description of the contents of a notice and notice process are also included. Notice by electronic or personal delivery are allowed as good practice, but are not a substitute for official notice by either registered or certified mail, return receipt requested.

Emergency Removals

The regulations provide that emergency removals are authorized to protect an Indian child in imminent physical damage or harm, but they should cease immediately when the placement is no longer necessary to prevent harm. The regulations also state that emergency removals should not last longer than 30 days unless the court makes certain determinations.

Transfer of Jurisdiction to Tribal Court

A request for transfer of jurisdiction may be made orally on the record in court or in writing by either a parent, Indian custodian, or the Indian child's tribe. The right to request transfer is available at any stage of child custody proceedings. The regulations contain five different factors that that court cannot consider in determining whether good cause exists not to transfer jurisdiction, including:

1. Whether the proceedings are at an advanced stage when the tribe, parents, or Indian custodian have not received notice of the proceedings until an advanced stage
2. Whether transfer was requested in prior proceedings
3. Whether transfer could affect the placement of the Indian child
4. The Indian child's cultural connections to the tribe or reservation
5. Socio-economic conditions or any negative perception of tribal or BIA social services or judicial systems

Active Efforts

In addition to requiring case workers to provide active efforts before a foster care placement or termination of parental rights can be ordered, the regulations require that active efforts for foster care or termination of parental rights be documented in detail in the court record.

Standards of Evidence

In addition to ICWA's statutory requirements for standards of evidence in a foster care placement or termination of parental rights proceeding, the regulations state that the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody will result in serious emotional or physical damage to the child. Showing that a family lives in poverty or using the age of the Indian custodian without demonstrating a causal relationship to harm is not acceptable.

Qualified Expert Witness

The regulations stipulate that a qualified expert witness must be able to testify to whether the Indian child's continued custody by the parents is likely to result in serious emotional or physical damage to the Indian child and should be qualified to testify to the prevailing social and cultural standards of the Indian child's tribe. The regulations also state that the Indian child's tribe may designate a qualified expert witness and that a state social worker assigned to the Indian child may not serve as a qualified expert witness.

Voluntary Proceedings

The regulations state that the parties participating in a voluntary proceeding must state on the record if the child is an Indian child or whether there is reason to believe that the child may be an Indian child. 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.

Parental Consent to Termination of Parental Rights or Placement

In addition to the consent being executed in writing and recorded in state court, the court:

1. Must explain to the parent or Indian custodian the terms and consequences of the consent
2. Must explain to the parent or Indian custodian the limitations to consent based on the type of proceeding
3. Must certify that the terms and consequences were explained on the record in English or the language of the parents
4. May allow the parents to execute consent at a court hearing that is not open to the public when they have requested or indicated a need for confidentiality
5. Must find that consent acquired prior to, or within 10 days after, the birth of an Indian child is not valid.

The regulations also include a description of what information must be contained in a consent document.

Withdrawal of Consent

Following the statute, the regulations also set out procedures for how a withdrawal of consent may be accomplished, including that a withdrawal of consent to a voluntary foster care placement may be done at any time, the parent or Indian custodian must file a written document with the court or testify before the court of their intent to withdraw consent, and the child must be returned to the parent(s) as soon as practicable. Other statutory requirements are also included in the regulations regarding withdrawal of consent for voluntary foster care, termination of parental rights, and adoptive placement.

Placement Preferences

The regulations state that the placement preferences under the statute apply in any foster care, pre-adoptive, and adoptive placement of an Indian child, unless the court finds that good cause exists to deviate from the placement preferences, or the Indian child's tribe has established a different order of preference than those contained in ICWA. If a parent of an Indian child requests anonymity in a voluntary proceeding, the court must give weight to the request in applying the preferences. The court , where appropriate, must consider the Indian child's parents' preferences in foster care, pre-adoptive, and adoptive placements.

Determining Good Cause to Deviate from Placement Preferences

The regulations state that the party asserting that there is good cause to deviate from the placement preferences must state on the record, in court or in writing to the parties, the reason for that assertion or belief. The party seeking to assert good cause bears the burden of proving by clear and convincing evidence that there is good cause, and the court's determination of good cause must be made on the record or in writing. The regulations also identify considerations on which good cause may be based, which include:

1. The request of one or both of the Indian child's parents after they have reviewed the ICWA preferred placement options, if any, that are available
2. The request of the child if the child is of sufficient age and has the capacity to understand the decision
3. The presence of a sibling attachment that can only be maintained through a particular placement
4. The extraordinary physical, mental, or emotional needs of the Indian child
5. The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements that meet the placement preferences, but none has been located. The standards for determining if a suitable placement is unavailable must conform to the prevailing social and cultural standards of the Indian community of the Indian child's parents. The regulations go on to state that a placement may not depart from the placement preferences based on the socio-economic status of one placement over another or solely on ordinary bonding and attachment that occurred during the time the Indian child was in a non-compliant placement.

Invalidating Certain ICWA Violations

The regulations allow the following parties to petition to invalidate violations of Sections 1911, 1912, or 1913 of ICWA:

1. An Indian child who was the subject of any action related to a foster care placement or termination of parental rights
2. A parent or Indian custodian from whose custody an Indian child was removed
3. The Indian child's tribe

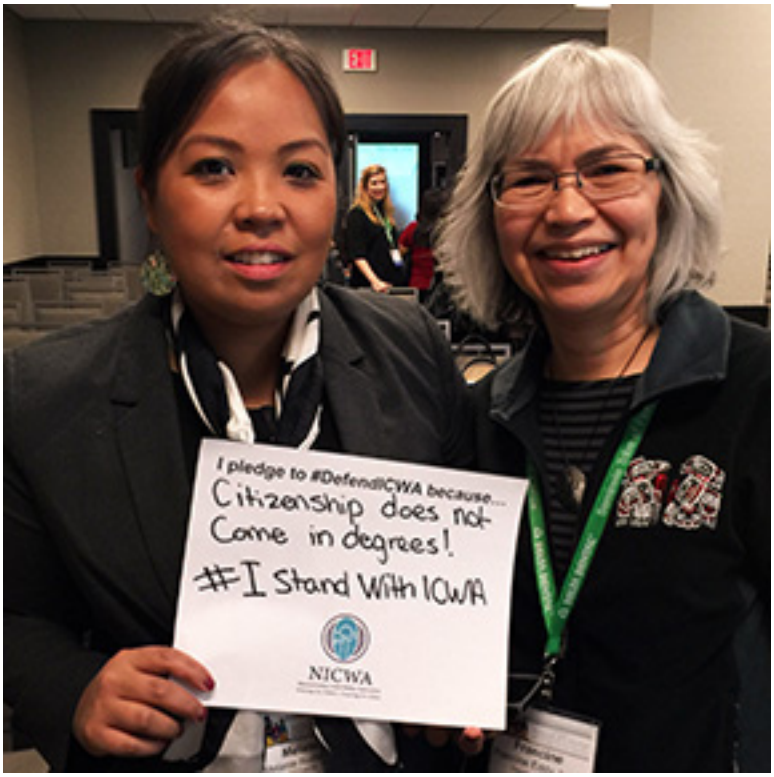
The petitioner does not have to have had his or her rights violated under these sections of the law to bring a petition, but rather only has to show that there was any violation under these sections of the law.

State Court Orders of Adoption Decrees

Any state court entering an order or decree of voluntary or involuntary adoption for an Indian child must provide a copy of that decree or order within 30 days to the BIA (address provided in the regulations). The regulations also describe additional information, besides that contained in the decree or order, that must be included.

State Collection of ICWA Information

All states must maintain records of every involuntary and voluntary foster care, pre-adoptive, and adoptive placement of an Indian child and make the record available within 14 days of a request by an Indian child's tribe or the Secretary of the Interior.



Native American Rights Fund
1506 Broadway
Boulder, CO 80302-6296
(303) 447-8760
www.narf.org

National Indian Child Welfare Association
5100 SW Macadam Avenue
Suite 300
(503) 222-4044
www.nicwa.org

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Published November 2, 2015 Author Clint Bolick (/en/authors/clint-bolick/)

The obituary of Laurynn Whiteshield depicts her as a happy and playful little girl. And for most of her short life, she was. From the age of nine months, she lived with her twin sister Michaela in a loving foster family that wanted to adopt her. When the girls were just shy of three, the county acted to make them available for adoption. But a court ordered that the girls be taken from their foster home and placed with their grandfather and his wife, who had been arrested a half-dozen times for abuse, neglect, endangerment, and abandonment of her own ...

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Published March 23, 2016 Author Outside Author (/en/authors/outside-author/)

Written by Susan Shelley for the LA Daily News Five hundred years ago, the Incas sacrificed children. They removed children as young as six from their families, transported them with great ceremony to a mountain location, and left them to die of exposure. Did they have the moral right to do it? Some people think so. "To their credit," wrote Kim MacQuarrie, an Emmy-winning documentary filmmaker, anthropologist and author, "the Incas did their best to ensure the survival of their people and empire by paying close attention to nature and doing their best to use every means at their disposal ...

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Published March 28, 2016 Author Starlee Coleman (/en/authors/starlee-coleman/)

Institute urges California Supreme Court to return little girl to foster home where she has lived for four years Phoenix—Late last week the Goldwater Institute filed a "friend of the court" brief urging the California Supreme Court to hear the case of Lexi Page and return her to the foster family that has loved and cared for her for four years. On Monday, at the direction of the Choctaw Nation, Lexi was taken from her home in California because she is 1.5% Choctaw and sent to live with another family in Utah. The family she was sent to ...

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Published August 18, 2016 Author Starlee Coleman (/en/authors/starlee-coleman/)

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Published October 6, 2015 Author Adi Dynar (/en/authors/adi-dynar/)

Adoptions by a child's stepparents are usually routine. Except when they involve Native American children. When the stepparent of a Native American child tries to adopt the child, the adoption is actively discouraged and sometimes actually prevented by state and federal law. This was the unfortunate case in a recent stepparent adoption in Washington state. "Baby boy T" has at least one-quarter Native American heritage from his Birth Mother while his Birth Father has no Native American heritage. T's Birth Father has a criminal past; he was violent toward T's Birth Mother, which resulted in the couple ...

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Published August 10, 2015 Author Goldwater Institute (/en/authors/goldwater-institute/)

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Published July 7, 2015 Author Mark Flatten (/en/authors/mark-flatten/)

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Goldwater Institute Files Class Action Lawsuit Against Parts of Indian Child Welfare Act (/en/work/topics/constitutional-rights/equal-protection/goldwater-institute-files-class-action-lawsuit-aga/)

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Phoenix—In a case with implications for current and future Native American children placed in foster care or for adoption, the Goldwater Institute today challenged the constitutionality of core provisions of the Indian Child Welfare Act in a class action lawsuit. The lawsuit was filed as part of a new Institute project to reform state and federal laws that discriminate against abused, neglected or abandoned Native American children. "When an abused child is removed from his home and placed in foster care or made available for adoption, judges are required to make a decision about where he will live based ...

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JOB AID

November 2016

New Federal Regulations Governing the Indian Child Welfare Act

This information is intended for practitioners and judicial officers with knowledge of and experience with the requirements of the Indian Child Welfare Act (ICWA) to inform them of the requirements of the new federal regulations governing court proceedings covered by ICWA (25 U.S.C. § 1901 et seq.) that become effective December 12, 2016. The substantive provisions of the new regulations are attached.[1] This Job Aid is not intended to be a complete analysis of the new federal regulations or how they relate to existing California law and practice. Further guidance on the implications of the new federal ICWA regulations will be forthcoming, but the purpose of this document is to alert courts to the potential need for immediate changes to court practice and procedure to comply with the new federal requirements.[2]

When do the new regulations apply?

The new regulations apply to "proceedings" initiated after December 12, 2016. "Child custody proceeding" as defined includes four separate phases of a case that may all take place within a single ongoing case: the foster care placement, termination of parental rights, preadoptive placement, and adoptive placement phases of a case are all considered separate "proceedings" for ICWA purposes. (See 25 U.S.C. § 1903(1); 25 C.F.R. §§ 23.143 and 23.2 (1996).)[3] Thus, for a case filed ***on or before*** December 12, 2016, the new regulations apply as long as the child's adoption is not yet final when the case moves from one of the four separate proceedings defined by ICWA. When a case procedurally moves from the foster care placement phase (reunification) to the termination of parental rights (TPR) phase or from TPR to

[1] 81 Fed.Reg. 38864 et seq. (June 14, 2016).

[2] This information was provided at the 2016 Juvenile Law Institute and Pre-Institute ICWA Roundtable and at other multidisciplinary educational programs. The regulations are available online at *www.gpo.gov/fdsys/pkg/FR-2016-06-14/pdf/2016-13686.pdf*.

[3] The definition of child custody proceeding found in 25 CFR 23.2 specifies that "[t]here may be several child-custody proceedings involving any given Indian child. Within each child-custody proceeding, there may be several hearings...."

adoptive placement, the new regulations apply to the new phase of the case because it is considered a new proceeding for ICWA purposes. The new regulations may pose a challenge for courts in determining when a new proceeding has started for ICWA purposes within an ongoing case.

How do the new requirements relate to California law and practice?

The new regulations are binding on state courts as the minimum federal standard that must be followed. For example, 25 Code of Federal Regulations part 23.106 (2016) confirms section 1921 of the Act itself, that where applicable state or other federal law provides a higher standard of protection, the higher standard shall apply.

Applying ICWA

The new regulations require ICWA inquiry at the beginning of each proceeding (25 C.F.R. § 23.107 (2016)) not each case. If there is "reason to know" that the child is an Indian child, but the status is not confirmed, the new regulations require the court to obtain evidence from the agency on the efforts made to determine the child's status (*id.* at § 23.107(b)(1)), and "[t]reat 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." (*Id.* at § 23.107(b)(2).) This means that pending confirmation of the child's status, all ICWA requirements must be met.

Emergency Removals (Detentions)

As a general rule, an Indian child cannot be removed from parental custody without compliance with ICWA requirements. The only exception is for "emergency proceedings" (25 U.S.C. 1922; see also chart at 81 Fed.Reg. 38868–38869 (June 14, 2016), attached.)

The new regulations limit the emergency removal power whenever there is "reason to know" that the child involved may be an "Indian child" (25 C.F.R. § 23.113 (2016)). The petition seeking emergency removal must contain specific factual information and allegations including the basis for belief that the child is at risk of imminent physical damage or harm, interactions with the tribe, and efforts made to assist the parents to have the child returned. (*Id.* at § 23.113(d).)

The court must make a specific finding that the removal or placement is necessary to prevent imminent physical damage or harm to the child. (*Id.* at § 23.113(b)(1).)

As a general rule, an emergency removal cannot last more than 30 days without compliance with ICWA requirements unless the court makes certain findings. (*Id.* at § 23.113(e).) This means that the court must generally consider evidence of active

efforts, testimony of a qualified expert witness, and evidence of whether the placement follows the placement preferences at a hearing that is within 30 days of the date the child was removed from the parents' physical custody by the agency.

Jurisdiction

California courts may not have jurisdiction over proceedings (other than emergency proceedings) involving an Indian child if the child resides or is domiciled within the reservation of a tribe that exercises exclusive jurisdiction over child custody matters or if the child is already a ward of a tribal court. In a situation where the court lacks jurisdiction, 25 Code of Federal Regulations part 23.110 clarifies that the court must expeditiously inform the tribal court of the matter, dismiss the state court proceeding, and provide the tribal court with all information regarding the proceeding including, but not limited to, the pleadings and any court records.

Active Efforts

The new regulations (25 Code of Federal Regulations part 23.2) now define active efforts as "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…" and describes 11 examples of active efforts. Courts should ensure that when a case involves an Indian child, case plans and services meet these new active efforts requirements.

Qualified Expert Witness

Regarding witnesses, 25 Code of Federal Regulations parts 23.121 and 23.122 discuss the requirements for qualified expert witness testimony as well as who can serve as a qualified expert witness.

Placement Preferences

Regarding placement, 25 Code of Federal Regulations parts 23.129 through 23.132 address placement preferences for an Indian child. One important clarification is that the issue of placement must be reassessed each time a change in placement is required and at each separate phase of the proceedings. Thus, the court must reassess whether the child's placement complies with the placement preferences when a case moves through each of the four ICWA phases: foster care placement, termination of parental rights, preadoptive placement, and adoptive placement.

The new regulations place limitations on the factors that the court can consider in making a determination that there is "good cause" to deviate from the placement preferences. In particular, the court may not depart from the placement preferences based on the socioeconomic status of any placement relative to another placement (25 C.F.R. § 23.132 (d) (2016)), nor may the court find good cause to deviate from the placement 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." (*Id.* at § 23.132(e).)

Transfers to Tribal Court

Transfers to tribal court are discussed under 25 Code of Federal Regulations parts 23.115 through 23.119. Particular issues to note are that the right to seek a transfer to tribal court may be exercised at any time, but that right attaches separately at the foster care placement and termination of parental rights phases of the case. (*Id.* at § 23.115.) Further, the regulations require that the tribal court be promptly notified of the petition to transfer (*Id.* at § 23.116), all parties have an opportunity to be heard, any "good cause" reasons to deny transfer are stated on the record, and the court's decision be on the record or in a written order. (*Id.* at § 23.118.)

The new regulations list five factors that the court must not consider in determining whether "good cause" exists not to transfer jurisdiction: (1) whether the proceedings are at an advanced stage if the Indian child's parent, Indian custodian, or tribe only recently received notice of the proceedings; (2) whether there was an earlier "proceeding" (i.e., foster care phase of the case) at which no petition to transfer was filed; (3) whether the transfer could affect the child's placement; (4) the child's cultural connections with the tribe; and (5) the socioeconomic conditions or any negative perception of tribal social services or judicial system. (*Id.* at § 23.118.)

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Additional resources:
CFCC Tribal/State Programs http://www.courts.ca.gov/3067.htm
Bureau of Indian Affairs http://www.bia.gov/WhoWeAre/BIA/OIS/HumanServices/IndianChildWelfareAct/index.htm

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Part II

Department of the Interior

Bureau of Indian Affairs

25 CFR Part 23

Indian Child Welfare Act Proceedings; Final Rule

Section	Respondent	Information collection	Annual number of respondents	Frequency of responses	Annual number of responses	Completion time per response	Total annual burden hours
23.141	State court or State agency.	Notify where records maintained	50	167	8,350	0.5	4,175
			.....	.....	98,069	.....	301,811

The annual cost burden to respondents associated with providing notice by certified mail is $6.74 and the cost of a return receipt green card is $2.80. For each Indian child-custody proceeding, at least two notices must be sent—one to the parent and one to the Tribe, totaling $19.08. At an annual estimated 13,000 child welfare proceedings that may involve an ''Indian child,'' where approximately 650 of these include an interstate transfer (13,650), this totals: $260,442. In addition, there are approximately 2,578 voluntary proceedings for which parties may choose to provide notice, at a cost of $49,118. Together, the total cost burden is $309,630.

Comment was taken on this information collection in the proposed rule, as part of the public notice and comment period proposed rule, in compliance with OMB regulations. One commenter, the California Health and Human Services Agency, Department of Social Services (CHHS) submitted comments specifically in response to the request for comments on the information collection burden.

• *Comment on Proposed § 23.111:* The proposed rule states that notice must be by registered mail, whereas the current 23.11(a) allows for notice by certified mail. To require registered mail will increase costs that undermine noticing under ICWA. *Response:* The statute specifies ''registered mail with return receipt requested.'' 25 U.S.C. 1912(a). In response to these comments, the Department examined whether certified mail with return receipt requested is allowable under the statute, and determined that it is because certified mail with return receipt requested better meets the goals of prompt, documented notice. The final rule allows for certified mail.

• *Comment on Proposed § 23.104, providing information on how to contact a Tribe:* The rule should clarify BIA's obligation in gathering the information for the list of Tribe's designated agents and contact information because the current list is outdated, inefficient, and inconsistently maintained. The list is hampered by publication in the **Federal Register** and BIA should be required to publish updates on the Web. The list also no longer maintains the historical affiliations, which was helpful. *Response:* BIA is now publishing the list using historical affiliations, as requested, and making the list available on its Web site, where it can be updated more frequently. The rule does not address this because these are procedures internal to the BIA.

• *Comment on Proposed § 23.111(i), requiring notice by both States where child is transferred interstate:* Requiring both the originating State court and receiving State court to provide notice is duplicative and burdensome because notice should only be required in the State where the actual court proceeding is pending. Another commenter stated that the provision appears to apply to transfers between Tribes and States, where notice is unnecessary. *Response:* The final rule deletes this provision.

• *Comment on Proposed § 23.134, requiring BIA to disclose information to adult adoptees:* This section appears to be creating duplicative work of the BIA and States, because both sections require each to provide adult adoptees information for Tribal enrollment. *Response:* The Act imposes this responsibility on both BIA and the State. Section 1951(b) of the Act imposes the responsibility on BIA, which is in § 23.71(b) of the final rule. Section 1917 of the Act imposes the responsibility on States, which is addressed at § 23.134 of the final rule.

• *Comment on Proposed § 23.137, requiring the State to establish a single location for placement records:* This requirement would be an unfunded mandate with undue burden and would require relocating 1,145 files to a different location and require changes to existing recordkeeping systems. Another State agency commented that there is a significant fiscal and annual burden due to the staffing, costs for copying, packaging and transferring physical files to a different location. *Response:* The final rule deletes the provision requiring States to establish a single, central repository. The associated information collection request has also been deleted.

• *Comment on Proposed § 23.137, requiring providing records to the Department or Tribe upon request:* The 15-minute burden estimate allocated to this task is too low. The time to copy, package and mail the documents will be no less than one hour, but more realistically two hours. *Response:* The final rule updates the burden estimates to reflect 1.5 hours.

If you have comments on this information collection, please submit them to Elizabeth K. Appel, Office of Regulatory Affairs & Collaborative Action—Indian Affairs, U.S. Department of the Interior, 1849 C Street NW., MS–3071, Washington, DC 20240, or by email to *elizabeth.appel@bia.gov.*

J. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment because it is of an administrative, technical, and procedural nature. *See,* 43 CFR 46.210(i). No extraordinary circumstances exist that would require greater review under the National Environmental Policy Act.

K. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

List of Subjects in 25 CFR Part 23

Administrative practice and procedure, Child welfare, Indians, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, amends part 23 in Title 25 of the Code of Federal Regulations as follows:

PART 23—INDIAN CHILD WELFARE ACT

■ 1. The authority citation for part 23 continues to read as follows: 5 U.S.C. 301; 25 U.S.C. 2, 9, 1901–1952.

■ 2. In § 23.2:

■ a. Add a definition for ''active efforts'' in alphabetical order;

■ b. Revise the definition of ''child-custody proceeding'';

■ c. Add definitions for ''continued custody'', ''custody'', and ''domicile'' in alphabetical order;

■ d. Add a definition for ''emergency proceeding'' in alphabetical order;
■ e. Revise the definition of ''extended family member'';
■ f. Add a definition for ''hearing'' in alphabetical order;
■ g. Revise the definitions of ''Indian child'', ''Indian child's Tribe'', and ''Indian custodian'';
■ h. Add a definition for ''Indian foster home'' in alphabetical order;
■ i. Add a definition of ''involuntary proceeding'' in alphabetical order;
■ j. Revise the definition of ''parent'';
■ k. Revise the definitions of ''reservation'' and ''Secretary'';
■ l. Add a definition for ''status offenses'' in alphabetical order;
■ m. Revise the definition of ''Tribal court''; and
■ n. Add definitions for ''upon demand'', and ''voluntary proceeding'' in alphabetical order.

The additions and revisions read as follows:

§ 23.2 Definitions.

* * * * *

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.

* * * * *

Child-custody proceeding. (1) ''Child-custody proceeding'' means and includes any action, other than an emergency proceeding, that may culminate in one of the following outcomes:

(i) *Foster-care placement,* which is any action removing an Indian child from his or her 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 is any action resulting in the termination of the parent-child relationship;

(iii) *Preadoptive placement,* which is 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; or

(iv) *Adoptive placement,* which is the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

(2) An action that may culminate in one of these four outcomes is considered a separate child-custody proceeding from an action that may culminate in a different one of these four outcomes. There may be several child-custody proceedings involving any given Indian child. Within each child-custody proceeding, there may be several hearings. If a child is placed in foster care or another out-of-home placement as a result of a status offense, that status offense proceeding is a child-custody proceeding.

* * * * *

Continued custody means physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law, that a parent or Indian custodian already has or had at any point in the past. The biological mother of a child has had custody of a child.

Custody means physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law. A party may demonstrate the existence of custody by looking to Tribal law or Tribal custom or State law.

Domicile means:

(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.

Emergency proceeding means and includes any court action that involves an emergency removal or emergency placement of an Indian child.

Extended family member is defined by the law or custom of the Indian child's Tribe or, in the absence of such law or custom, is a person who has reached age 18 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.

* * * * *

Hearing means a judicial session held for the purpose of deciding issues of fact, of law, or both.

* * * * *

Indian child means any unmarried person who is under age 18 and either:

(1) Is a member or citizen of an Indian Tribe; or

(2) Is eligible for membership or citizenship in an Indian Tribe and is the

biological child of a member/citizen of an Indian Tribe.

Indian child's Tribe means:

(1) The Indian Tribe in which an Indian child is a member or eligible for membership; or

(2) In the case of an Indian child who is a member of or eligible for membership in more than one Tribe, the Indian Tribe described in § 23.109.

Indian custodian means any Indian who has legal custody of an Indian child under applicable Tribal law or custom or under applicable State law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child. An Indian may demonstrate that he or she is an Indian custodian by looking to Tribal law or Tribal custom or State law.

Indian foster home means a foster home where one or more of the licensed or approved foster parents is an ''Indian'' as defined in 25 U.S.C. 1903(3).

Involuntary proceeding means a child-custody proceeding in which the parent does not consent of his or her free will to the foster-care, preadoptive, or adoptive placement or termination of parental rights or in which the parent consents to the foster-care, preadoptive, or adoptive placement under threat of removal of the child by a State court or agency.

* * * * *

Parent or *parents* means any biological parent or parents of an Indian child, or any Indian who has lawfully adopted an Indian child, including adoptions under Tribal law or custom. It does not include an unwed biological father where paternity has not been acknowledged or established.

Reservation means Indian country as defined in 18 U.S.C 1151 and any lands, not covered under that section, 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.

Secretary means the Secretary of the Interior or the Secretary's authorized representative acting under delegated authority.

* * * * *

Status offenses mean offenses that would not be considered criminal if committed by an adult; they are acts prohibited only because of a person's status as a minor (*e.g.,* truancy, incorrigibility).

* * * * *

Tribal court means a court with jurisdiction over child-custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian Tribe, or any other administrative body of a Tribe vested with authority over child-custody proceedings.

* * * * *

Upon demand means that the parent or Indian custodian can regain custody simply upon verbal request, without any formalities or contingencies.

* * * * *

Voluntary proceeding means 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.

■ 3. Revise § 23.11 to read as follows:

§ 23.11 Notice.

(a) In any involuntary proceeding in a State court where the court knows or has reason to know that an Indian child is involved, and where the identity and location of the child's parent or Indian custodian or Tribe is known, the party seeking the foster-care placement of, or termination of parental rights to, an Indian child must directly notify the parents, the Indian custodians, and the child's Tribe by registered or certified mail with return receipt requested, of the pending child-custody proceedings and their right of intervention. Notice must include the requisite information identified in § 23.111, consistent with the confidentiality requirement in § 23.111(d)(6)(ix). Copies of these notices must be sent to the appropriate Regional Director listed in paragraphs (b)(1) through (12) of this section by registered or certified mail with return receipt requested or by personal delivery and must include the information required by § 23.111.

(b)(1) For child-custody proceedings in Alabama, Connecticut, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, or any territory or possession of the United States, notices must be sent to the following address: Eastern Regional Director, Bureau of Indian Affairs, 545 Marriott Drive, Suite 700, Nashville, Tennessee 37214.

(2) For child-custody proceedings in Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio, or Wisconsin, notices must be sent to the following address: Minneapolis Regional Director, Bureau of Indian Affairs, 331 Second Avenue South, Minneapolis, Minnesota 55401–2241.

(3) For child-custody proceedings in Nebraska, North Dakota, or South Dakota, notices must be sent to the following address: Aberdeen Regional Director, Bureau of Indian Affairs, 115 Fourth Avenue SE., Aberdeen, South Dakota 57401.

(4) For child-custody proceedings in Kansas, Texas (except for notices to the Ysleta del Sur Pueblo of El Paso County, Texas), or the western Oklahoma counties of Alfalfa, Beaver, Beckman, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Cotton, Custer, Dewey, Ellis, Garfield, Grant, Greer, Harmon, Harper, Jackson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Major, Noble, Oklahoma, Pawnee, Payne, Pottawatomie, Roger Mills, Texas, Tillman, Washita, Woods or Woodward, notices must be sent to the following address: Anadarko Regional Director, Bureau of Indian Affairs, P.O. Box 368, Anadarko, Oklahoma 73005. Notices to the Ysleta del Sur Pueblo must be sent to the Albuquerque Regional Director at the address listed in paragraph (b)(6) of this section.

(5) For child-custody proceedings in Wyoming or Montana (except for notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana), notices must be sent to the following address: Billings Regional Director, Bureau of Indian Affairs, 316 N. 26th Street, Billings, Montana 59101. Notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, must be sent to the Portland Regional Director at the address listed in paragraph (b)(11) of this section.

(6) For child-custody proceedings in the Texas counties of El Paso and Hudspeth or in Colorado or New Mexico (exclusive of notices to the Navajo Nation from the New Mexico counties listed in paragraph (b)(9) of this section), notices must be sent to the following address: Albuquerque Regional Director, Bureau of Indian Affairs, 615 First Street, P.O. Box 26567, Albuquerque, New Mexico 87125. Notices to the Navajo Nation must be sent to the Navajo Regional Director at the address listed in paragraph (b)(9) of this section.

(7) For child-custody proceedings in Alaska (except for notices to the Metlakatla Indian Community, Annette Island Reserve, Alaska), notices must be sent to the following address: Juneau Regional Director, Bureau of Indian

Affairs, 709 West 9th Street, Juneau, Alaska 99802–1219. Notices to the Metlakatla Indian Community, Annette Island Reserve, Alaska, must be sent to the Portland Regional Director at the address listed in paragraph (b)(11) of this section.

(8) For child-custody proceedings in Arkansas, Missouri, or the eastern Oklahoma counties of Adair, Atoka, Bryan, Carter, Cherokee, Craig, Creek, Choctaw, Coal, Delaware, Garvin, Grady, Haskell, Hughes, Jefferson, Johnson, Latimer, LeFlore, Love, Mayes, McCurtain, McClain, McIntosh, Murray, Muskogee, Nowata, Okfuskee, Okmulgee, Osage, Ottawa, Pittsburg, Pontotoc, Pushmataha, Marshall, Rogers, Seminole, Sequoyah, Stephens, Tulsa, Wagoner, or Washington, notices must be sent to the following address: Muskogee Regional Director, Bureau of Indian Affairs, 101 North Fifth Street, Muskogee, Oklahoma 74401.

(9) For child-custody proceedings in the Arizona counties of Apache, Coconino (except for notices to the Hopi Tribe of Arizona and the San Juan Southern Paiute Tribe of Arizona) or Navajo (except for notices to the Hopi Tribe of Arizona); the New Mexico counties of McKinley (except for notices to the Zuni Tribe of the Zuni Reservation), San Juan, or Socorro; or the Utah county of San Juan, notices must be sent to the following address: Navajo Regional Director, Bureau of Indian Affairs, P.O. Box 1060, Gallup, New Mexico 87301. Notices to the Hopi and San Juan Southern Paiute Tribes of Arizona must be sent to the Phoenix Regional Director at the address listed in paragraph (b)(10) of this section. Notices to the Zuni Tribe of the Zuni Reservation must be sent to the Albuquerque Regional Director at the address listed in paragraph (b)(6 of this section).

(10) For child-custody proceedings in Arizona (exclusive of notices to the Navajo Nation from those counties listed in paragraph (b)(9) of this section), Nevada, or Utah (exclusive of San Juan County), notices must be sent to the following address: Phoenix Regional Director, Bureau of Indian Affairs, 1 North First Street, P.O. Box 10, Phoenix, Arizona 85001.

(11) For child-custody proceedings in Idaho, Oregon, or Washington, notices must be sent to the following address: Portland Regional Director, Bureau of Indian Affairs, 911 NE 11th Avenue, Portland, Oregon 97232. All notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, located in the Montana counties of Flathead, Lake, Missoula, and Sanders, must also be sent to the Portland Regional Director.

(12) For child-custody proceedings in California or Hawaii, notices must be sent to the following address: Sacramento Regional Director, Bureau of Indian Affairs, Federal Office Building, 2800 Cottage Way, Sacramento, California 95825.

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

(d) Upon request from a party to an Indian child-custody proceeding, the Secretary will make a reasonable attempt to identify and locate the child's Tribe, parents, or Indian custodians to assist the party seeking the information.

■ 4. Revise § 23.71 to read as follows:

§ 23.71 Recordkeeping and information availability.

(a) The Division of Human Services, Bureau of Indian Affairs (BIA), is authorized to receive all information and to maintain a central file on all State Indian adoptions. This file is confidential and only designated persons may have access to it.

(b) Upon the request of an adopted Indian who has reached age 18, the adoptive or foster parents of an Indian child, or an Indian Tribe, BIA will disclose such information as may be necessary for purposes of Tribal enrollment or determining any rights or benefits associated with Tribal membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, BIA must certify to the Indian child's Tribe, where the information warrants, that the child's parentage and other circumstances entitle the child to enrollment under the criteria established by such Tribe.

(c) BIA will ensure that the confidentiality of this information is maintained and that the information is not subject to the Freedom of Information Act, 5 U.S.C. 552, as amended.

■ 5. Add subpart I to read as follows:

Subpart I—Indian Child Welfare Act Proceedings

General Provisions

Sec.

Pretrial Requirements

Petitions To Transfer to Tribal Court

Adjudication of Involuntary Proceedings

Voluntary Proceedings

Subpart I—Indian Child Welfare Act Proceedings

General Provisions

§ 23.101 What is the purpose of this subpart?

The regulations in this subpart clarify the minimum Federal standards governing implementation of the Indian Child Welfare Act (ICWA) to ensure that ICWA is applied in all States consistent with the Act's express language, Congress's intent in enacting the statute, and to promote the stability and security of Indian tribes and families.

§ 23.102 What terms do I need to know?

The following terms and their definitions apply to this subpart. All other terms have the meanings assigned in § 23.2.

Agency means a nonprofit, for-profit, or governmental organization and its employees, agents, or officials that performs, or provides services to biological parents, foster parents, or adoptive parents to assist in the administrative and social work necessary for foster, preadoptive, or adoptive placements.

Indian organization means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians or a Tribe, or a majority of whose members are Indians.

§ 23.103 When does ICWA apply?

(a) ICWA includes requirements that apply whenever an Indian child is the subject of:

(1) A child-custody proceeding, including:

(i) An involuntary proceeding;

(ii) A voluntary proceeding that could prohibit the parent or Indian custodian from regaining custody of the child upon demand; and

(iii) A proceeding involving status offenses if any part of the proceeding results in the need for out-of-home placement of the child, including a foster-care, preadoptive, or adoptive placement, or termination of parental rights.

(2) An emergency proceeding.

(b) ICWA does not apply to:

(1) A Tribal court proceeding;

(2) A proceeding regarding a criminal act that is not a status offense;

(3) An award of custody of the Indian child to one of the parents including, but not limited to, an award in a divorce proceeding; or

(4) A voluntary 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, chosen for the Indian child and that does not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand.

(c) If a proceeding listed in paragraph (a) of this section concerns a child who meets the statutory definition of ''Indian child,'' then ICWA will apply to that proceeding. In determining whether ICWA applies to a proceeding, the State court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum.

(d) If ICWA applies at the commencement of a proceeding, it will not cease to apply simply because the child reaches age 18 during the pendency of the proceeding.

§ 23.104 What provisions of this subpart apply to each type of child-custody proceeding?

The following table lists what sections of this subpart apply to each type of child-custody proceeding identified in § 23.103(a):

Section	Type of proceeding
23.101–23.106 (General Provisions)	Emergency, Involuntary, Voluntary.
Pretrial Requirements:	
23.107 (How should a State court determine if there is reason to know the child is an Indian child?).	Emergency, Involuntary, Voluntary.
23.108 (Who makes the determination as 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?).	Emergency, Involuntary, Voluntary.
23.109 (How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?).	Emergency, Involuntary, Voluntary.
23.110 (When must a State court dismiss an action?)	Involuntary, Voluntary.
23.111 (What are the notice requirements for a child-custody proceeding involving an Indian child?).	Involuntary (foster-care placement and termination of parental rights).
23.112 (What time limits and extensions apply?)	Involuntary (foster-care placement and termination of parental rights).
23.113 (What are the standards for emergency proceedings involving an Indian child?)	Emergency.
23.114 (What are the requirements for determining improper removal?)	Involuntary.
Petitions to Transfer to Tribal Court:	
23.115 (How are petitions for transfer of a proceeding made?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).

Section	Type of proceeding
23.116 (What happens after a petition for transfer is made?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
23.117 (What are the criteria for ruling on transfer petitions?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
23.118 (How is a determination of ''good cause'' to deny transfer made?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
23.119 (What happens after a petition for transfer is granted?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
Adjudication of Involuntary Proceedings:	
23.120 (How does the State court ensure that active efforts have been made?)	Involuntary (foster-care placement and termination of parental rights).
23.121 (What are the applicable standards of evidence?)	Involuntary (foster-care placement and termination of parental rights).
23.122 (Who may serve as a qualified expert witness?)	Involuntary (foster-care placement and termination of parental rights).
23.123 Reserved	N/A.
Voluntary Proceedings:	
23.124 (What actions must a State court undertake in voluntary proceedings?)	Voluntary.
23.125 (How is consent obtained?)	Voluntary.
23.126 (What information must a consent document contain?)	Voluntary.
23.127 (How is withdrawal of consent to a foster-care placement achieved?)	Voluntary.
23.128 (How is withdrawal of consent to a termination of parental rights or adoption achieved?)	Voluntary.
Dispositions:	
23.129 (When do the placement preferences apply?)	Involuntary, Voluntary.
23.130 (What placement preferences apply in adoptive placements?)	Involuntary, Voluntary.
23.131 (What placement preferences apply in foster-care or preadoptive placements?)	Involuntary, Voluntary.
23.132 (How is a determination of ''good cause'' to depart from the placement preferences made?).	Involuntary, Voluntary.
Access:	
23.133 (Should courts allow participation by alternative methods?)	Emergency, Involuntary.
23.134 (Who has access to reports and records during a proceeding?)	Emergency, Involuntary.
23.135 Reserved.	N/A.
Post-Trial Rights & Responsibilities:	
23.136 (What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?).	Involuntary (if consent given under threat of removal), voluntary.
23.137 (Who can petition to invalidate an action for certain ICWA violations?)	Emergency (to extent it involved a specified violation), involuntary, voluntary.
23.138 (What are the rights to information about adoptees' Tribal affiliations?)	Emergency, Involuntary, Voluntary.
23.139 (Must notice be given of a change in an adopted Indian child's status?)	Involuntary, Voluntary.
Recordkeeping:	
23.140 (What information must States furnish to the Bureau of Indian Affairs?)	Involuntary, Voluntary.
23.141 (What records must the State maintain?)	Involuntary, Voluntary.
23.142 (How does the Paperwork Reduction Act affect this subpart?)	Emergency, Involuntary, Voluntary.
Effective Date:	
23.143 (How does this subpart apply to pending proceedings?)	Emergency, Involuntary, Voluntary.
Severability:	
23.144 (What happens if some portion of part is held to be invalid by a court of competent jurisdiction?).	Emergency, Involuntary, Voluntary.

Note: For purposes of this table, status-offense child-custody proceedings are included as a type of involuntary proceeding.

§ 23.105 How do I contact a Tribe under the regulations in this subpart?

To contact a Tribe to provide notice or obtain information or verification under the regulations in this subpart, you should direct the notice or inquiry as follows:

(a) Many Tribes designate an agent for receipt of ICWA notices. The BIA publishes a list of Tribes' designated Tribal agents for service of ICWA notice in the **Federal Register** each year and makes the list available on its Web site at *www.bia.gov.*

(b) For a Tribe without a designated Tribal agent for service of ICWA notice, contact the Tribe to be directed to the appropriate office or individual.

(c) If you do not have accurate contact information for a Tribe, or the Tribe contacted fails to respond to written inquiries, you should seek assistance in contacting the Indian Tribe from the BIA local or regional office or the BIA's Central Office in Washington, DC (see *www.bia.gov*).

§ 23.106 How does this subpart interact with State and Federal laws?

(a) The regulations in this subpart provide minimum Federal standards to ensure compliance with ICWA.

(b) Under section 1921 of ICWA, where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires the State or Federal court to apply the higher State or Federal standard.

Pretrial Requirements

§ 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.

§ 23.108 Who makes the determination as 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.

§ 23.109 How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?

(a) If the Indian child is a member or eligible for membership in only one Tribe, that Tribe must be designated as the Indian child's Tribe.

(b) If the Indian child meets the definition of ''Indian child'' through more than one Tribe, deference should be given to the Tribe in which the Indian child is already a member, unless otherwise agreed to by the Tribes.

(c) If an Indian child meets the definition of ''Indian child'' through more than one Tribe because the child is a member in more than one Tribe or the child is not a member of but is eligible for membership in more than one Tribe, the court must provide the opportunity in any involuntary child-custody proceeding for the Tribes to determine which should be designated as the Indian child's Tribe.

(1) If the Tribes are able to reach an agreement, the agreed-upon Tribe should be designated as the Indian child's Tribe.

(2) If the Tribes are unable to reach an agreement, the State court designates, for the purposes of ICWA, the Indian Tribe with which the Indian child has the more significant contacts as the Indian child's Tribe, taking into consideration:

(i) Preference of the parents for membership of the child;

(ii) Length of past domicile or residence on or near the reservation of each Tribe;

(iii) Tribal membership of the child's custodial parent or Indian custodian; and

(iv) Interest asserted by each Tribe in the child-custody proceeding;

(v) Whether there has been a previous adjudication with respect to the child by a court of one of the Tribes; and

(vi) Self-identification by the child, if the child is of sufficient age and capacity to meaningfully self-identify.

(3) A determination of the Indian child's Tribe for purposes of ICWA and the regulations in this subpart do not constitute a determination for any other purpose.

§ 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.

§ 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.

§ 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.

§ 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.

§ 23.114 What are the requirements for determining improper removal?

(a) If, in the course of any child-custody proceeding, any party asserts or the court has reason to believe that the Indian child may have been improperly removed from the custody of his or her parent or Indian custodian, or that the Indian child has been improperly retained (such as after a visit or other temporary relinquishment of custody), the court must expeditiously determine whether there was improper removal or retention.

(b) If the court finds that the Indian child was improperly removed or retained, the court must terminate the proceeding and the child must be returned immediately to his or her parent or Indian custodian, unless returning the child to his parent or Indian custodian would subject the child to substantial and immediate danger or threat of such danger.

Petitions To Transfer to Tribal Court

§ 23.115 How are petitions for transfer of a proceeding made?

(a) Either parent, the Indian custodian, or the Indian child's Tribe may request, at any time, orally on the record or in writing, that the State court transfer a foster-care or termination-of-parental-rights proceeding to the jurisdiction of the child's Tribe.

(b) The right to request a transfer is available at any stage in each foster-care or termination-of-parental-rights proceeding.

§ 23.116 What happens after a petition for transfer is made?

Upon receipt of a transfer petition, the State court must ensure that the Tribal court is promptly notified in writing of the transfer petition. This notification may request a timely response regarding whether the Tribal court wishes to decline the transfer.

§ 23.117 What are the criteria for ruling on transfer petitions?

Upon receipt of a transfer petition from an Indian child's parent, Indian custodian, or Tribe, the State court must transfer the child-custody proceeding unless the court determines that transfer is not appropriate because one or more of the following criteria are met:

(a) Either parent objects to such transfer;

(b) The Tribal court declines the transfer; or

(c) Good cause exists for denying the transfer.

§ 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.

§ 23.119 What happens after a petition for transfer is granted?

(a) If the Tribal court accepts the transfer, the State court should expeditiously provide the Tribal court with all records related to the proceeding, including, but not limited to, the pleadings and any court record.

(b) The State court should work with the Tribal court to ensure that the transfer of the custody of the Indian child and of the proceeding is accomplished smoothly and in a way that minimizes the disruption of services to the family.

Adjudication of Involuntary Proceedings

§ 23.120 How does the State court ensure that active efforts have been made?

(a) Prior to ordering an involuntary foster-care placement or termination of parental rights, the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful.

(b) Active efforts must be documented in detail in the record.

§ 23.121 What are the applicable standards of evidence?

(a) The court must not order a foster-care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(b) The court must not order a termination of parental rights for an Indian child unless evidence beyond a reasonable doubt is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(c) For a foster-care placement or termination of parental rights, the evidence must 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.

(d) Without a causal relationship identified in paragraph (c) of this section, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.

§ 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.

§ 23.123 [Reserved]

Voluntary Proceedings

§ 23.124 What actions must a State court undertake in voluntary proceedings?

(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. As described in § 23.107, where a consenting parent requests anonymity, a Tribe receiving such information must keep relevant documents and information confidential.

(c) State courts must ensure that the placement for the Indian child complies with §§ 23.129–23.132.

§ 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.

§ 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.

§ 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.

§ 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.

Dispositions

§ 23.129 When do the placement preferences apply?

(a) In any preadoptive, adoptive, or foster-care placement of an Indian child, the placement preferences specified in § 23.130 and § 23.131 apply.

(b) Where a consenting parent requests anonymity in a voluntary proceeding, the court must give weight to the request in applying the preferences.

(c) The placement preferences must be applied in any foster-care, preadoptive, or adoptive placement unless there is a determination on the record that good cause under § 23.132 exists to not apply those placement preferences.

§ 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.

§ 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.

§ 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.

Access

§ 23.133 Should courts allow participation by alternative methods?

If it possesses the capability, the court should allow alternative methods of participation in State-court child-custody proceedings involving an Indian child, such as participation by telephone, videoconferencing, or other methods.

§ 23.134 Who has access to reports and records during a proceeding?

Each party to an emergency proceeding or a foster-care-placement or termination-of-parental-rights proceeding under State law involving an Indian child has a right to timely examine all reports and other documents filed or lodged with the court upon which any decision with respect to such action may be based.

§ 23.135 [Reserved]

Post-Trial Rights & Responsibilities

§ 23.136 What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?

(a) Within two years after a final decree of adoption of any Indian child by a State court, or within any longer period of time permitted by the law of the State, the State court may invalidate the voluntary adoption upon finding that the parent's consent was obtained by fraud or duress.

(b) Upon the parent's filing of a petition to vacate the final decree of adoption of the parent's Indian child, the court must give notice to all parties to the adoption proceedings and the Indian child's Tribe and must hold a hearing on the petition.

(c) Where the court finds that the parent's consent was obtained through fraud or duress, the court must vacate the final decree of adoption, order the consent revoked, and order that the child be returned to the parent.

§ 23.137 Who can petition to invalidate an action for certain ICWA violations?

(a) Any of the following may petition any court of competent jurisdiction to invalidate an action for foster-care placement or termination of parental rights under state law where it is alleged that 25 U.S.C. 1911, 1912, or 1913 has been violated:

(1) An Indian child who is or was the subject of any action for foster-care placement or termination of parental rights;

(2) A parent or Indian custodian from whose custody such child was removed; and

(3) The Indian child's Tribe.

(b) Upon a showing that an action for foster-care placement or termination of parental rights violated any provision of 25 U.S.C. 1911, 1912, or 1913, the court must determine whether it is appropriate to invalidate the action.

(c) To petition for invalidation, there is no requirement that the petitioner's rights under ICWA were violated; rather, a petitioner may challenge the action based on any violations of 25 U.S.C. 1911, 1912, or 1913 during the course of the child-custody proceeding.

§ 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 parents and provide such other information necessary to protect any rights, which may include Tribal membership, resulting from the individual's Tribal relationship.

§ 23.139 Must notice be given of a change in an adopted Indian child's status?

(a) If an Indian child has been adopted, the court must notify, by registered or certified mail with return receipt requested, the child's biological parent or prior Indian custodian and the Indian child's Tribe whenever:

(1) A final decree of adoption of the Indian child has been vacated or set aside; or

(2) The adoptive parent has voluntarily consented to the termination of his or her parental rights to the child.

(b) The notice must state the current name, and any former name, of the Indian child, inform the recipient of the right to petition for return of custody of the child, and provide sufficient information to allow the recipient to participate in any scheduled hearings.

(c) A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice and filing the waiver with the court.

(1) Prior to accepting the waiver, the court must explain the consequences of the waiver and explain how the waiver may be revoked.

(2) The court must certify that the terms and consequences of the waiver and how the waiver may be revoked were explained 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.

(3) Where confidentiality is requested or indicated, execution of the waiver 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.

(4) The biological parent or Indian custodian may revoke the waiver at any time by filing with the court a written notice of revocation.

(5) A revocation of the right to receive notice does not affect any child-custody proceeding that was completed before the filing of the notice of revocation.

Recordkeeping

§ 23.140 What information must States furnish to the Bureau of Indian Affairs?

(a) Any State court entering a final adoption decree or order in any voluntary or involuntary Indian-child adoptive placement must furnish a copy of the decree or order within 30 days to the Bureau of Indian Affairs, Chief, Division of Human Services, 1849 C Street NW., Mail Stop 4513 MIB, Washington, DC 20240, along with the following information, in an envelope marked ''Confidential'':

(1) Birth name and birthdate of the Indian child, and Tribal affiliation and name of the Indian child after adoption;

(2) Names and addresses of the biological parents;

(3) Names and addresses of the adoptive parents;

(4) Name and contact information for any agency having files or information relating to the adoption;

(5) Any affidavit signed by the biological parent or parents asking that their identity remain confidential; and

(6) Any information relating to Tribal membership or eligibility for Tribal membership of the adopted child.

(b) If a State agency has been designated as the repository for all State-court adoption information and is fulfilling the duties described in paragraph (a) of this section, the State courts in that State need not fulfill those same duties.

§ 23.141 What records must the State maintain?

(a) The State must maintain a record of every voluntary or involuntary foster-care, preadoptive, and adoptive

placement of an Indian child and make the record available within 14 days of a request by an Indian child's Tribe or the Secretary.

(b) The record must contain, at a minimum, the petition or complaint, all substantive orders entered in the child-custody proceeding, the complete record of the placement determination (including, but not limited to, the findings in the court record and the social worker's statement), and, if the placement departs from the placement preferences, detailed documentation of the efforts to comply with the placement preferences.

(c) A State agency or agencies may be designated to be the repository for this information. The State court or agency should notify the BIA whether these records are maintained within the court system or by a State agency.

§ 23.142 How does the Paperwork Reduction Act affect this subpart?

The collections of information contained in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned OMB Control Number 1076–0186. Response is required to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless the form or regulation requesting the information displays a currently valid OMB Control Number. Send comments regarding this collection of information, including suggestions for reducing the burden, to the Information Collection Clearance Officer—Indian Affairs, 1849 C Street NW., Washington, DC 20240.

Effective Date

§ 23.143 How does this subpart apply to pending proceedings?

None of the provisions of this subpart affects a proceeding under State law for foster-care placement, termination of parental rights, preadoptive placement, or adoptive placement that was initiated prior to December 12, 2016, but the provisions of this subpart apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

Severability

§ 23.144 What happens if some portion of this part is held to be invalid by a court of competent jurisdiction?

If any portion of this part is determined to be invalid by a court of competent jurisdiction, the other portions of the part remain in effect. For example, the Department has considered separately whether the provisions of this part apply to involuntary and voluntary proceedings; thus, if a particular provision is held to be invalid as to one type of proceeding, it is the Department's intent that it remains valid as to the other type of proceeding.

Dated: June 6, 2016.

Lawrence S. Roberts,

Acting Assistant Secretary—Indian Affairs.

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Truth and Reconciliation Materials

December, 2015: The Lakota People's Law Project calls on the U.S. government to follow the example set by Canada, South Africa and others and set up a federal Truth and Reconciliation Commission to confront, work through and find solutions for the trauma that continues today as the legacy of the Boarding School Era. LPLP asserts that the current state foster care systems perpetuate the ideals and functions of the boarding school system, and that part of reconciliation must be a fundamental change in Native American Foster Care.

We call upon the United States Congress to begin a Truth and Reconciliation process to provide redress to Native Americans for the harmful legacy of the Boarding School Era.

Excerpt of 2015 Article published by the Carnegie Council for Ethics in International Affairs http://www.carnegiecouncil.org/publications/ethics_online/0102:

South Africa: A Model Approach

The South African TRC is widely praised for its emphasis upon restorative justice. Unlike previous truth commissions in Latin America, it did not offer widespread amnesty to perpetrators, but instead enticed them to come forward and admit their guilt in exchange for amnesty case-by-case. The TRC formed committees that ensured that both rehabilitation and reparations would be provided on an individual basis. Live broadcasts of South Africans—black, white, Indian, and colored[1]—testifying before the commissioners in a court-like setup were shown internationally. It was not long before the world, and most importantly South Africans, came to learn of the many hidden atrocities that had been endured under the apartheid system. There is no doubt that the South African TRC process has resulted in a model of public reconciliation which deserves attention from all areas of the globe, including those in the United States who are searching for a mechanism to ameliorate a legacy of systemic racism. However, it is essential to recognize that the South African TRC favored an individualized approach that placed victims and perpetrators at the center of the process, rather than the apartheid system and its structures of governance, and that this framing may limit the applicability of the South African model to other settings.

As Mahmood Mamdani points out, although the South African TRC labeled apartheid as a "crime against humanity," it did not formally address the system of apartheid and its legality, but rather the individuals who were affected by it.[2] In other words, although the TRC was branded as a national activity, in reality its focus upon 'victims' and 'perpetrators' individualized the process of reconciliation and allowed the system of apartheid, and those who worked within it, to remain in the shadows, hidden from scrutiny. Any TRC model that bypasses the role of institutions and structures of governance and focuses only on individuals is going to be heavily flawed if it is deployed to address structural racism in the United States. The South African TRC model, which individualizes the process of reconciliation after racialized and ethnicized violence, has extreme

shortcomings when applied to a North American setting in which institutions, as well as individual actions, must take center stage.

Canada's Truth and Reconciliation Process

The United States need not look far for a country that chose to establish a national truth and reconciliation commission that is currently examining historic racist violence against its indigenous peoples. The Canadian TRC model is a unique process: it is the first to be taking place in a society not undergoing fundamental government transition, as seen with the rest of TRCs. In this, at least, it offers the United States a basis for comparison. The Truth and Reconciliation Commission of Canada began its work in 2009 and is focused on the Indian Residential School (IRS) system and the abuses perpetrated by the church- and government-run institutions against First Nations, Métis,[3] and Inuit children. The Canadian TRC model, like South Africa's, can be characterized as very top-down, confined as it is to a mandate that results from the Indian Residential School Settlement Agreement, a lawsuit settlement reached between the Canadian government, the Counsel of the Churches that ran the schools, the Assembly of First Nations, Aboriginal Peoples organizations, and IRS survivors. The Canadian TRC has treated the IRS system, much like South Africa and apartheid, as a crime against humanity and has not been shy to label the system as one that perpetuated cultural genocide. At the same time, however, it repeats the same mistake: the structures of governance that created the IRS system have not been critically examined.

Moreover, the IRS system is individualized as an isolated occurrence, and thus separated from other anti-Aboriginal policies both before and after the IRS system was in operation. In the same spirit, it has engaged First Nations and Inuit communities on a case-by-case basis, compartmentalizing the process as opposed to allowing the communities to lead the process themselves in a more culturally and historically nuanced way. Again, this is not to say that the Canadian process is fatally flawed. The acknowledgement of the abuses that took place in the IRS system is an important first step to an improved relationship between Aboriginal and non-Aboriginal communities. The problem that remains is that the majority white, non-Aboriginal populace has been largely disengaged from the process—something that could also be detrimental to an American process, if this model were adopted in the United States. Additionally, the way in which the TRC emerged—from a legal process that required it, rather than a community that led it—raises questions about the political will that exists to continue wider reconciliation efforts after the Canadian TRC's mandate expires in June 2015. The Canadian TRC offers significant lessons from which the United States can learn. Yet in fact, there may be no better lessons than those already learned within its own borders.

The Maine Wabanaki-State Child Welfare TRC: A Possibility

In 2012, the state of Maine and the Wabanaki tribal governments located within its boundaries (Houlton Band of Maliseets, the Passamaquoddy at Sipayik and Motahkomikuk, the Aroostook Band of Micmacs, and the Penobscot Nation), signed on to a joint tribal-state TRC that was designed at the grassroots, creating a hybrid TRC model. The Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission (MWTRC) has been specifically mandated to investigate and document an era in the state's history that saw Native children being sent into

foster care at an alarmingly high rate, calling into question the state's adherence to the federal Indian Child Welfare Act. This process is unique in that it is the first government-endorsed TRC in the United States and it is also, as Eduardo Gonzalez of the International Center for Transitional Justice (ICTJ) recognizes, "trying to throw light over issues of marginalization, and discrimination, to cast some light on race relations in the state of Maine."

Learning lessons from the TRCs in South Africa, Canada, and Greensboro, the MWTRC has managed to pioneer a very different model. Like South Africa, the MWTRC drafted its mandate and formed a commission, in this case to inquire into the forced removal of Native children and those affected during the process, while also (unlike South Africa) placing the state and its child welfare system under examination. The truth-telling and healing mechanisms of the MWTRC are very similar to those seen in the Canadian TRC process, such as sharing circles and private testimony. The MWTRC also seeks out to change child welfare practices fundamentally and seeks systemic reconciliation between the child welfare practices of the state and those of the tribes, all of which will be outlined in its recommendations to the tribal and state governments at the conclusion of its mandate in June 2015.

Learning from Greensboro, the MWTRC obtained the signatures of the five tribal governments and the state of Maine, and, like Greensboro, also formed an organization (i.e. Maine Wabanaki REACH) to help fulfill the specific and wider goals of the TRC within and beyond its mandate. The MWTRC operates within the whitest state in the United States and has a relatively small Native population in comparison to other states. Yet it has managed to engage both Native and non-Native populations; being both very responsive to the needs of tribal communities and having the wherewithal to navigate non-Native networks within one of the more sparsely populated and geographically isolated states of the east coast. However, it still lacks widespread understanding in the state amongst the non-Native population, and the grassroots nature of the MWTRC, like Greensboro, has resulted in funding challenges. Nevertheless, the MWTRC may provide the most innovative model for others in the country, and indeed the world, to replicate and adapt accordingly.

Links to other materials on Truth and Reconciliation

Canada: www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf

Maine: www.mainewabanakitrc.org/report/

Minnesota: www.house.leg.state.mn.us/resolutions/ls86/0/HC0004.htm

November 2016

New Federal Regulations Governing the Indian Child Welfare Act

This information is intended for practitioners and judicial officers with knowledge of and experience with the requirements of the Indian Child Welfare Act (ICWA) to inform them of the requirements of the new federal regulations governing court proceedings covered by ICWA (25 U.S.C. § 1901 et seq.) that become effective December 12, 2016. The substantive provisions of the new regulations are attached.[1] This Job Aid is not intended to be a complete analysis of the new federal regulations or how they relate to existing California law and practice. Further guidance on the implications of the new federal ICWA regulations will be forthcoming, but the purpose of this document is to alert courts to the potential need for immediate changes to court practice and procedure to comply with the new federal requirements.[2]

When do the new regulations apply?

The new regulations apply to "proceedings" initiated after December 12, 2016. "Child custody proceeding" as defined includes four separate phases of a case that may all take place within a single ongoing case: the foster care placement, termination of parental rights, preadoptive placement, and adoptive placement phases of a case are all considered separate "proceedings" for ICWA purposes. (See 25 U.S.C. § 1903(1); 25 C.F.R. §§ 23.143 and 23.2 (1996).)[3] Thus, for a case filed ***on or before*** December 12, 2016, the new regulations apply as long as the child's adoption is not yet final when the case moves from one of the four separate proceedings defined by ICWA. When a case procedurally moves from the foster care placement phase (reunification) to the termination of parental rights (TPR) phase or from TPR to adoptive placement, the new regulations apply to the new phase of the case because it is considered a new proceeding for ICWA purposes. The new regulations may pose a challenge for courts in determining when a new proceeding has started for ICWA purposes within an ongoing case.

[1] 81 Fed.Reg. 38864 et seq. (June 14, 2016).

[2] This information was provided at the 2016 Juvenile Law Institute and Pre-Institute ICWA Roundtable and at other multidisciplinary educational programs. The regulations are available online at *www.gpo.gov/fdsys/pkg/FR-2016-06-14/pdf/2016-13686.pdf*.

[3] The definition of child custody proceeding found in 25 CFR 23.2 specifies that "[t]here may be several child-custody proceedings involving any given Indian child. Within each child-custody proceeding, there may be several hearings…."

How do the new requirements relate to California law and practice?

The new regulations are binding on state courts as the minimum federal standard that must be followed. For example, 25 Code of Federal Regulations part 23.106 (2016) confirms section 1921 of the Act itself, that where applicable state or other federal law provides a higher standard of protection, the higher standard shall apply.

Applying ICWA

The new regulations require ICWA inquiry at the beginning of each proceeding (25 C.F.R. § 23.107 (2016)), not each case. If there is "reason to know" that the child is an Indian child, but the status is not confirmed, the new regulations require the court to obtain evidence from the agency on the efforts made to determine the child's status (*id.* at § 23.107(b)(1)), and "[t]reat 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." (*Id.* at § 23.107(b)(2).) This means that pending confirmation of the child's status, all ICWA requirements must be met.

Emergency Removals (Detentions)

As a general rule, an Indian child cannot be removed from parental custody without compliance with ICWA requirements. The only exception is for "emergency proceedings" (25 U.S.C. 1922; see also chart at 81 Fed.Reg. 38868–38869 (June 14, 2016), attached.)

The new regulations limit the emergency removal power whenever there is "reason to know" that the child involved is an "Indian child" (25 C.F.R. § 23.113 (2016)). The petition seeking emergency removal must contain specific factual information and allegations including the basis for belief that the child is at risk of imminent physical damage or harm, interactions with the tribe, and efforts made to assist the parents to have the child returned. (*Id.* at § 23.113(d).)

The court must make a specific finding that the removal or placement is necessary to prevent imminent physical damage or harm to the child. (*Id.* at § 23.113(b)(1).)

As a general rule, an emergency removal cannot last more than 30 days without compliance with ICWA requirements unless the court makes certain findings. (*Id.* at § 23.113(e).) This means that the court must generally consider evidence of active efforts, testimony of a qualified expert witness, and evidence of whether the placement follows the placement preferences at a hearing that is within 30 days of the date the child was removed from the parents' physical custody by the agency.

Jurisdiction

California courts may not have jurisdiction over proceedings (other than emergency proceedings) involving an Indian child if the child resides or is domiciled within the reservation of a tribe that exercises exclusive jurisdiction over child custody matters or if the child is already a ward of a tribal court. In a situation where the court lacks jurisdiction, 25 Code of Federal Regulations part 23.110 clarifies that the court must

expeditiously inform the tribal court of the matter, dismiss the state court proceeding, and provide the tribal court with all information regarding the proceeding including, but not limited to, the pleadings and any court records.

Active Efforts

The new regulations (25 Code of Federal Regulations part 23.2) now define active efforts as "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…" and describes 11 examples of active efforts. Courts should ensure that when a case involves an Indian child, case plans and services meet these new active efforts requirements.

Qualified Expert Witness

Regarding witnesses, 25 Code of Federal Regulations parts 23.121 and 23.122 discuss the requirements for qualified expert witness testimony as well as who can serve as a qualified expert witness.

Placement Preferences

Regarding placement, 25 Code of Federal Regulations parts 23.129 through 23.132 address placement preferences for an Indian child. One important clarification is that the issue of placement must be reassessed each time a change in placement is required and at each separate phase of the proceedings. Thus, the court must reassess whether the child's placement complies with the placement preferences when a case moves through each of the four ICWA phases: foster care placement, termination of parental rights, preadoptive placement, and adoptive placement.

The new regulations place limitations on the factors that the court can consider in making a determination that there is "good cause" to deviate from the placement preferences. In particular, the court may not depart from the placement preferences based on the socioeconomic status of any placement relative to another placement (25 C.F.R. § 23.132 (d) (2016)), nor may the court find good cause to deviate from the placement 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." (*Id.* at § 23.132(e).)

Transfers to Tribal Court

Transfers to tribal court are discussed under 25 Code of Federal Regulations parts 23.115 through 23.119. Particular issues to note are that the right to seek a transfer to tribal court may be exercised at any time, but that right attaches separately at the foster care placement and termination of parental rights phases of the case. (*Id.* at § 23.115.) Further, the regulations require that the tribal court be promptly notified of the petition to transfer (*Id.* at § 23.116), all parties have an opportunity to be heard, any "good cause" reasons to deny transfer are stated on the record, and the court's decision be on the record or in a written order. (*Id.* at § 23.118.)

The new regulations list five factors that the court must not consider in determining whether "good cause" exists not to transfer jurisdiction: (1) whether the proceedings are at an advanced stage if the Indian child's parent, Indian custodian, or tribe only recently received notice of the proceedings; (2) whether there was an earlier "proceeding" (i.e., foster care phase of the case) at which no petition to transfer was filed; (3) whether the transfer could affect the child's placement; (4) the child's cultural connections with the tribe; and (5) the socioeconomic conditions or any negative perception of tribal social services or judicial system. (*Id.* at § 23.118.)

Contacts:

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Additional resources:

CFCC Tribal/State Programs http://www.courts.ca.gov/3067.htm
Bureau of Indian Affairs
http://www.bia.gov/WhoWeAre/BIA/OIS/HumanServices/IndianChildWelfareAct/index.htm

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Part II

Department of the Interior

Bureau of Indian Affairs

25 CFR Part 23

Indian Child Welfare Act Proceedings; Final Rule

Section	Respondent	Information collection	Annual number of respondents	Frequency of responses	Annual number of responses	Completion time per response	Total annual burden hours
23.141	State court or State agency.	Notify where records maintained	50	167	8,350	0.5	4,175
			.....	.....	98,069	.....	301,811

The annual cost burden to respondents associated with providing notice by certified mail is $6.74 and the cost of a return receipt green card is $2.80. For each Indian child-custody proceeding, at least two notices must be sent—one to the parent and one to the Tribe, totaling $19.08. At an annual estimated 13,000 child welfare proceedings that may involve an ''Indian child,'' where approximately 650 of these include an interstate transfer (13,650), this totals: $260,442. In addition, there are approximately 2,578 voluntary proceedings for which parties may choose to provide notice, at a cost of $49,118. Together, the total cost burden is $309,630.

Comment was taken on this information collection in the proposed rule, as part of the public notice and comment period proposed rule, in compliance with OMB regulations. One commenter, the California Health and Human Services Agency, Department of Social Services (CHHS) submitted comments specifically in response to the request for comments on the information collection burden.

• *Comment on Proposed § 23.111:* The proposed rule states that notice must be by registered mail, whereas the current 23.11(a) allows for notice by certified mail. To require registered mail will increase costs that undermine noticing under ICWA. *Response:* The statute specifies ''registered mail with return receipt requested.'' 25 U.S.C. 1912(a). In response to these comments, the Department examined whether certified mail with return receipt requested is allowable under the statute, and determined that it is because certified mail with return receipt requested better meets the goals of prompt, documented notice. The final rule allows for certified mail.

• *Comment on Proposed § 23.104, providing information on how to contact a Tribe:* The rule should clarify BIA's obligation in gathering the information for the list of Tribe's designated agents and contact information because the current list is outdated, inefficient, and inconsistently maintained. The list is hampered by publication in the **Federal Register** and BIA should be required to publish updates on the Web. The list also no longer maintains the historical affiliations, which was helpful. *Response:* BIA is now publishing the list using historical affiliations, as requested, and making the list available on its Web site, where it can be updated more frequently. The rule does not address this because these are procedures internal to the BIA.

• *Comment on Proposed § 23.111(i), requiring notice by both States where child is transferred interstate:* Requiring both the originating State court and receiving State court to provide notice is duplicative and burdensome because notice should only be required in the State where the actual court proceeding is pending. Another commenter stated that the provision appears to apply to transfers between Tribes and States, where notice is unnecessary. *Response:* The final rule deletes this provision.

• *Comment on Proposed § 23.134, requiring BIA to disclose information to adult adoptees:* This section appears to be creating duplicative work of the BIA and States, because both sections require each to provide adult adoptees information for Tribal enrollment. *Response:* The Act imposes this responsibility on both BIA and the State. Section 1951(b) of the Act imposes the responsibility on BIA, which is in § 23.71(b) of the final rule. Section 1917 of the Act imposes the responsibility on States, which is addressed at § 23.134 of the final rule.

• *Comment on Proposed § 23.137, requiring the State to establish a single location for placement records:* This requirement would be an unfunded mandate with undue burden and would require relocating 1,145 files to a different location and require changes to existing recordkeeping systems. Another State agency commented that there is a significant fiscal and annual burden due to the staffing, costs for copying, packaging and transferring physical files to a different location. *Response:* The final rule deletes the provision requiring States to establish a single, central repository. The associated information collection request has also been deleted.

• *Comment on Proposed § 23.137, requiring providing records to the Department or Tribe upon request:* The 15-minute burden estimate allocated to this task is too low. The time to copy, package and mail the documents will be no less than one hour, but more realistically two hours. *Response:* The final rule updates the burden estimates to reflect 1.5 hours.

If you have comments on this information collection, please submit them to Elizabeth K. Appel, Office of Regulatory Affairs & Collaborative Action—Indian Affairs, U.S. Department of the Interior, 1849 C Street NW., MS–3071, Washington, DC 20240, or by email to *elizabeth.appel@bia.gov.*

J. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment because it is of an administrative, technical, and procedural nature. *See,* 43 CFR 46.210(i). No extraordinary circumstances exist that would require greater review under the National Environmental Policy Act.

K. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

List of Subjects in 25 CFR Part 23

Administrative practice and procedure, Child welfare, Indians, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, amends part 23 in Title 25 of the Code of Federal Regulations as follows:

PART 23—INDIAN CHILD WELFARE ACT

■ 1. The authority citation for part 23 continues to read as follows: 5 U.S.C. 301; 25 U.S.C. 2, 9, 1901–1952.

■ 2. In § 23.2:

■ a. Add a definition for ''active efforts'' in alphabetical order;

■ b. Revise the definition of ''child-custody proceeding'';

■ c. Add definitions for ''continued custody'', ''custody'', and ''domicile'' in alphabetical order;

■ d. Add a definition for ''emergency proceeding'' in alphabetical order;
■ e. Revise the definition of ''extended family member'';
■ f. Add a definition for ''hearing'' in alphabetical order;
■ g. Revise the definitions of ''Indian child'', ''Indian child's Tribe'', and ''Indian custodian'';
■ h. Add a definition for ''Indian foster home'' in alphabetical order;
■ i. Add a definition of ''involuntary proceeding'' in alphabetical order;
■ j. Revise the definition of ''parent'';
■ k. Revise the definitions of ''reservation'' and ''Secretary'';
■ l. Add a definition for ''status offenses'' in alphabetical order;
■ m. Revise the definition of ''Tribal court''; and
■ n. Add definitions for ''upon demand'', and ''voluntary proceeding'' in alphabetical order.

The additions and revisions read as follows:

§ 23.2 Definitions.

* * * * *

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.

* * * * *

Child-custody proceeding. (1) ''Child-custody proceeding'' means and includes any action, other than an emergency proceeding, that may culminate in one of the following outcomes:

(i) *Foster-care placement,* which is any action removing an Indian child from his or her 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 is any action resulting in the termination of the parent-child relationship;

(iii) *Preadoptive placement,* which is 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; or

(iv) *Adoptive placement,* which is the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

(2) An action that may culminate in one of these four outcomes is considered a separate child-custody proceeding from an action that may culminate in a different one of these four outcomes. There may be several child-custody proceedings involving any given Indian child. Within each child-custody proceeding, there may be several hearings. If a child is placed in foster care or another out-of-home placement as a result of a status offense, that status offense proceeding is a child-custody proceeding.

* * * * *

Continued custody means physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law, that a parent or Indian custodian already has or had at any point in the past. The biological mother of a child has had custody of a child.

Custody means physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law. A party may demonstrate the existence of custody by looking to Tribal law or Tribal custom or State law.

Domicile means:

(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.

Emergency proceeding means and includes any court action that involves an emergency removal or emergency placement of an Indian child.

Extended family member is defined by the law or custom of the Indian child's Tribe or, in the absence of such law or custom, is a person who has reached age 18 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.

* * * * *

Hearing means a judicial session held for the purpose of deciding issues of fact, of law, or both.

* * * * *

Indian child means any unmarried person who is under age 18 and either:

(1) Is a member or citizen of an Indian Tribe; or

(2) Is eligible for membership or citizenship in an Indian Tribe and is the

biological child of a member/citizen of an Indian Tribe.

Indian child's Tribe means:

(1) The Indian Tribe in which an Indian child is a member or eligible for membership; or

(2) In the case of an Indian child who is a member of or eligible for membership in more than one Tribe, the Indian Tribe described in § 23.109.

Indian custodian means any Indian who has legal custody of an Indian child under applicable Tribal law or custom or under applicable State law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child. An Indian may demonstrate that he or she is an Indian custodian by looking to Tribal law or Tribal custom or State law.

Indian foster home means a foster home where one or more of the licensed or approved foster parents is an ''Indian'' as defined in 25 U.S.C. 1903(3).

Involuntary proceeding means a child-custody proceeding in which the parent does not consent of his or her free will to the foster-care, preadoptive, or adoptive placement or termination of parental rights or in which the parent consents to the foster-care, preadoptive, or adoptive placement under threat of removal of the child by a State court or agency.

* * * * *

Parent or *parents* means any biological parent or parents of an Indian child, or any Indian who has lawfully adopted an Indian child, including adoptions under Tribal law or custom. It does not include an unwed biological father where paternity has not been acknowledged or established.

Reservation means Indian country as defined in 18 U.S.C 1151 and any lands, not covered under that section, 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.

Secretary means the Secretary of the Interior or the Secretary's authorized representative acting under delegated authority.

* * * * *

Status offenses mean offenses that would not be considered criminal if committed by an adult; they are acts prohibited only because of a person's status as a minor (*e.g.,* truancy, incorrigibility).

* * * * *

Tribal court means a court with jurisdiction over child-custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian Tribe, or any other administrative body of a Tribe vested with authority over child-custody proceedings.

* * * * *

Upon demand means that the parent or Indian custodian can regain custody simply upon verbal request, without any formalities or contingencies.

* * * * *

Voluntary proceeding means 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.

■ 3. Revise § 23.11 to read as follows:

§ 23.11 Notice.

(a) In any involuntary proceeding in a State court where the court knows or has reason to know that an Indian child is involved, and where the identity and location of the child's parent or Indian custodian or Tribe is known, the party seeking the foster-care placement of, or termination of parental rights to, an Indian child must directly notify the parents, the Indian custodians, and the child's Tribe by registered or certified mail with return receipt requested, of the pending child-custody proceedings and their right of intervention. Notice must include the requisite information identified in § 23.111, consistent with the confidentiality requirement in § 23.111(d)(6)(ix). Copies of these notices must be sent to the appropriate Regional Director listed in paragraphs (b)(1) through (12) of this section by registered or certified mail with return receipt requested or by personal delivery and must include the information required by § 23.111.

(b)(1) For child-custody proceedings in Alabama, Connecticut, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, or any territory or possession of the United States, notices must be sent to the following address: Eastern Regional Director, Bureau of Indian Affairs, 545 Marriott Drive, Suite 700, Nashville, Tennessee 37214.

(2) For child-custody proceedings in Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio, or Wisconsin, notices must be sent to the following address: Minneapolis Regional Director, Bureau of Indian Affairs, 331 Second Avenue South, Minneapolis, Minnesota 55401–2241.

(3) For child-custody proceedings in Nebraska, North Dakota, or South Dakota, notices must be sent to the following address: Aberdeen Regional Director, Bureau of Indian Affairs, 115 Fourth Avenue SE., Aberdeen, South Dakota 57401.

(4) For child-custody proceedings in Kansas, Texas (except for notices to the Ysleta del Sur Pueblo of El Paso County, Texas), or the western Oklahoma counties of Alfalfa, Beaver, Beckman, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Cotton, Custer, Dewey, Ellis, Garfield, Grant, Greer, Harmon, Harper, Jackson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Major, Noble, Oklahoma, Pawnee, Payne, Pottawatomie, Roger Mills, Texas, Tillman, Washita, Woods or Woodward, notices must be sent to the following address: Anadarko Regional Director, Bureau of Indian Affairs, P.O. Box 368, Anadarko, Oklahoma 73005. Notices to the Ysleta del Sur Pueblo must be sent to the Albuquerque Regional Director at the address listed in paragraph (b)(6) of this section.

(5) For child-custody proceedings in Wyoming or Montana (except for notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana), notices must be sent to the following address: Billings Regional Director, Bureau of Indian Affairs, 316 N. 26th Street, Billings, Montana 59101. Notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, must be sent to the Portland Regional Director at the address listed in paragraph (b)(11) of this section.

(6) For child-custody proceedings in the Texas counties of El Paso and Hudspeth or in Colorado or New Mexico (exclusive of notices to the Navajo Nation from the New Mexico counties listed in paragraph (b)(9) of this section), notices must be sent to the following address: Albuquerque Regional Director, Bureau of Indian Affairs, 615 First Street, P.O. Box 26567, Albuquerque, New Mexico 87125. Notices to the Navajo Nation must be sent to the Navajo Regional Director at the address listed in paragraph (b)(9) of this section.

(7) For child-custody proceedings in Alaska (except for notices to the Metlakatla Indian Community, Annette Island Reserve, Alaska), notices must be sent to the following address: Juneau Regional Director, Bureau of Indian

Affairs, 709 West 9th Street, Juneau, Alaska 99802–1219. Notices to the Metlakatla Indian Community, Annette Island Reserve, Alaska, must be sent to the Portland Regional Director at the address listed in paragraph (b)(11) of this section.

(8) For child-custody proceedings in Arkansas, Missouri, or the eastern Oklahoma counties of Adair, Atoka, Bryan, Carter, Cherokee, Craig, Creek, Choctaw, Coal, Delaware, Garvin, Grady, Haskell, Hughes, Jefferson, Johnson, Latimer, LeFlore, Love, Mayes, McCurtain, McClain, McIntosh, Murray, Muskogee, Nowata, Okfuskee, Okmulgee, Osage, Ottawa, Pittsburg, Pontotoc, Pushmataha, Marshall, Rogers, Seminole, Sequoyah, Stephens, Tulsa, Wagoner, or Washington, notices must be sent to the following address: Muskogee Regional Director, Bureau of Indian Affairs, 101 North Fifth Street, Muskogee, Oklahoma 74401.

(9) For child-custody proceedings in the Arizona counties of Apache, Coconino (except for notices to the Hopi Tribe of Arizona and the San Juan Southern Paiute Tribe of Arizona) or Navajo (except for notices to the Hopi Tribe of Arizona); the New Mexico counties of McKinley (except for notices to the Zuni Tribe of the Zuni Reservation), San Juan, or Socorro; or the Utah county of San Juan, notices must be sent to the following address: Navajo Regional Director, Bureau of Indian Affairs, P.O. Box 1060, Gallup, New Mexico 87301. Notices to the Hopi and San Juan Southern Paiute Tribes of Arizona must be sent to the Phoenix Regional Director at the address listed in paragraph (b)(10) of this section. Notices to the Zuni Tribe of the Zuni Reservation must be sent to the Albuquerque Regional Director at the address listed in paragraph (b)(6 of this section).

(10) For child-custody proceedings in Arizona (exclusive of notices to the Navajo Nation from those counties listed in paragraph (b)(9) of this section), Nevada, or Utah (exclusive of San Juan County), notices must be sent to the following address: Phoenix Regional Director, Bureau of Indian Affairs, 1 North First Street, P.O. Box 10, Phoenix, Arizona 85001.

(11) For child-custody proceedings in Idaho, Oregon, or Washington, notices must be sent to the following address: Portland Regional Director, Bureau of Indian Affairs, 911 NE 11th Avenue, Portland, Oregon 97232. All notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, located in the Montana counties of Flathead, Lake, Missoula, and Sanders, must also be sent to the Portland Regional Director.

(12) For child-custody proceedings in California or Hawaii, notices must be sent to the following address: Sacramento Regional Director, Bureau of Indian Affairs, Federal Office Building, 2800 Cottage Way, Sacramento, California 95825.

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

(d) Upon request from a party to an Indian child-custody proceeding, the Secretary will make a reasonable attempt to identify and locate the child's Tribe, parents, or Indian custodians to assist the party seeking the information.

■ 4. Revise § 23.71 to read as follows:

§ 23.71 Recordkeeping and information availability.

(a) The Division of Human Services, Bureau of Indian Affairs (BIA), is authorized to receive all information and to maintain a central file on all State Indian adoptions. This file is confidential and only designated persons may have access to it.

(b) Upon the request of an adopted Indian who has reached age 18, the adoptive or foster parents of an Indian child, or an Indian Tribe, BIA will disclose such information as may be necessary for purposes of Tribal enrollment or determining any rights or benefits associated with Tribal membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, BIA must certify to the Indian child's Tribe, where the information warrants, that the child's parentage and other circumstances entitle the child to enrollment under the criteria established by such Tribe.

(c) BIA will ensure that the confidentiality of this information is maintained and that the information is not subject to the Freedom of Information Act, 5 U.S.C. 552, as amended.

■ 5. Add subpart I to read as follows:

Subpart I—Indian Child Welfare Act Proceedings

General Provisions

Sec.

Pretrial Requirements

Petitions To Transfer to Tribal Court

Adjudication of Involuntary Proceedings

Voluntary Proceedings

Subpart I—Indian Child Welfare Act Proceedings

General Provisions

§ 23.101 What is the purpose of this subpart?

The regulations in this subpart clarify the minimum Federal standards governing implementation of the Indian Child Welfare Act (ICWA) to ensure that ICWA is applied in all States consistent with the Act's express language, Congress's intent in enacting the statute, and to promote the stability and security of Indian tribes and families.

§ 23.102 What terms do I need to know?

The following terms and their definitions apply to this subpart. All other terms have the meanings assigned in § 23.2.

Agency means a nonprofit, for-profit, or governmental organization and its employees, agents, or officials that performs, or provides services to biological parents, foster parents, or adoptive parents to assist in the administrative and social work necessary for foster, preadoptive, or adoptive placements.

Indian organization means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians or a Tribe, or a majority of whose members are Indians.

§ 23.103 When does ICWA apply?

(a) ICWA includes requirements that apply whenever an Indian child is the subject of:

(1) A child-custody proceeding, including:

(i) An involuntary proceeding;

(ii) A voluntary proceeding that could prohibit the parent or Indian custodian from regaining custody of the child upon demand; and

(iii) A proceeding involving status offenses if any part of the proceeding results in the need for out-of-home placement of the child, including a foster-care, preadoptive, or adoptive placement, or termination of parental rights.

(2) An emergency proceeding.

(b) ICWA does not apply to:

(1) A Tribal court proceeding;

(2) A proceeding regarding a criminal act that is not a status offense;

(3) An award of custody of the Indian child to one of the parents including, but not limited to, an award in a divorce proceeding; or

(4) A voluntary 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, chosen for the Indian child and that does not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand.

(c) If a proceeding listed in paragraph (a) of this section concerns a child who meets the statutory definition of ''Indian child,'' then ICWA will apply to that proceeding. In determining whether ICWA applies to a proceeding, the State court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum.

(d) If ICWA applies at the commencement of a proceeding, it will not cease to apply simply because the child reaches age 18 during the pendency of the proceeding.

§ 23.104 What provisions of this subpart apply to each type of child-custody proceeding?

The following table lists what sections of this subpart apply to each type of child-custody proceeding identified in § 23.103(a):

Section	Type of proceeding
23.101–23.106 (General Provisions)	Emergency, Involuntary, Voluntary.
Pretrial Requirements:	
23.107 (How should a State court determine if there is reason to know the child is an Indian child?).	Emergency, Involuntary, Voluntary.
23.108 (Who makes the determination as 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?).	Emergency, Involuntary, Voluntary.
23.109 (How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?).	Emergency, Involuntary, Voluntary.
23.110 (When must a State court dismiss an action?)	Involuntary, Voluntary.
23.111 (What are the notice requirements for a child-custody proceeding involving an Indian child?).	Involuntary (foster-care placement and termination of parental rights).
23.112 (What time limits and extensions apply?)	Involuntary (foster-care placement and termination of parental rights).
23.113 (What are the standards for emergency proceedings involving an Indian child?)	Emergency.
23.114 (What are the requirements for determining improper removal?)	Involuntary.
Petitions to Transfer to Tribal Court:	
23.115 (How are petitions for transfer of a proceeding made?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).

Section	Type of proceeding
23.116 (What happens after a petition for transfer is made?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
23.117 (What are the criteria for ruling on transfer petitions?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
23.118 (How is a determination of ''good cause'' to deny transfer made?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
23.119 (What happens after a petition for transfer is granted?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
Adjudication of Involuntary Proceedings:	
23.120 (How does the State court ensure that active efforts have been made?)	Involuntary (foster-care placement and termination of parental rights).
23.121 (What are the applicable standards of evidence?)	Involuntary (foster-care placement and termination of parental rights).
23.122 (Who may serve as a qualified expert witness?)	Involuntary (foster-care placement and termination of parental rights).
23.123 Reserved	N/A.
Voluntary Proceedings:	
23.124 (What actions must a State court undertake in voluntary proceedings?)	Voluntary.
23.125 (How is consent obtained?)	Voluntary.
23.126 (What information must a consent document contain?)	Voluntary.
23.127 (How is withdrawal of consent to a foster-care placement achieved?)	Voluntary.
23.128 (How is withdrawal of consent to a termination of parental rights or adoption achieved?)	Voluntary.
Dispositions:	
23.129 (When do the placement preferences apply?)	Involuntary, Voluntary.
23.130 (What placement preferences apply in adoptive placements?)	Involuntary, Voluntary.
23.131 (What placement preferences apply in foster-care or preadoptive placements?)	Involuntary, Voluntary.
23.132 (How is a determination of ''good cause'' to depart from the placement preferences made?).	Involuntary, Voluntary.
Access:	
23.133 (Should courts allow participation by alternative methods?)	Emergency, Involuntary.
23.134 (Who has access to reports and records during a proceeding?)	Emergency, Involuntary.
23.135 Reserved.	N/A.
Post-Trial Rights & Responsibilities:	
23.136 (What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?).	Involuntary (if consent given under threat of removal), voluntary.
23.137 (Who can petition to invalidate an action for certain ICWA violations?)	Emergency (to extent it involved a specified violation), involuntary, voluntary.
23.138 (What are the rights to information about adoptees' Tribal affiliations?)	Emergency, Involuntary, Voluntary.
23.139 (Must notice be given of a change in an adopted Indian child's status?)	Involuntary, Voluntary.
Recordkeeping:	
23.140 (What information must States furnish to the Bureau of Indian Affairs?)	Involuntary, Voluntary.
23.141 (What records must the State maintain?)	Involuntary, Voluntary.
23.142 (How does the Paperwork Reduction Act affect this subpart?)	Emergency, Involuntary, Voluntary.
Effective Date:	
23.143 (How does this subpart apply to pending proceedings?)	Emergency, Involuntary, Voluntary.
Severability:	
23.144 (What happens if some portion of part is held to be invalid by a court of competent jurisdiction?).	Emergency, Involuntary, Voluntary.

Note: For purposes of this table, status-offense child-custody proceedings are included as a type of involuntary proceeding.

§ 23.105 How do I contact a Tribe under the regulations in this subpart?

To contact a Tribe to provide notice or obtain information or verification under the regulations in this subpart, you should direct the notice or inquiry as follows:

(a) Many Tribes designate an agent for receipt of ICWA notices. The BIA publishes a list of Tribes' designated Tribal agents for service of ICWA notice in the **Federal Register** each year and makes the list available on its Web site at *www.bia.gov.*

(b) For a Tribe without a designated Tribal agent for service of ICWA notice, contact the Tribe to be directed to the appropriate office or individual.

(c) If you do not have accurate contact information for a Tribe, or the Tribe contacted fails to respond to written inquiries, you should seek assistance in contacting the Indian Tribe from the BIA local or regional office or the BIA's Central Office in Washington, DC (see *www.bia.gov*).

§ 23.106 How does this subpart interact with State and Federal laws?

(a) The regulations in this subpart provide minimum Federal standards to ensure compliance with ICWA.

(b) Under section 1921 of ICWA, where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires the State or Federal court to apply the higher State or Federal standard.

Pretrial Requirements

§ 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.

§ 23.108 Who makes the determination as 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.

§ 23.109 How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?

(a) If the Indian child is a member or eligible for membership in only one Tribe, that Tribe must be designated as the Indian child's Tribe.

(b) If the Indian child meets the definition of ''Indian child'' through more than one Tribe, deference should be given to the Tribe in which the Indian child is already a member, unless otherwise agreed to by the Tribes.

(c) If an Indian child meets the definition of ''Indian child'' through more than one Tribe because the child is a member in more than one Tribe or the child is not a member of but is eligible for membership in more than one Tribe, the court must provide the opportunity in any involuntary child-custody proceeding for the Tribes to determine which should be designated as the Indian child's Tribe.

(1) If the Tribes are able to reach an agreement, the agreed-upon Tribe should be designated as the Indian child's Tribe.

(2) If the Tribes are unable to reach an agreement, the State court designates, for the purposes of ICWA, the Indian Tribe with which the Indian child has the more significant contacts as the Indian child's Tribe, taking into consideration:

(i) Preference of the parents for membership of the child;

(ii) Length of past domicile or residence on or near the reservation of each Tribe;

(iii) Tribal membership of the child's custodial parent or Indian custodian; and

(iv) Interest asserted by each Tribe in the child-custody proceeding;

(v) Whether there has been a previous adjudication with respect to the child by a court of one of the Tribes; and

(vi) Self-identification by the child, if the child is of sufficient age and capacity to meaningfully self-identify.

(3) A determination of the Indian child's Tribe for purposes of ICWA and the regulations in this subpart do not constitute a determination for any other purpose.

§ 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.

§ 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.

§ 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.

§ 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.

§ 23.114 What are the requirements for determining improper removal?

(a) If, in the course of any child-custody proceeding, any party asserts or the court has reason to believe that the Indian child may have been improperly removed from the custody of his or her parent or Indian custodian, or that the Indian child has been improperly retained (such as after a visit or other temporary relinquishment of custody), the court must expeditiously determine whether there was improper removal or retention.

(b) If the court finds that the Indian child was improperly removed or retained, the court must terminate the proceeding and the child must be returned immediately to his or her parent or Indian custodian, unless returning the child to his parent or Indian custodian would subject the child to substantial and immediate danger or threat of such danger.

Petitions To Transfer to Tribal Court

§ 23.115 How are petitions for transfer of a proceeding made?

(a) Either parent, the Indian custodian, or the Indian child's Tribe may request, at any time, orally on the record or in writing, that the State court transfer a foster-care or termination-of-parental-rights proceeding to the jurisdiction of the child's Tribe.

(b) The right to request a transfer is available at any stage in each foster-care or termination-of-parental-rights proceeding.

§ 23.116 What happens after a petition for transfer is made?

Upon receipt of a transfer petition, the State court must ensure that the Tribal court is promptly notified in writing of the transfer petition. This notification may request a timely response regarding whether the Tribal court wishes to decline the transfer.

§ 23.117 What are the criteria for ruling on transfer petitions?

Upon receipt of a transfer petition from an Indian child's parent, Indian custodian, or Tribe, the State court must transfer the child-custody proceeding unless the court determines that transfer is not appropriate because one or more of the following criteria are met:

(a) Either parent objects to such transfer;

(b) The Tribal court declines the transfer; or

(c) Good cause exists for denying the transfer.

§ 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.

§ 23.119 What happens after a petition for transfer is granted?

(a) If the Tribal court accepts the transfer, the State court should expeditiously provide the Tribal court with all records related to the proceeding, including, but not limited to, the pleadings and any court record.

(b) The State court should work with the Tribal court to ensure that the transfer of the custody of the Indian child and of the proceeding is accomplished smoothly and in a way that minimizes the disruption of services to the family.

Adjudication of Involuntary Proceedings

§ 23.120 How does the State court ensure that active efforts have been made?

(a) Prior to ordering an involuntary foster-care placement or termination of parental rights, the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful.

(b) Active efforts must be documented in detail in the record.

§ 23.121 What are the applicable standards of evidence?

(a) The court must not order a foster-care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(b) The court must not order a termination of parental rights for an Indian child unless evidence beyond a reasonable doubt is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(c) For a foster-care placement or termination of parental rights, the evidence must 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.

(d) Without a causal relationship identified in paragraph (c) of this section, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.

§ 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.

§ 23.123 [Reserved]

Voluntary Proceedings

§ 23.124 What actions must a State court undertake in voluntary proceedings?

(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. As described in § 23.107, where a consenting parent requests anonymity, a Tribe receiving such information must keep relevant documents and information confidential.

(c) State courts must ensure that the placement for the Indian child complies with §§ 23.129–23.132.

§ 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.

§ 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.

§ 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.

§ 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.

Dispositions

§ 23.129 When do the placement preferences apply?

(a) In any preadoptive, adoptive, or foster-care placement of an Indian child, the placement preferences specified in § 23.130 and § 23.131 apply.

(b) Where a consenting parent requests anonymity in a voluntary proceeding, the court must give weight to the request in applying the preferences.

(c) The placement preferences must be applied in any foster-care, preadoptive, or adoptive placement unless there is a determination on the record that good cause under § 23.132 exists to not apply those placement preferences.

§ 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.

§ 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.

§ 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.

Access

§ 23.133 Should courts allow participation by alternative methods?

If it possesses the capability, the court should allow alternative methods of participation in State-court child-custody proceedings involving an Indian child, such as participation by telephone, videoconferencing, or other methods.

§ 23.134 Who has access to reports and records during a proceeding?

Each party to an emergency proceeding or a foster-care-placement or termination-of-parental-rights proceeding under State law involving an Indian child has a right to timely examine all reports and other documents filed or lodged with the court upon which any decision with respect to such action may be based.

§ 23.135 [Reserved]

Post-Trial Rights & Responsibilities

§ 23.136 What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?

(a) Within two years after a final decree of adoption of any Indian child by a State court, or within any longer period of time permitted by the law of the State, the State court may invalidate the voluntary adoption upon finding that the parent's consent was obtained by fraud or duress.

(b) Upon the parent's filing of a petition to vacate the final decree of adoption of the parent's Indian child, the court must give notice to all parties to the adoption proceedings and the Indian child's Tribe and must hold a hearing on the petition.

(c) Where the court finds that the parent's consent was obtained through fraud or duress, the court must vacate the final decree of adoption, order the consent revoked, and order that the child be returned to the parent.

§ 23.137 Who can petition to invalidate an action for certain ICWA violations?

(a) Any of the following may petition any court of competent jurisdiction to invalidate an action for foster-care placement or termination of parental rights under state law where it is alleged that 25 U.S.C. 1911, 1912, or 1913 has been violated:

(1) An Indian child who is or was the subject of any action for foster-care placement or termination of parental rights;

(2) A parent or Indian custodian from whose custody such child was removed; and

(3) The Indian child's Tribe.

(b) Upon a showing that an action for foster-care placement or termination of parental rights violated any provision of 25 U.S.C. 1911, 1912, or 1913, the court must determine whether it is appropriate to invalidate the action.

(c) To petition for invalidation, there is no requirement that the petitioner's rights under ICWA were violated; rather, a petitioner may challenge the action based on any violations of 25 U.S.C. 1911, 1912, or 1913 during the course of the child-custody proceeding.

§ 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 parents and provide such other information necessary to protect any rights, which may include Tribal membership, resulting from the individual's Tribal relationship.

§ 23.139 Must notice be given of a change in an adopted Indian child's status?

(a) If an Indian child has been adopted, the court must notify, by registered or certified mail with return receipt requested, the child's biological parent or prior Indian custodian and the Indian child's Tribe whenever:

(1) A final decree of adoption of the Indian child has been vacated or set aside; or

(2) The adoptive parent has voluntarily consented to the termination of his or her parental rights to the child.

(b) The notice must state the current name, and any former name, of the Indian child, inform the recipient of the right to petition for return of custody of the child, and provide sufficient information to allow the recipient to participate in any scheduled hearings.

(c) A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice and filing the waiver with the court.

(1) Prior to accepting the waiver, the court must explain the consequences of the waiver and explain how the waiver may be revoked.

(2) The court must certify that the terms and consequences of the waiver and how the waiver may be revoked were explained 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.

(3) Where confidentiality is requested or indicated, execution of the waiver 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.

(4) The biological parent or Indian custodian may revoke the waiver at any time by filing with the court a written notice of revocation.

(5) A revocation of the right to receive notice does not affect any child-custody proceeding that was completed before the filing of the notice of revocation.

Recordkeeping

§ 23.140 What information must States furnish to the Bureau of Indian Affairs?

(a) Any State court entering a final adoption decree or order in any voluntary or involuntary Indian-child adoptive placement must furnish a copy of the decree or order within 30 days to the Bureau of Indian Affairs, Chief, Division of Human Services, 1849 C Street NW., Mail Stop 4513 MIB, Washington, DC 20240, along with the following information, in an envelope marked ''Confidential'':

(1) Birth name and birthdate of the Indian child, and Tribal affiliation and name of the Indian child after adoption;

(2) Names and addresses of the biological parents;

(3) Names and addresses of the adoptive parents;

(4) Name and contact information for any agency having files or information relating to the adoption;

(5) Any affidavit signed by the biological parent or parents asking that their identity remain confidential; and

(6) Any information relating to Tribal membership or eligibility for Tribal membership of the adopted child.

(b) If a State agency has been designated as the repository for all State-court adoption information and is fulfilling the duties described in paragraph (a) of this section, the State courts in that State need not fulfill those same duties.

§ 23.141 What records must the State maintain?

(a) The State must maintain a record of every voluntary or involuntary foster-care, preadoptive, and adoptive

placement of an Indian child and make the record available within 14 days of a request by an Indian child's Tribe or the Secretary.

(b) The record must contain, at a minimum, the petition or complaint, all substantive orders entered in the child-custody proceeding, the complete record of the placement determination (including, but not limited to, the findings in the court record and the social worker's statement), and, if the placement departs from the placement preferences, detailed documentation of the efforts to comply with the placement preferences.

(c) A State agency or agencies may be designated to be the repository for this information. The State court or agency should notify the BIA whether these records are maintained within the court system or by a State agency.

§ 23.142 How does the Paperwork Reduction Act affect this subpart?

The collections of information contained in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned OMB Control Number 1076–0186. Response is required to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless the form or regulation requesting the information displays a currently valid OMB Control Number. Send comments regarding this collection of information, including suggestions for reducing the burden, to the Information Collection Clearance Officer—Indian Affairs, 1849 C Street NW., Washington, DC 20240.

Effective Date

§ 23.143 How does this subpart apply to pending proceedings?

None of the provisions of this subpart affects a proceeding under State law for foster-care placement, termination of parental rights, preadoptive placement, or adoptive placement that was initiated prior to December 12, 2016, but the provisions of this subpart apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

Severability

§ 23.144 What happens if some portion of this part is held to be invalid by a court of competent jurisdiction?

If any portion of this part is determined to be invalid by a court of competent jurisdiction, the other portions of the part remain in effect. For example, the Department has considered separately whether the provisions of this part apply to involuntary and voluntary proceedings; thus, if a particular provision is held to be invalid as to one type of proceeding, it is the Department's intent that it remains valid as to the other type of proceeding.

Dated: June 6, 2016.

Lawrence S. Roberts,

Acting Assistant Secretary—Indian Affairs.

[FR Doc. 2016–13686 Filed 6–13–16; 8:45 am]

BILLING CODE 4310–02–P

Truth and Reconciliation Materials

December, 2015: The Lakota People's Law Project calls on the U.S. government to follow the example set by Canada, South Africa and others and set up a federal Truth and Reconciliation Commission to confront, work through and find solutions for the trauma that continues today as the legacy of the Boarding School Era. LPLP asserts that the current state foster care systems perpetuate the ideals and functions of the boarding school system, and that part of reconciliation must be a fundamental change in Native American Foster Care.

We call upon the United States Congress to begin a Truth and Reconciliation process to provide redress to Native Americans for the harmful legacy of the Boarding School Era.

Excerpt of 2015 Article published by the Carnegie Council for Ethics in International Affairs http://www.carnegiecouncil.org/publications/ethics_online/0102:

South Africa: A Model Approach

The South African TRC is widely praised for its emphasis upon restorative justice. Unlike previous truth commissions in Latin America, it did not offer widespread amnesty to perpetrators, but instead enticed them to come forward and admit their guilt in exchange for amnesty case-by-case. The TRC formed committees that ensured that both rehabilitation and reparations would be provided on an individual basis. Live broadcasts of South Africans—black, white, Indian, and colored[1]—testifying before the commissioners in a court-like setup were shown internationally. It was not long before the world, and most importantly South Africans, came to learn of the many hidden atrocities that had been endured under the apartheid system. There is no doubt that the South African TRC process has resulted in a model of public reconciliation which deserves attention from all areas of the globe, including those in the United States who are searching for a mechanism to ameliorate a legacy of systemic racism. However, it is essential to recognize that the South African TRC favored an individualized approach that placed victims and perpetrators at the center of the process, rather than the apartheid system and its structures of governance, and that this framing may limit the applicability of the South African model to other settings.

As Mahmood Mamdani points out, although the South African TRC labeled apartheid as a "crime against humanity," it did not formally address the system of apartheid and its legality, but rather the individuals who were affected by it.[2] In other words, although the TRC was branded as a national activity, in reality its focus upon 'victims' and 'perpetrators' individualized the process of reconciliation and allowed the system of apartheid, and those who worked within it, to remain in the shadows, hidden from scrutiny. Any TRC model that bypasses the role of institutions and structures of governance and focuses only on individuals is going to be heavily flawed if it is deployed to address structural racism in the United States. The South African TRC model, which individualizes the process of reconciliation after racialized and ethnicized violence, has extreme

shortcomings when applied to a North American setting in which institutions, as well as individual actions, must take center stage.

Canada's Truth and Reconciliation Process

The United States need not look far for a country that chose to establish a national truth and reconciliation commission that is currently examining historic racist violence against its indigenous peoples. The Canadian TRC model is a unique process: it is the first to be taking place in a society not undergoing fundamental government transition, as seen with the rest of TRCs. In this, at least, it offers the United States a basis for comparison. The Truth and Reconciliation Commission of Canada began its work in 2009 and is focused on the Indian Residential School (IRS) system and the abuses perpetrated by the church- and government-run institutions against First Nations, Métis,[3] and Inuit children. The Canadian TRC model, like South Africa's, can be characterized as very top-down, confined as it is to a mandate that results from the Indian Residential School Settlement Agreement, a lawsuit settlement reached between the Canadian government, the Counsel of the Churches that ran the schools, the Assembly of First Nations, Aboriginal Peoples organizations, and IRS survivors. The Canadian TRC has treated the IRS system, much like South Africa and apartheid, as a crime against humanity and has not been shy to label the system as one that perpetuated cultural genocide. At the same time, however, it repeats the same mistake: the structures of governance that created the IRS system have not been critically examined.

Moreover, the IRS system is individualized as an isolated occurrence, and thus separated from other anti-Aboriginal policies both before and after the IRS system was in operation. In the same spirit, it has engaged First Nations and Inuit communities on a case-by-case basis, compartmentalizing the process as opposed to allowing the communities to lead the process themselves in a more culturally and historically nuanced way. Again, this is not to say that the Canadian process is fatally flawed. The acknowledgement of the abuses that took place in the IRS system is an important first step to an improved relationship between Aboriginal and non-Aboriginal communities. The problem that remains is that the majority white, non-Aboriginal populace has been largely disengaged from the process—something that could also be detrimental to an American process, if this model were adopted in the United States. Additionally, the way in which the TRC emerged—from a legal process that required it, rather than a community that led it—raises questions about the political will that exists to continue wider reconciliation efforts after the Canadian TRC's mandate expires in June 2015. The Canadian TRC offers significant lessons from which the United States can learn. Yet in fact, there may be no better lessons than those already learned within its own borders.

The Maine Wabanaki-State Child Welfare TRC: A Possibility

In 2012, the state of Maine and the Wabanaki tribal governments located within its boundaries (Houlton Band of Maliseets, the Passamaquoddy at Sipayik and Motahkomikuk, the Aroostook Band of Micmacs, and the Penobscot Nation), signed on to a joint tribal-state TRC that was designed at the grassroots, creating a hybrid TRC model. The Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission (MWTRC) has been specifically mandated to investigate and document an era in the state's history that saw Native children being sent into

foster care at an alarmingly high rate, calling into question the state's adherence to the federal Indian Child Welfare Act. This process is unique in that it is the first government-endorsed TRC in the United States and it is also, as Eduardo Gonzalez of the International Center for Transitional Justice (ICTJ) recognizes, "trying to throw light over issues of marginalization, and discrimination, to cast some light on race relations in the state of Maine."

Learning lessons from the TRCs in South Africa, Canada, and Greensboro, the MWTRC has managed to pioneer a very different model. Like South Africa, the MWTRC drafted its mandate and formed a commission, in this case to inquire into the forced removal of Native children and those affected during the process, while also (unlike South Africa) placing the state and its child welfare system under examination. The truth-telling and healing mechanisms of the MWTRC are very similar to those seen in the Canadian TRC process, such as sharing circles and private testimony. The MWTRC also seeks out to change child welfare practices fundamentally and seeks systemic reconciliation between the child welfare practices of the state and those of the tribes, all of which will be outlined in its recommendations to the tribal and state governments at the conclusion of its mandate in June 2015.

Learning from Greensboro, the MWTRC obtained the signatures of the five tribal governments and the state of Maine, and, like Greensboro, also formed an organization (i.e. Maine Wabanaki REACH) to help fulfill the specific and wider goals of the TRC within and beyond its mandate. The MWTRC operates within the whitest state in the United States and has a relatively small Native population in comparison to other states. Yet it has managed to engage both Native and non-Native populations; being both very responsive to the needs of tribal communities and having the wherewithal to navigate non-Native networks within one of the more sparsely populated and geographically isolated states of the east coast. However, it still lacks widespread understanding in the state amongst the non-Native population, and the grassroots nature of the MWTRC, like Greensboro, has resulted in funding challenges. Nevertheless, the MWTRC may provide the most innovative model for others in the country, and indeed the world, to replicate and adapt accordingly.

Links to other materials on Truth and Reconciliation

Canada: www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf

Maine: www.mainewabanakitrc.org/report/

Minnesota: www.house.leg.state.mn.us/resolutions/ls86/0/HC0004.htm

Information Bulletin re Enforcement of Tribal Court Protection Orders

California Department of Justice **DIVISION OF LAW ENFORCEMENT** **Larry J. Wallace, Director**	# *INFORMATION BULLETIN*	
Subject: Enforcement of tribal court protection orders	***No.*** DLE-2016-03 *Date:* 11/29/16	*Contact for information:* Larry J. Wallace, Director Division of Law Enforcement (916) 319-8200

TO: All State and Local Law Enforcement Agencies

Both California and federal law require all law enforcement officers of this state to enforce tribal court protection orders, sometimes called "protective orders." (Cal. Fam. Code, §§ 6400-6409 [Uniform Interstate Enforcement of Domestic Violence Protective Orders Act]; 18 U.S.C. § 2265 [Violence Against Women Act; federal law requiring "full faith and credit" be given to tribal court protection orders].)

Presentation of a protection order that identifies both the protected individual and the individual against whom enforcement is sought and, on its face, appears to be currently in effect constitutes probable cause to believe that a valid tribal court protection order exists. (Cal. Fam. Code, § 6403, subd. (a).)

Once there is probable cause to believe that a valid tribal court protection order exists, a law enforcement officer must enforce the order as if it were an order issued by a California court. (Cal. Fam. Code, § 6403, subd. (a); 18 U.S.C. § 2265(a).) If a protection order is not presented, a law enforcement officer may consider other information to determine if there is probable cause to believe that a valid order exists. (Cal. Fam. Code § 6403, subd. (b).)

Law enforcement officers must enforce valid tribal court protection orders and shall not require any of the following:

(1) Presentation of a certified copy of the tribal court protection order. The order may be inscribed on any tangible medium or stored in an electronic or other medium if it is retrievable in perceivable form. (Cal. Fam. Code, § 6403, subd. (a).)
(2) Registration or filing of the protection order with the state. (Cal. Fam. Code, § 6403, subd. (d).)
(3) Verification in any statewide database (for example, the California Law Enforcement Telecommunications System (CLETS) or the California Restraining and Protective Order System (CARPOS)). (Cal. Fam. Code § 6403, subd. (d).)

If a law enforcement officer determines that an otherwise valid tribal court protection order cannot be enforced because the respondent (i.e., the individual against whom enforcement is sought) has not been notified or served with the order, the officer shall inform him or her of the order, make a reasonable effort to serve the order, and allow him or her a reasonable opportunity to comply with the order before enforcing it. Verbal notice of the order is sufficient. (Cal. Fam. Code, § 6403, subd. (c).)

Sincerely,

Larry J. Wallace, Director
Division of Law Enforcement

For KAMALA D. HARRIS
Attorney General

Tribal Representation in ICWA Cases and Pro Hac Fees

PRO HAC VICE

A person who is not a member of the State Bar of California but who is eligible to practice law in another state may act as counsel pro hac vice, provided certain conditions are met.

Frequently Asked Questions

In addition to the requirement that an active member of the State Bar of California is associated as attorney of record, an attorney is **not eligible** to appear as counsel pro hac vice if he or she is:

- A resident of the state of California
- Regularly employed in the state of California
- Regularly engaged in substantial business, professional, or other activities in the state of California

For details about eligibility, see Rule 9.40 of the California Rules of Court.

Application Information

The State Bar does not have a standard application form for Pro Hac Vice. Applications are accepted in a form of copies of moving papers filed with the Court in which the out-of-state attorney wishes to appear.

A detailed list of what the application will need to include can be found in Rule 9.40.

Briefly, the application will need to include:

- the case name and number;
- the court name;
- a declaration by the out-of-state attorney containing his/her name, home and business address, where he/she is licensed to practice;
- a declaration indicating bar membership status in the attorney's home state; and
- the name, phone number, address and bar number of the California attorney of record.

NOTE: A copy of the application and notice of hearing must be sent to the State Bar's San Francisco office:

Pro Hac Vice Program
The State Bar of California
180 Howard St.
San Francisco, CA 94105
e-mail: ProHac@calbar.ca.gov
Phone: 415-538-2111

It is advisable to speak with the clerk of the court you are applying to for information regarding its requirements.

For additional information contact the State Bar's Office of Special Admissions and Specialization at **415-538-2100**.

- Fee information
- Credit Card Form

The State Bar of California, Office of Special Admissions/Specialization, accepts credit card payments for the following programs:

- Pro Hac Vice
- Out of State Attorney Arbitration Counsel
- Practical Training of Law Students

To pay with a MasterCard/Visa credit card, print the OSAAC Credit Card Form above and fax it to 415-538-2180 or mail it to:

The State Bar of California
Office of Special Admissions/Specialization
180 Howard St.
San Francisco, California, 94105

The fax number and mailing address are also listed on each form.

FREQUENTLY ASKED QUESTIONS

Collapse All

What is Pro Hac Vice (PHV)?

Pro Hac Vice allows an attorney who is not a member of The State Bar of California to appear in a pending California court proceeding. The attorney must be a member in good standing and eligible to practice before any bar of the United States of America.

What are the requirements of PHV?

According to California Rules of Court rule 9.40, out-of-state attorneys may apply to appear in a California state court Pro Hac Vice (PHV), provided they meet the rule requirements. The out-of-state attorney must provide the name and address of the California attorney of record and disclose the title of court in which the out-of-state attorney has applied to appear pro hac vice within the preceding two years.

The application must be filed with the court in which the out-of-state attorney wishes to appear; a copy of the application is to be served on The State Bar of California. The State Bar is considered the custodian of records for PHV applications and does not approve or disapprove the PHV application.

Approval of the application is determined by the court in which the attorney wishes to appear.

Where do I mail the State Bar's copy of my application?

The State Bar of California
Office of Admissions
180 Howard Street
San Francisco, CA 94105

What is the State Bar's processing fee for a PHV application?

The filing fee is $50. per attorney, per case.

Can I fax my application to the State Bar?

Do not fax an application since the $50 processing fee is required with the accompanying application.

Does the State Bar have a standard application form for PHV?

Not at this time. Applications are accepted in a form of copies of moving papers filed with the Court in which the out-of-state attorney wishes to appear.

What information is required in a PHV application?

A detailed list of what the application will need to include can be found in rule 9.40.

Briefly. the application will need to include:

- the case name and number
- the court name
- a declaration by the out-of-state attorney containing:
  - the attorney's name, home and business address
  - where the attorney is licensed to practice
  - a statement indicating the member's "good standing" status in their home state
  - the name, phone number, address and bar number of the California attorney of record

It is advisable to speak with the clerk of the court you are applying to for information regarding their own requirements.

What type of matters are within the jurisdiction of practicing PHV in the state of California?

Appearing PHV in California is limited to California state matters only. Federal matters are not within our jurisdiction.

Will I get a confirmation or receipt from the State Bar when my application has been processed?

Yes, you will receive a confirmation either by mail, or by fax. Most judges will accept the listing of the State Bar's name, address, and declaration of payment on a proof of service as sufficient proof that the State Bar has received notice of the application -although this is based on the discretion of the individual judge.

I am in the process of moving to California or have just moved to California. Can I still apply PHV?

No. If you reside in California you will not be eligible for a pro hac vice appearance.

How many times may I appear Pro Hac Vice?

There is no hard and fast rule to determine this. It is usually up to the discretion of the particular court. The spirit of the rule that the Court will follow mandates that out-of-state attorneys not abuse the PHV application by using it on a regular basis as a substitute for practicing in California.

Am I required to serve the State Bar with copies of subsequent filings made with the Court?

No. You are only required to serve the initial moving papers on The State Bar of California.

Does my California attorney of record need to be present at all court appearances?

Since every court has different requirements, please check with the Court in which the application is made.

Turtle Talk
Indigenous Law and Policy Center Blog
Michigan State University College of Law

Proposed Court Rule in Michigan to Waive Pro Hac Fees and Other Limits for Out of State Tribal ICWA Attorneys

Posted on November 3, 2016 by Kate Fort

Here.

In ICWA cases, the tribe has a right of intervention in whatever state court is hearing the case of the tribal child. While it is true that the "tribal representative" does not have to be attorneys, when they *are* attorneys, there may be concerns about practicing without finding local counsel or using the local "pro hac" rule. Michigan has proposed a court rule that would waive those requirements for tribal attorneys representing the tribe in a state court where the attorney is not barred. This proposed rule is in direct response a number of requests from tribal ICWA attorneys nationwide. We are hopeful other states will consider a similar rule (though in Nebraska this is right is guaranteed by statute, which is another great fix). This rule was proposed by the Michigan Tribal-State Judicial Forum.

Also, if you are an out of state attorney who would benefit from this proposed Rule (or in state) please send in comments by March 1.

Related

ICT Article on Michigan Bid to Codify ICWA
In "Author: Matthew L.M. Fletcher"

ICT Article on Indian Child Welfare Act
In "Author: Matthew L.M. Fletcher"

BIA Proposes Federal Rule (!) to Govern ICWA Implementation
In "Author: Kate E. Fort"

This entry was posted in Author: Kate E. Fort, Child Welfare, ICWA and tagged court rule, ICWA, intervention, MIFPA, party status, pro hac, tribal representative. Bookmark the permalink.

California Rules of Court

Rule 9.40. Counsel pro hac vice

(a) Eligibility

A person who is not a member of the State Bar of California but who is a member in good standing of and eligible to practice before the bar of any United States court or the highest court in any state, territory, or insular possession of the United States, and who has been retained to appear in a particular cause pending in a court of this state, may in the discretion of such court be permitted upon written application to appear as counsel *pro hac vice*, provided that an active member of the State Bar of California is associated as attorney of record. No person is eligible to appear as counsel *pro hac vice* under this rule if the person is:

(1) A resident of the State of California;

(2) Regularly employed in the State of California; or

(3) Regularly engaged in substantial business, professional, or other activities in the State of California.

(Subd (a) amended effective January 1, 2007.)

(b) Repeated appearances as a cause for denial

Absent special circumstances, repeated appearances by any person under this rule is a cause for denial of an application.

(Subd (b) lettered effective January 1, 2007; adopted as part of subd (a) effective September 13, 1972.)

(c) Application

(1) strong] *Application in superior court*

A person desiring to appear as counsel *pro hac vice* in a superior court must file with the court a verified application together with proof of service by mail in accordance with Code of Civil Procedure section 1013a of a copy of the application and of the notice of hearing of the application on all parties who have appeared in the cause and on the State Bar of California at its San Francisco office. The notice of hearing must be given at the time prescribed in Code of Civil Procedure section 1005 unless the court has prescribed a shorter period.

(2) *Application in Supreme Court or Court of Appeal*

An application to appear as counsel *pro hac vice* in the Supreme Court or a Court of Appeal must be made as provided in rule 8.54, with proof of service on all parties who have appeared in the cause and on the State Bar of California at its San Francisco office.

(Subd (c) amended and relettered effective January 1, 2007; adopted as part of subd (b) effective September 13, 1972; subd (b) previously amended effective October 3, 1973, September 3, 1986, January 17, 1991, and March 15, 1991.)

(d) Contents of application

The application must state:

(1) The applicant's residence and office address;

(2) The courts to which the applicant has been admitted to practice and the dates of admission;

(3) That the applicant is a member in good standing in those courts;

(4) That the applicant is not currently suspended or disbarred in any court;

(5) The title of court and cause in which the applicant has filed an application to appear as counsel *pro hac vice* in this state in the preceding two years, the date of each application, and whether or not it was granted; and

(6) The name, address, and telephone number of the active member of the State Bar of California who is attorney of record.

(Subd (d) amended and lettered effective January 1, 2007; adopted as part of subd (b) effective September 13, 1972; subd (b) previously amended effective October 3, 1973, September 3, 1986, January 17, 1991, and March 15, 1991.)

(e) Fee for application

An applicant for permission to appear as counsel *pro hac vice* under this rule must pay a reasonable fee not exceeding $50 to the State Bar of California with the copy of the application and the notice of hearing that is served on the State Bar. The Board of Governors of the State Bar of California will fix the amount of the fee:

(1) To defray the expenses of administering the provisions of this rule that are applicable to the State Bar and the incidental consequences resulting from such provisions; and

(2) Partially to defray the expenses of administering the Board's other responsibilities to enforce the provisions of the State Bar Act relating to the competent delivery of legal services and the incidental consequences resulting therefrom.

(Subd (e) amended and relettered effective January 1, 2007; adopted as subd (c) effective September 3, 1986.)

(f) Counsel *pro hac vice* subject to jurisdiction of courts and State Bar

A person permitted to appear as counsel *pro hac vice* under this rule is subject to the jurisdiction of the courts of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a member of the State Bar of California. The counsel *pro hac vice* must familiarize himself or herself and comply with the standards of professional conduct required of members of the State Bar of California and will be subject to the disciplinary jurisdiction of the State Bar with respect to any of his or her acts occurring in the course of such appearance. Article 5, chapter 4, division III of the Business and Professions Code and the Rules of Procedure of the State Bar govern in any investigation or proceeding conducted by the State Bar under this rule.

(Subd (f) amended and relettered effective January 1, 2007; previously relettered as subd (d) effective September 3, 1986.)

(g) Supreme Court and Court of Appeal not precluded from permitting argument in a particular case

This rule does not preclude the Supreme Court or a Court of Appeal from permitting argument in a particular case from a person who is not a member of the State Bar, but who is licensed to practice in another jurisdiction and who possesses special expertise in the particular field affected by the proceeding.

(Subd (g) amended and relettered effective January 1, 2007; previously relettered as subd (e) effective September 3, 1986.)

Rule 9.40 amended and renumbered effective January 1, 2007; adopted as rule 983 by the Supreme Court effective September 13, 1972; previously amended effective October 3, 1973, September 3, 1986, January 17, 1991, and March 15, 1991.

Protecting Children and Tribal Access to Child Abuse Central Index

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688
Telephone 415-865-4200 • Fax 415-865-4205 • TDD 415-865-4272

MEMORANDUM

Date
November 29, 2016

To
Tribal Court-State Court Forum (forum) Members

From
Jenny Walter
Supervising Attorney, Center for Children, Families & the Courts (CFCC)

Subject
Protecting Children and Tribal Access to Child Abuse Central Index

Action Requested
Review and Request Access

Deadline
December 15, 2016

Contact
Jenny Walter, CFCC
415-865-7687 phone
jennifer.walter@jud.ca.gov

This memorandum is in response to your request for more information about the Child Abuse Central Index (Index) and tribal access to this database. Delia Parr, California Indian Legal Services, brought this issue to the attention of the forum at its October teleconference.

The Index

In 1980, the California Legislature enacted Penal Code sections 11169 and 11170 that specifically directed the California Department of Justice (DOJ) to establish a statewide database[1] to maintain information regarding all substantiated reports of child abuse and severe neglect that are investigated in California. The information in this database or Index is available to a number of statutorily authorized persons and agencies, including law enforcement, county

[1] This database is known by the following names: the Automated Child Abuse System (ACAS), the Child Abuse Central Index (CACI) and the Index. The statute governing it is the Child Abuse and Neglect Reporting Act (Act). The regulations implementing the Act and specifically the Index are at Title 11 California Code of Regulations, Division 1, Chapter 9.

welfare agencies (including their foster care and child care licensing organizations) and county probation departments that are conducting a child abuse investigation associated with information contained in the database. (See Pen. Code § 11165.9.) It is also available to tribal agencies in limited circumstances—when seeking background criminal information for use in approving a home for the placement of a child and screening prospective employees who may have contact with children. (See Pen. Code § 11170(b)(3) and Welf. & Inst. C. § 10553.12.)

Generally, the Index is used to aid law enforcement investigations and prosecutions, and to provide notification of new child abuse investigation reports involving the same suspects and/or victims. Information is also used to help screen applicants for licensing or employment in child care facilities, foster homes, and adoptive homes. The purpose of allowing access to this information on a statewide basis is to quickly provide authorized agencies, including tribal agencies, with relevant information regarding individuals with a known or suspected history of abuse or neglect.

The Problem

While tribal agencies can obtain information from the Index, they cannot readily submit information to the Index. In practice, only certain agencies are authorized to investigate and report cases to DOJ for inclusion in the Index, and those agencies must have "conducted an active investigation." (Pen. C. § 11169(a).) Pen. Code § 11165.9 specifies those agencies and tribal agencies are not among them. If a tribal social service agency investigates and substantiates an incident of child abuse or severe neglect, the tribal agency can report that to a statutorily authorized agency, typically a county child welfare agency, which in turn must conduct an "active investigation" by:

- Assessing the nature and seriousness of the known or suspected abuse;
- Interviewing the victims and any known suspects and witnesses, when appropriate and/or available;
- Gathering and preserving evidence;
- Determining whether the incident is substantiated, inconclusive or unfounded; and
- Preparing a report that will be retained in the agency's files. (See 11 CCR § 901.)

If the county's investigation confirms the findings of the tribal agency, then it must notify the DOJ, notify the known or suspected child abuser, in writing, that he or she has been reported to the Index, and retain the investigative reports underlying the report. (Pen. Code § 11169.)

This practice poses several problems: (1) suspected or known abusers remain in the home of a child posing safety risks; (2) unnecessary duplication of effort by agencies; (3) delays in entry into the Index due to double investigations; and (4) barriers to sharing information among tribal and nontribal agencies that should be working together to protect children.

Potential Solutions

(1) Legislative change- adding tribal agencies to the list of authorized agencies in Penal Code § 11165.9.

(2) Seek DOJ interpretation to permit tribal agencies to submit reports directly to DOJ for inclusion in the Index.

(3) Seek DOJ interpretation of its regulations to exempt child welfare agencies from conducting an active investigation for reports made by tribal agencies and direct child welfare agencies to submit tribal reports to DOJ for entry into the Index.

The first solution would likely face challenges in the Legislature, and it may be unnecessary.

The second solution is the most direct because access to the Index rests with DOJ. The policy argument in favor of granting access is clear given the child safety concerns described above. The legal argument is presented below.

Federal law has numerous provisions that require a state or tribe to consider how children can be kept safe. (Part E of Title IV of the Social Security Act codified at 42 United States Code section 670 et seq. (Title IV-E).) Background check requirements for prospective foster and adoptive parents or guardians are one means. Several additional requirements for ensuring child safety with which a state or tribal child welfare program must comply include checking any child abuse and neglect registry maintained by a State/Indian Tribe in which the adults living in the home of a prospective foster or adoptive parent have resided in the preceding five years. Title IV-E at section 471(20)(A) requires criminal record clearances prior to approval of prospective foster and adoptive parents. Federal law contemplates that a tribe operating its own tribal social service agency would have the necessary tools to work with the state and county to ensure child safety. Thus, federal law strongly suggests tribes should have direct access to the Index to input relevant information.

Although reasoning from the converse, because the Act provides that Index information may be given to an investigator from an agency that is investigating the known or suspected case of child abuse or severe neglect (See Pen. Code § 11167(b)), that same agency should also be able to submit information to the Index.

Arguably, Penal Code § 11165.9 simply informs mandated and non-mandated reporters of child abuse and neglect where to make their reports and was never intended to limit access to the enumerated agencies. Even if the statutory list (See Pen. Code § 11166) does authorize access to the Index, it was not intended to be an exhaustive list. Because DOJ established the Index, it has the authority to give access to other entities, including tribal agencies.

The third solution, while better than the current situation, is less desirable than the first and second solutions, because of the potential for human error and delays. The Act specifies that

each of the agencies enumerated in statute are required to accept a child abuse report. (See Pen. Code § 11165.9.) Therefore, if one of these agencies receives a report of child abuse from a tribal entity, it must accept the report. A regulation that exempts the enumerated agencies from reinvestigating the report submitted by a tribal agency would release the agency from its obligation to conduct an "active investigation." Adding a regulation that implements Penal Code § 11169(c) to clarify that upon receipt of a tribal report, the agency enumerated in statute will promptly serve the notice on the known or suspected child abuser, in writing, that he or she has been reported to the Index, and retain the tribal investigative reports underlying the tribal agency's report, would ensure that the existing statutory procedures are followed.

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Date
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Rule and Form Proposals

JUDICIAL COUNCIL OF CALIFORNIA

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www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

[ItC prefix as assigned]-__

Title
Indian Child Welfare Act: Amend Rule 5.552 to allow tribal access consistent with Welfare and Institutions Code 827

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rule 5.552

Proposed by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A Juhas, Cochair

Tribal Court–State Court Forum
Hon. Abby Abinanti, Cochair
Hon. Dennis M. Perluss, Cochair

Action Requested
Review and submit comments by [deadline]

Proposed Effective Date
January 1, 2018

Contact
Ann Gilmour, Attorney
415-865-4207
ann.gilmour@jud.ca.gov
Jennifer Walter, Supervising Attorney
415-865-7687
jennifer.walter@jud.ca.gov

Executive Summary and Origin

The Family and Juvenile Law Advisory Committee (committee) and Tribal Court–State Court Forum (forum) jointly propose to amend California Rules of Court, rule 5.552 to conform to California statutory law. This proposal is in response to comments from practitioners and court staff advising that the discrepancies between the rule and statutory requirements were causing confusion.

Background

Effective January 1, 2015, Assembly Bill 1618 (Stats. 2014, Ch. 57, Sec. 1) added subparagraph (f) to section 827 of the Welfare and Institutions Code[1] to clarify the right of an Indian child's tribe to have access to the juvenile court file of a case involving that child. At that time, no changes were made to California Rules of Court rule 5.552, which implements this section. Contrary to section 827 as amended, rule 5.552 continues to require that representatives of an

[1] Unless otherwise noted, all further statutory references are to the Welfare and Institutions Code.

Indian child's tribe petition the juvenile court if the tribe wants access to the juvenile court file. This inconsistency has created confusion.

In addition, court staff have noted that rule 5.552(d)(1)(C) requires that notice of a petition for disclosure be served on "[t]he child", while the relevant statutes stipulate that notice be served on a child 10 years of age or older.[2] Commentators have noted that serving notice on an infant or young child makes no sense and is a waste of resources.

Because the Rules and Projects Committee of the California Judicial Council has requested that the Family and Juvenile Law Advisory Committee review rules to determine what language is unnecessarily duplicative of statutory language and recommend rule revisions as appropriate, the committee and forum are also recommending that rule language that is duplicative of statutory language be deleted. The rationale is that repetitions of statutory text in the rules of court necessitate that they be frequently amended when the underlying statutes are amended.

The Proposal

This proposal would:

- Rename rule to clarify that it covers transfers that between tribal and state court;
- Delete subdivision (b), which is duplicative of section 827(a). This deletion also addresses the inconsistency between the rule and subparagraph (f) of section 827;
- Renumber and amend subdivision (c) in light of the removal of subdivision (b);
- Revise and renumber subdivision (d)(1)(C) of rule 5.552 to require notice to a child only when the child is ten years of age or older in conformity with section 290.1 through 295;
- Revise and renumber subdivision (f) to remove language that is repetitive of section 828;
- Delete subdivision (g), which is repetitive of section 827(b)(2);
- Revise subdivision (h) to add the exception in new subdivision (i), which authorizes the filing of a motion to transfer a case back to state court when a tribal court determines that it is not in the best interest of the child or the parties to retain jurisdiction; and
- Add new subdivision (i), which describes the state court procedure when a tribal court with concurrent jurisdiction decides it is in the child's best interest for the case to be heard in state court.

[2] See Welf. & Inst. Code section 290.1 through 295.

These revisions will make the rule consistent with, but not repetitive of legislation and remove confusion.

Alternatives Considered

The committee and forum considered taking no action at this time. However, as discussed above, rule 5.552, as currently drafted, is inconsistent with statutory law. The inconsistency has caused confusion and results in unnecessary court motions and notices. This is an inefficient use of judicial and party resources.

Implementation Requirements, Costs, and Operational Impacts

No implementation requirements or operational impacts are expected. To the extent any costs are associated with the rule revisions, it is anticipated that they will result in cost savings by avoiding unnecessary motions and notices.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The advisory committee [or other proponent] also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so please quantify.
- What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.
- Would ___ months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

Title 5. Family and Juvenile Rules

Division 3. Juvenile Rules

Chapter 3. General Conduct of Juvenile Court Proceedings

Rule 5.552. Confidentiality of records (§§ 827, 828)

(a) Definitions

***

~~**(b) General provisions**~~

~~(1) The following individuals and entities may inspect, receive, and copy the juvenile case file without an order of the juvenile court:~~

~~(A) Court personnel;~~

~~(B) The district attorney, a city attorney, or a city prosecutor authorized to prosecute criminal or juvenile cases under the law;~~

~~(C) The child who is the subject of the proceeding;~~

~~(D) The child's parents;~~

~~(E) The child's guardians;~~

~~(F) The attorneys for the parties, including any trial court or appellate attorney representing a party in the juvenile proceeding or related appellate proceeding;~~

~~(G) Judges, referees, other hearing officers, probation officers, and law enforcement officers who are actively participating in criminal or juvenile proceedings involving the child;~~

~~(H) The county counsel, city attorney, or any other attorney representing the petitioning agency in a dependency action;~~

~~(I) Members of child protective agencies as defined in Penal Code section 11165.9; and~~

~~(J) The California Department of Social Services in order to carry out its duty to oversee and monitor county child welfare agencies, children in~~

~~foster care or receiving foster care assistance, and out- of state placements.~~

~~(2) The following individuals and entities may inspect the juvenile case file without a court order and may receive a copy of the juvenile case file pursuant to a court order:~~

~~(A) All persons and entities listed in Welfare and Institutions Code sections 827 and 828 who are not listed in (b)(1) above; and~~

~~(B) An Indian child's tribal representative if the tribe has intervened in the child's case.~~

~~(3) Authorization for any other person or entity to inspect, obtain, or copy juvenile case files may be ordered only by the juvenile court presiding judge or a judicial officer of the juvenile court.~~

~~(4) Juvenile case files may not be obtained or inspected by civil or criminal subpoena.~~

~~(5) When a petition is sustained for any offense listed in section 676, the charging petition, the minutes of the proceeding, and the orders of adjudication and disposition that are contained in the juvenile case file must be available for public inspection, unless the court has prohibited disclosure of those records under that section.~~

(b~~e~~) Petition

Juvenile case files may only be obtained or inspected in accordance with sections 827 and 828. Juvenile case files may not be obtained or inspected by civil or criminal subpoena. With the exception of those persons permitted to inspect juvenile court records without court authorization under sections 827 and 828, every person or agency seeking to inspect or obtain juvenile court records must petition the court for authorization using *Petition for Disclosure of Juvenile Court Records* (form JV-570).

***

(c~~d~~) Notice of petition for disclosure

(1) At least 10 days before the petition is submitted to the court, the petitioner must personally or by first-class mail serve *Request for Disclosure of Juvenile Case File* (form JV-570), *Notice of Request for Disclosure of Juvenile Case File* (form JV-571), and a blank copy of *Objection to Release of Juvenile Case File* (form JV-572) on the following:

(A)_(B) ***

(C) The child if the child is 10 years of age or older;

(D)-(I) ***

.

(2)-(4) ***

(~~d~~e) Procedure

***

(~~e~~f) Reports of law enforcement agencies (§ 828)

~~Except for records sealed under section 389 or 781, or Penal Code section 1203.45, information gathered and retained by a law enforcement agency regarding the taking of a child into custody may be disclosed without court authorization to another law enforcement agency, including a school district police or security department, or to any person or agency that has a legitimate need for the information for the purposes of official disposition of a case.~~

~~(1) If the law enforcement agency retaining the report is notified under section 1155 that the child has escaped from a secure detention facility, the agency must release the name of the child and any descriptive information on specific request by any agency or individual whose attempts to apprehend the child will be assisted by the information requested.~~

~~(2) In the absence of a specific request, the law enforcement agency retaining the report may release information about a child reported to have escaped from a secure detention facility if the agency determines that the information is necessary to assist in the apprehension of the child or the protection of members of the public from substantial physical harm.~~

~~(3)~~ Except as authorized ~~u~~nder section 828, all others seeking to inspect or obtain ~~such~~ information gathered and retained by a law enforcement agency regarding the taking of a child into custody ~~reports~~ must petition the juvenile court for authorization, using *Petition to Obtain Report of Law Enforcement Agency* (form JV-575).

~~(g) School notification~~

~~When a child enrolled in a public school is found to have committed one of the offenses described in section 827(b)(2), the court must provide written notice of the~~

~~offense and the disposition to the superintendent of the school district within seven days. The superintendent must disseminate information to the principal of the school the child attends, and the principal may disseminate information to any teacher or administrator for the purposes of the rehabilitation of the child or the protection of other students and staff.~~

(f~~h~~) Other applicable statutes

***

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INVITATION TO COMMENT

[ItC prefix as assigned]-__

Title
Family Law - Transfers of Title IV-D Child Support Cases between State and Tribal Court

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rule 5.372

Proposed by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Tribal Court–State Court Forum
Hon. Abby Abinanti, Cochair
Hon. Dennis M. Perluss, Cochair

Action Requested
Review and submit comments by [deadline]

Proposed Effective Date
January 1, 2018

Contact
Ann Gilmour, Attorney
415-865-4207
ann.gilmour@jud.ca.gov

Executive Summary and Origin

The Judicial Council adopted California Rules of Court, rule 5.372, effective January 1, 2014, to provide a consistent procedure for the discretionary transfer of title IV-D child support cases from the state courts to tribal courts in cases of concurrent jurisdiction. Since that time, the rule has been used primarily between the state courts in Humboldt and Del Norte counties and the Yurok Tribal Court as the Yurok Tribe is the first California tribe to establish a title IV-D program. Representatives of the state Department of Child Support Services, local county child support agencies, the tribal child support program, the tribal court, the state courts, and Judicial Council staff met to review the case transfer procedures at a cross-court educational exchange on October 26, 2016. Participants made a number of suggestions to improve the transfer process, including amendments to rule 5.372.

Background

Rule 5.372 was adopted in response to the need for consistent procedures for determining the orderly transfer of title IV-D child support cases from the state court to the tribal court when there is concurrent subject matter jurisdiction.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) P.L. No. 104-193 as amended by the Balanced Budget Act of 1997 P.L. No. 105-33 (111 Stat. 251), authorized the direct federal funding of tribal child support programs. Before the passage of PRWORA, tribal members seeking child support program services only had the option of applying to state title IV-D programs for assistance in establishing and enforcing child support orders. After the enactment of PRWORA, a number of tribes located outside of California applied for and received federal funding to develop tribal title IV-D child support programs. The first tribe located in California to receive federal funding for a tribal title IV-D child support program was the Yurok Tribe.

The Yurok Tribe began receiving grant funding from the federal Office of Child Support Enforcement for startup planning for a tribal child support program on August 1, 2011. The Yurok had comprehensive direct services available by August 1, 2013. The beginning of title IV-D funding for tribal child support programs created the need for a statewide rule of court to aid in the orderly transfer of appropriate cases from the state court to the tribal court. While the Yurok Tribe is the first tribe located in California to begin a federally funded child support program, the rule was drafted in anticipation that other tribes may develop such programs in the future.

Since implementation of the rule of court, over 40 cases have been considered for transfer between the state courts in Humboldt and Del Norte counties and the Yurok Tribal Court. The Yurok Tribe intends to seek transfer of cases currently under the jurisdiction of state court in the following counties: Lake, Mendocino, Shasta, Siskiyou, and Trinity. In addition, at least one other tribe located in Southern California is expected to soon begin handling title IV-D child support cases.

Based on the experience with the transfers that have taken place so far, the participants have suggested amendments to rule 5.732 to streamline the process, reduce confusion, and ensure consistency and efficient use of court resources.

Prior Circulation

The proposal to adopt rule 5.372 was circulated for public comment from April 19, 2013, through June 19, 2013, to the standard mailing list for family and juvenile law proposals including child support professionals, as well as to the regular rules and forms mailing list. You can find the discussion of that proposal and comments at http://www.courts.ca.gov/documents/jc-20131025-itemA18.pdf

The Proposal

The proposal would amend rule 5.372 as follows:

- Amend the title and subdivision (a) to clarify that a title IV-D child support case may be transferred between tribal and state courts in both directions. The prior rule had only envisioned a title IV-D child support case being transferred from the state court to the tribal court. However, the goal is to ensure that a title IV-D child support case will be in

the jurisdiction (tribal or state), which is best able to serve the family and protect the best interests of the child. As a family's circumstances change, a case which may have initially been best served by tribal court jurisdiction may transition to one which is best served by state court jurisdiction. The Full Faith and Credit for Child Support Orders Act, P.L. No. 103-383 (28 U.S.C. § 1738(B) mandates full faith and credit for child support orders between tribal and state courts, thereby contemplating movement in either direction. The mutual recognition of child support orders issued by a tribal or state court has aided the ability of these orders to be transferred from an issuing court to another court for effective enforcement of those orders;

- Amend subdivision (e) to:

    - Allow the state court to suggest transfer to tribal court of its own motion should circumstances suggest to the court that tribal court jurisdiction may be in the child's best interest;
    - Require that certain information be included in the motion to transfer to tribal court. This information is fundamental to the court's determination of concurrent jurisdiction;
    - Specify the forms of evidence that the court may rely upon when making its ruling on a transfer motion;
    - Recognize a presumption of tribal court jurisdiction if the child involved in the case is a tribal member or eligible for tribal membership. This is consistent with legal principles which generally recognizes tribal subject matter jurisdiction over children who are members or eligible for membership in the tribe[1];
    - Specify the time limit within which any objection to the transfer to tribal court must be brought;
    - Provide that the objecting party has the burden of proof to establish that there is good cause not to transfer the matter to tribal court. This is consistent with state implementation of the Indian Child Welfare Act (25 U.S.C. § 1901 *et seq.*)[2];

- Amend subdivision (f) to:

    - Remove some of the factors to be considered in making a determination to transfer to tribal court. The original list of factors was drawn from a Wisconsin rule which governs the transfer of general civil matters where there is concurrent tribal and state court jurisdiction. Not all of those factors were relevant to the consideration of the more specific title IV-D child support case type. In particular, the nature of the action, the interests of the parties and whether state or tribal law

[1] *Williams v. Lee* (1959) 358 U.S. 217; *Sanders v. Robinson* (9th Cir. 1988) 864 F.2d 630; *State v. Central Council of Tlingit and Haida Indian Tribes of Alaska* (2016) 371 P.3d 255 (S.C. Alaska); 25 U.S.C. 1911.
[2] See Welf. & Inst. Code § 305.5(4).

will apply are all the same in these child support cases. The inclusion of these on the list of factors to be considered was confusing and inefficient use of court resources;

- Specify that the court may not consider the perceived adequacy of tribal judicial system in determining whether or not to transfer the case. This is consistent with state and federal law under the Indian Child Welfare Act[3]; and
- Permit the state court judge to contact the tribal court judge to resolve procedural issues consistent with procedures contained in the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and the Tribal Court Civil Money Judgement Act.[4]

The proposal responds to the needs identified by the parties who have been involved in the process of transferring title IV-D child support cases from state to tribal court including judicial officers, court staff, staff or the state and local child support agency, tribal child support agency staff and tribal court judiciary. The parties state that these amendments will increase the efficiency of the transfer process.

Alternatives Considered

The forum and committee considered taking no action at this time, however, it was decided that amending the rule now, based on the experience of existing users, would prevent the perpetuation of problems in additional counties and facilitate the transfer process as more tribes begin operating their tribal IV-D programs.

Implementation Requirements, Costs, and Operational Impacts

The forum and committee do not believe that there will be any costs associated with this proposal. In fact, to the extent that the proposal stream lines the process for these transfers it will reduce costs and court time.

[3] See Welf. & Inst. Code § 305.5(c)(3); 25 C.F.R. § 23.118(c)(5).
[4] See Family Code §3410 and Code of Civil Procedure §1740.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee [or other proponent] is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so please quantify.
- What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.
- Would 6 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

Rule proposal pgs 5-7

Title 5. Family and Juvenile Rules

Division 1. Family Rules

Chapter 10. Government Child Support Cases (Title IV-D Support Cases)

Rule 5.372. Transfer of title IV-D cases between ~~to a~~ tribal court and state court

(a) Purpose

This rule is intended to define the procedure for transfer of title IV-D child support cases ~~from~~ between a California superior court ~~to~~ and a tribal court.

(b) – (d)

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(e) Determination of concurrent jurisdiction by a superior court

(1) The superior court may, on its own motion, or on the motion of any party and after notice to the parties of their right to object, transfer a child support and custody provision of an action in which the state is providing services under California Family Code section 17400 to a tribal court, as defined in (a). This provision applies to both prejudgment and postjudgment cases.

(2) The motion for transfer to a tribal court must include the following information:

a. Whether the child is a tribal member or eligible for tribal membership;
b. Whether one or both of the child's parents is a tribal member or eligible for tribal membership;
c. Whether one or both of the child's parents lives on tribal lands or in tribal housing, works for the tribe or receives tribal benefits;
d. Whether there are other children of the obligor subject to child support obligations;
e. Any other factor supporting the child's or parents' connection to the tribe

(3) When ruling on a motion to transfer, the superior court must first make a threshold determination that concurrent jurisdiction exists. Evidence to support this determination may include:

a. Evidence contained within the motion for transfer;
b. Evidence agreed to by stipulation of the parties; and

c. Other evidence submitted by the parties, or by the tribe.

The court may request that the tribal child support agency or the tribal court submit information concerning the tribe's jurisdiction.

(4) There is a presumption of concurrent jurisdiction if the child is a tribal member or eligible for tribal membership. If concurrent jurisdiction is found to exist, the transfer to tribal court will occur unless a party has objected ~~in a timely manner~~within 20 days. On the filing of a timely objection to the transfer, the superior court must conduct a hearing on the record considering all the relevant factors set forth in (f). The objecting party has the burden of proof to establish good cause not to transfer to tribal court.

(f) Evidentiary considerations

(1) In making a determination on the application for case transfer, the superior court must consider:

~~(1) The nature of the action;~~
~~(2) The interests of the parties;~~
(a.~~3~~) The identities of the parties;
(b. ~~4~~) The convenience of the parties and witnesses;
~~(5) Whether state or tribal law will apply;~~
(c.~~6~~) The remedy available in the superior court or tribal court; and
(d.~~7~~) Any other factors deemed necessary by the superior court.

(2) In making a determination on the application for case transfer, the superior court may not consider the perceived adequacy of tribal systems.

(3) The superior court may after notice to all parties, attempt to resolve any procedural issues by contacting the tribal court concerning a motion to transfer. The superior court shall allow the parties to participate in, and shall prepare a record of, any communication made with the tribal court judge.

(g) Order on request to transfer

If the superior court denies the request for transfer, the court must state on the record the basis for denying the request. If the superior court grants the request for transfer, it must issue a final order on the request to transfer including a determination of whether concurrent jurisdiction exists.

(h) Proceedings after order granting transfer

Once the superior court has granted the application to transfer, and has received confirmation that the tribal court has accepted jurisdiction, the superior court clerk must deliver a copy of the entire file, including all pleadings and orders, to the clerk of the tribal court and close the state court file. With the exception of a filing by a tribal court as described by subdivision (i) of this rule, the superior court may not accept any further filings in the state court action.

(i) Transfer of proceedings from tribal court

If the tribal court determines that it is not in the best interest of the child or the parties for the tribal court to retain jurisdiction of a child support case, the tribe may upon noticed motion to all parties and the state child support agency, file a motion to transfer the case to the jurisdiction of the superior court.

~~*Rule 5.372 adopted effective January 1, 2014.*~~