



[4310-6W-P]

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR 23

[K00103 12/13 A3A10; 134D0102DR-DS5A300000-DR.5A311.IA000113]

RIN 1076-AF25

Regulations for State Courts and Agencies in Indian Child Custody Proceedings

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Proposed rule.

SUMMARY: This proposed rule would add a new subpart to the Department of the Interior's (Department) regulations implementing the Indian Child Welfare Act (ICWA), to improve ICWA implementation by State courts and child welfare agencies. These regulations complement recently published *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, reflect recommendations made by the Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence, and address significant developments in jurisprudence since ICWA's inception. This publication also announces the dates and locations for tribal consultation sessions and public meetings to receive comment on this proposed rule.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]. *Comments on the information collections contained in this proposed regulation are separate from those on the substance of the proposed rule.* Comments on the information collection burden should be received by [INSERT DATE 30

DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER] to ensure consideration, but must be received no later than [INSERT DATE 60 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]. See the SUPPLEMENTARY INFORMATION section of this document for dates of public meetings and tribal consultation sessions.

ADDRESSES: You may submit comments by any of the following methods:

-Federal rulemaking portal: www.regulations.gov. The rule is listed under the agency name “Bureau of Indian Affairs” or “BIA.” The rule has been assigned Docket ID: BIA-2015-0001.

-E-mail: comments@bia.gov. Include “ICWA” in the subject line of the message.

-Mail or hand-delivery: 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.

Comments on the Paperwork Reduction Act information collections contained in this rule are separate from comments on the substance of the rule. Submit comments on the information collection requirements in this rule to the Desk Officer for the Department of the Interior by e-mail at OIRA_Submission@omb.eop.gov or by facsimile at (202) 395-5806. Please also send a copy of your comments to comments@bia.gov.

See the SUPPLEMENTARY INFORMATION section of this document for locations of public meetings and tribal consultation sessions.

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. You may review the information collection request online at [http:// www.reginfo.gov](http://www.reginfo.gov). Follow the

instructions to review Department of the Interior collections under review by OMB.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

Since ICWA was enacted by Congress in 1978, it has improved child welfare practices regarding Indian children. Commentators have asserted, however, that it has not reached its full potential due largely to ineffective or inconsistent implementation in some case. This proposed rule would establish a new subpart to regulations implementing ICWA at 25 CFR 23 to address Indian child welfare proceedings in State courts. This proposed rule is published in response to comments received during several listening sessions, written comments submitted throughout 2014, and recommendations that regulations are needed to fully implement ICWA. *See, e.g.,* Attorney General's Advisory Committee on American Indian and Alaska Native Children Exposed to Violence: Ending Violence So Children Can Thrive (November 2014), p. 77. This proposed rule would also respond to significant developments in jurisprudence since the regulations were established in 1979 and last substantively updated in 1994.

This proposed rule 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. This consistency is necessary to ensure that the goals of ICWA are carried out with each Indian child custody proceeding, regardless of the child welfare worker, judge, and State involved. The proposed rule would establish the following procedures to ensure compliance with ICWA: determining whether ICWA applies to any child custody proceeding, providing notice to the parents or Indian custodian and Indian tribe(s), requesting and responding to requests to transfer

proceedings to tribal court, adjudication of involuntary placements, adoptions, and terminations of parental rights, undertaking voluntary proceedings, identifying and applying placement preferences, and post-proceeding actions.

The Department requests comment on this proposed rule.

II. Background

Congress enacted ICWA in 1978 to address the Federal, State, and private agency policies and practices that resulted in the “wholesale separation of Indian children from their families.” H. Rep. 95-1386 (July 24, 1978), at 9. Congress found “that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions” 25 U.S.C. 1901(4). Congress determined that cultural ignorance and biases within the child welfare system were significant causes of this problem and that state 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); H. Rep. 95-1386, at 10. Congress enacted ICWA to “protect the best interests of Indian children and to promote 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 or institutions which will reflect the unique values of Indian culture.” H. Rep. 95-1386, at 8. The ICWA thus articulates a strong “federal policy that, where possible, an Indian child should remain in the Indian community.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989) (citing H. Rep. 95-1386 at 24).

Following ICWA's enactment, in July 1979, the Department issued regulations addressing notice procedures for involuntary child custody proceedings involving Indian children, as well as governing the provision of funding for and administration of Indian child and family service programs as authorized by ICWA. *See* 25 CFR part 23. Those regulations did not address the specific requirements and standards that ICWA imposes upon State court child custody proceedings, beyond the requirements for contents of the notice. Also, in 1979, BIA published guidelines for State courts to use in interpreting many of ICWA's requirements in Indian child custody proceedings. 44 Fed. Reg. 67584 (Nov. 26, 1979).

In 2014, the Department invited comments to determine whether to update its guidelines 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 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. An overwhelming proportion of the commenters requested not only that the Department update its ICWA guidelines but that the Department also issue regulations addressing the requirements and standards that ICWA imposes upon State court child custody proceedings. The Department reviewed and considered each comment in developing this proposed rule.

The Department has examined its authority to interpret and implement ICWA, including through a rulemaking, and has concluded that it possesses authority to implement the statute through rulemaking. ICWA instructs that "[w]ithin [180] days after November 8, 1978, the

Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter.” 25 U.S.C. 1952. This is a broad grant of authority to the Secretary of the Interior (Secretary) to issue rules in order to ensure that the statute is fully and properly implemented. In addition to this 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 “prescribe 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. Finally, the United States has long been understood to have a special relationship with Indian nations, which includes the duty and power to protect them. Congress referred to this inherent authority in the opening language of ICWA, which explains that the “United States has a direct interest, as trustee, in protecting Indian children.” 25 U.S.C. 1901(3). These regulations, which are intended to improve the implementation of ICWA, uphold this Federal interest.

The Department has concluded that these regulations are now necessary to effectively carry out the provisions of ICWA. In issuing the guidelines in 1979, the Department found that primary responsibility for interpreting many of ICWA’s provisions rests with the State courts that decide Indian child custody cases. *See, e.g.*, 44 Fed. Reg. 67,584 (November 26, 1979). At the time, the Department opined that the promulgation of regulations was not necessary to carry out ICWA. Since that time, it has become clear that a uniform interpretation of key provisions is necessary to ensure compliance with ICWA. These regulations will provide a stronger measure of consistency in the implementation of ICWA, which has been interpreted in different, and sometimes conflicting, ways by various State courts and agencies and has resulted in different minimum standards being applied across the United States, contrary to Congress’ intent. Moreover, conflicting interpretations can lead to arbitrary outcomes, and certain interpretations

and applications threaten the rights that ICWA was intended to protect. *See, e.g., Holyfield*, 490 U.S. at 45-46 (describing the need for uniformity in defining “domicile” under ICWA).

III. Overview of the Proposed Rule

This proposed rule addresses ICWA implementation by State courts and child welfare agencies, including updating definitions, and replacing current notice provisions at 25 CFR 23.11 with a proposed new subpart I to 25 CFR part 23. The proposed new subpart also addresses other aspects of ICWA compliance by State courts and child welfare agencies including, but not limited to, other pretrial requirements, procedures for requesting transfer of an Indian child custody proceeding to tribal court, adjudications of involuntary placements, adoptions, and termination of parental rights, voluntary proceedings, dispositions, and post-trial rights. For example, the proposed rule clarifies ICWA applicability and codifies that there is no “Existing Indian Family Exception (EIF)” to ICWA. Since first identification of the EIF in 1982, the majority of State appellate courts that have considered the EIF have rejected it as contrary to the plain language of ICWA. Some State legislatures have also explicitly rejected the EIF within their State ICWA statutes. When Congress enacted ICWA, it intended that an “Indian child” was the threshold for application of ICWA. The Department agrees with the States that have concluded that there is no existing Indian family exception to application of ICWA. The proposed rule also promotes the early identification of ICWA applicability. Such identifications will promote proper implementation of ICWA at an early stage, to prevent – as much as possible—delayed discoveries that ICWA applies.

We welcome comments on all aspects of this rule. We are particularly interested in the use of “should” versus “must.” The proposed rule makes several of the provisions issued in the recently published *Guidelines for State Courts and Agencies in Indian Child Custody*

Proceedings, 80 FR 10146 (February 25, 2015), binding as regulation. These proposed mandatory provisions (indicating an action “must” be taken, for example) are authorized by ICWA. Some proposed provisions indicate that certain actions “should” be taken. We welcome comment on whether mandatory language is authorized by ICWA in those instances and any appropriate revisions to further promote compliance with ICWA.

IV. Public Meetings & Tribal Consultation Sessions

The Department will host both public meetings and tribal consultation sessions on this proposed rule.

A. Public Meetings

All are invited to the public meetings. Dates and locations for the public meetings are as follows:

Date	Time	Location	Venue
Wednesday, April 22, 2015	9 a.m. – noon Local Time	Portland, Oregon	BIA Regional Office 911 NE 11th Ave Portland, OR 97232*
Thursday, April 23, 2015	1-4 p.m. Local Time	Rapid City, South Dakota	Best Western Ramkota Hotel 2111 N Lacrosse St Rapid City, SD 57701
Tuesday, May 5, 2015	1-4 p.m. Local Time	Albuquerque, New Mexico	National Indian Programs Training Center 1011 Indian School Road, NW Suite 254 Albuquerque, NM 87104*
Thursday, May 7, 2015	1-4 p.m. Local Time	Prior Lake, Minnesota	Mystic Lake Casino Hotel 2400 Mystic Lake Blvd Prior Lake, MN 55372
Tuesday, May 12, 2015	1 p.m.-4 p.m. Eastern Time	Via teleconference	888-730-9138 Passcode: INTERIOR
Thursday, May 14, 2015	1-4 p.m. Local Time	Tulsa, Oklahoma	Tulsa Marriott Southern Hills 1902 East 71st Tulsa, OK 74136

*Please RSVP for the Portland and Albuquerque meetings to consultation@bia.gov, bring photo identification, and arrive early to allow for time to get through security, as these are Federal buildings. No RSVP is necessary for the other locations.

B. Tribal Consultation Sessions

Tribal consultation sessions are for representatives of currently federally recognized tribes only, to discuss the rule on a government-to-government basis with the Department. These sessions may be closed to the public. The dates and locations for the tribal consultations are as follows:

Date	Time	Location	Venue
Monday, April 20, 2015	3:30 p.m.-5:30 p.m. Local Time	Portland, Oregon	Hilton Portland & Executive Towers 921 SW Sixth Avenue Portland, OR 97204 (at the same location as NICWA conference)
Thursday, April 23, 2015	9 a.m.-12 p.m. Local Time	Rapid City, South Dakota	Best Western Ramkota Hotel 2111 N Lacrosse St Rapid City, SD 57701
Tuesday, May 5, 2015	9 a.m.-12 p.m. Local Time	Albuquerque, New Mexico	National Indian Programs Training Center 1011 Indian School Road, NW Suite 254 Albuquerque, NM 87104*
Thursday, May 7, 2015	9 a.m.-12 p.m. Local Time	Prior Lake, Minnesota	Mystic Lake Casino Hotel 2400 Mystic Lake Blvd Prior Lake, MN 55372
Monday, May 11, 2015	1 p.m.-4 p.m. Eastern Time	Via teleconference	Call-in number: 888-730-9138 Passcode: INTERIOR =
Thursday, May 14, 2015	9 a.m.-12 p.m. Local Time	Tulsa, Oklahoma	Tulsa Marriott Southern Hills 1902 East 71st Tulsa, OK 74136

V. Statutory Authority

The Department is issuing this proposed rule pursuant to ICWA, 25 U.S.C. 1901 et seq., and its authority over the management of all Indian affairs under 25 U.S.C. 2, 9.

VI. Procedural Requirements

1. 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.

2. Regulatory Flexibility Act

The Department certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

3. 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. It will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year. 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. 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.

4. 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.

5. 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.

6. Federalism (E.O. 13132)

Under 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 has 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. In the spirit of EO 13132, the Department specifically solicits comment on this proposed rule from State officials, including suggestions for how the rule could be made more flexible for State implementation.

7. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of Executive Order 12988. Specifically, this rule has been reviewed to eliminate errors and ambiguity and written to minimize litigation; and is written in clear language and contains clear legal standards.

8. Consultation with Indian Tribes (E.O. 13175)

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments," Executive Order 13175 (59 FR 22951, November 6, 2000), and 512 DM 2, we have evaluated the potential effects on federally recognized Indian tribes and Indian trust assets. The Department hosted several listening sessions on the ICWA guidelines and notified each federally recognized tribal leader of the sessions. Several federally recognized Indian tribes submitted written comments and many suggested developing regulations. The Department considered each tribe's comments and concerns and have addressed them, where possible, in the proposed rule. The Department will be continuing to consult with tribes during the public comment period on this rule. The dates and locations of consultation sessions are listed in section IV, above.

9. Paperwork Reduction Act

OMB Control Number: 1076-NEW

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 to provide notice to 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 governments and individuals.

Number of Respondents: 5,500 on average (each year).

Number of Responses: 116,100 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: 277,276 hours.

Estimated Total Annual Non-Hour Cost: \$868,400.**

*The following table shows estimates of the hour burden above what a State court or agency would do in a child custody proceeding that does not involve ICWA requirements:

Sec.	Information Collection	Annual No. of Respondents	Frequency of Responses	Annual No. of Responses	Completion Time per Response	Total Annual Burden Hours
23.107	Obtain information on whether child is "Indian child"	50	260	13,000	12	156,000
23.109	Notify of tribal	50	130	6,500	1	6,500

(c)(3)	membership where more than 1 tribe					
23.111 , 23.113	Notify tribe, parents, Indian custodian of child custody proceeding	50	260	13,000	6	78,000
23.113	Document basis for emergency removal/placement	50	260	13,000	0.5	6,500
23.113	Maintain records detailing steps to provide notice	50	260	13,000	0.5	6,500
23.113	Petition for court order authorizing emergency removal/placement (with required contents)	50	260	13,000	0.5	6,500
23.118	Notify tribal court of transfer, provide records	50	5	250	0.25	63
23.120	Document “active efforts”	50	130	6,500	0.5	3,250
23.125	Parental consent to termination or adoption (with required contents)	5,000	1	5,000	0.5	2,500
23.126 , 127	Notify placement of withdrawal of consent	50	2	100	0.25	25
23.128	Document each placement (including required documents)	50	130	6,500	0.5	3,250
23.128	Maintain records of placements	50	130	6,500	0.5	3,250
23.132	Notify of petition to vacate	50	5	250	0.25	63
23.135	Notify of change in status quo	50	130	6,500	0.25	1,625
23.136	Notify of final adoption	50	130	6,500	0.25	1,625

	decree/order					
23.137	Maintain records in a single location and respond to inquiries	50	130	6,500	0.25	1,625
				116,100	6.75	277,276

** In many cases, there are no start-up costs associated with these information collections because State courts are agencies are already implementing child custody actions. However, it is possible that some States may not yet have a single location, or electronic database accessible from anywhere, housing all placement records. For this reason, we are estimating a start-up cost of \$487,500 (or just under \$10,000 per state on average, with the understanding that there will be no start-up costs in some states and up to \$20,000 or more in others). The annual cost burden to respondents associated with providing notice by registered mail is \$11.95 and the cost of a return receipt green card is \$2.70. For each Indian child custody proceeding, at least two notices must be sent—one to the parent and one to the tribe, totaling \$29.30. At an annual estimated 13,000 child welfare proceedings that may involve an “Indian child,” this totals: \$380,900. Together with the start-up cost, the total non-hour cost burden for all 50 States is \$868,400.

10. 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.

11. 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.

12. Clarity of this Regulation

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you believe that we have not met these requirements, send us comments by one of the methods listed in the "COMMENTS" section. To better help revise the rule, your comments should be as specific as possible. For example, include the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where lists or tables would be useful, etc.

13. Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment – including your personal identifying information – may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

The Department cannot ensure that comments received after the close of the comment period (see DATES) will be included in the docket for this rulemaking and considered.

Comments sent to an address other than those listed above will not be included in the docket for this rulemaking.

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, proposes to amend 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”;
- b. Revise the definition of “child custody proceeding”;
- c. Add definitions for “continued custody”, “custody”, and “domicile”;
- d. Revise the definition of “extended family member”;
- e. Add a definition for “imminent physical danger or harm”;
- f. Revise the definition of “Indian child’s tribe”, “Indian custodian” , “parent”, “reservation”, and “Secretary”;

- g. Add a definition for “status offenses”;
- h. Revise the definition of “tribal court”; and
- i. Add definitions for “upon demand” and “voluntary placement”.

The additions and revisions read as follows:

revise the following definitions to read as follows:

§ 23.2 Definitions.

* * * * *

Active efforts means actions intended primarily to maintain and reunite an Indian child with his or her family or tribal community and constitute more than reasonable efforts as required by Title IV-E of the Social Security Act (42 U.S.C. 671(a)(15)). Active efforts include, for example:

- (1) Engaging the Indian child, the Indian child’s parents, the Indian child’s extended family members, and the Indian child’s custodian(s);
- (2) Taking steps necessary to keep siblings together;
- (3) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
- (4) Identifying, notifying, and inviting representatives of the Indian child’s tribe to participate;
- (5) Conducting or causing to be conducted a diligent search for the Indian child’s extended family members for assistance and possible placement;

(6) Taking into account the Indian child's tribe's prevailing social and cultural conditions and way of life, and requesting the assistance of representatives designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards;

(7) Offering and employing all available and culturally appropriate family preservation strategies;

(8) Completing a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;

(9) Notifying and consulting with extended family members of the Indian child to provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources for the Indian child;

(10) Making arrangements to provide family interaction in the most natural setting that can ensure the Indian child's safety during any necessary removal;

(11) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or extended family in utilizing and accessing those resources;

(12) Monitoring progress and participation in services;

(13) Providing consideration of alternative ways of addressing the needs of the Indian child's parents and extended family, if services do not exist or if existing services are not available;

(14) Supporting regular visits and trial home visits of the Indian child during any period of removal, consistent with the need to ensure the safety of the child; and

(15) Providing post-reunification services and monitoring.

* * * * *

Child custody proceeding means and includes any proceeding or action that involves:

(1) *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, although parental rights have not been terminated;

(2) *Termination of parental rights*, which is any action resulting in the termination of the parent-child relationship;

(3) *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

(4) *Adoptive placement*, which is the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

* * * * *

Continued custody means physical and/or legal custody that a parent 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 and/or legal custody 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 any person over the age of eighteen, physical presence in a place and intent to remain there;

(2) For an Indian child, the domicile of the Indian child's parents. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's mother.

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 the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

* * * * *

Imminent physical damage or harm means present or impending risk of serious bodily injury or death.

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 with which the Indian child has more significant contacts.

Indian custodian means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child. An Indian person may demonstrate that he or she is an Indian custodian by looking to tribal law or tribal custom or State law.

Parent means 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 or custom. It does not include an unwed father where paternity has not been acknowledged or established.

Reservation means Indian country as defined in 18 U.S.C 1151, including any lands, title to which is held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation.

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, including 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 custodians can regain custody simply upon request, without any contingencies such as repaying the child's expenses.

Voluntary placement means a placement that either parent has, of his or her free will, chosen for the Indian child, including private adoptions.

3. In § 23.11, revise paragraph (d) and remove paragraphs (e), (f), and (g).

The revision reads as follows:

§ 23.11 Notice.

* * * * *

(d) Notice to the appropriate BIA Area Director pursuant to paragraph (b) of this section must be sent by registered mail with return receipt requested and must include the information required by § 23.111 of these regulations.

* * * * *

4. Add subpart I to read as follows:

Subpart I –Indian Child Welfare Act Proceedings

General Provisions

Sec.

- | | |
|--------|---|
| 23.101 | What is the purpose of this subpart? |
| 23.102 | What terms do I need to know? |
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General Provisions

§ 23.101 What is the purpose of this subpart?

These regulations 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' intent in enacting the statute, and the canon of construction that statutes enacted for the benefit of Indians are to be liberally construed to their benefit. In order to fully implement ICWA, these regulations apply in all proceedings and stages of a proceeding in which ICWA is or becomes applicable.

§ 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 private State-licensed agency or public agency and their employees, agents or officials involved in and/or seeking to place a child in a child custody proceeding.

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 applies whenever an Indian child is the subject of a State child custody proceeding as defined by the Act. ICWA also applies to proceedings involving status offenses or juvenile delinquency proceedings if any part of those proceedings results in the need for

placement of the child in a foster care, preadoptive or adoptive placement, or termination of parental rights.

(b) There is no exception to application of ICWA based on the so-called “existing Indian family doctrine” and, the following non-exhaustive list of factors that have been used by courts in applying the existing Indian family doctrine may not be considered in determining whether ICWA is applicable:

- (1) The extent to which the parent or Indian child
 - (i) Participates in or observes tribal customs,
 - (ii) Votes in tribal elections or otherwise participates in tribal community affairs,
 - (iii) Contributes to tribal or Indian charities, subscribes to tribal newsletters or other periodicals of special interest in Indians,
 - (iv) Participates in Indian religious, social, cultural, or political events, or maintains social contacts with other members of the tribe;
- (2) The relationship between the Indian child and his/her Indian parents;
- (3) The extent of current ties either parent has to the tribe;
- (4) Whether the Indian parent ever had custody of the child;
- (5) The level of involvement of the tribe in the State court proceedings; and/or
- (6) Blood quantum.

(c) Agencies and State courts, in every child custody proceeding, must ask whether the child is or could be an Indian child and conduct an investigation into whether the child is an Indian child.

(d) If there is any reason to believe the child is an Indian child, the agency and State court must treat the child as an Indian child, unless and until it is determined that the child is not a member or is not eligible for membership in an Indian tribe.

(e) ICWA and these regulations or any associated Federal guidelines do not apply to:

(1) Tribal court proceedings;

(2) Placements based upon an act by the Indian child which, if committed by an adult, would be deemed a criminal offense; or

(3) An award, in a divorce proceeding, of custody of the Indian child to one of the parents.

(f) Voluntary placements that do not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand are not covered by ICWA. Such placements should be made pursuant to a written agreement, and the agreement should state explicitly the right of the parent or Indian custodian to regain custody of the child upon demand.

(g) Voluntary placements in which a parent consents to a foster care placement or seeks to permanently terminate his or her rights or to place the child in a preadoptive or adoptive placement are covered by ICWA.

§ 23.104 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 these regulations, 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 website at www.bia.gov.

(b) For tribes without a designated tribal agent for service of ICWA notice, contact the tribe(s) to be directed to the appropriate individual or office.

(c) If you do not have accurate contact information for the tribe(s) or the tribe(s) contacted fail(s) to respond to written inquiries, you may seek assistance in contacting the Indian tribe(s) from the BIA Regional Office and/or Central Office in Washington, DC (see www.bia.gov).

§ 23.105 How does this subpart interact with State laws?

(a) These regulations provide minimum Federal standards to ensure compliance with ICWA and are applicable in all child custody proceedings in which ICWA applies.

(b) In any child custody proceeding 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 that the State court must apply the higher standard.

Pretrial Requirements

§ 23.106 When does the requirement for active efforts begin?

(a) The requirement to engage in “active efforts” begins from the moment the possibility arises that an agency case or investigation may result in the need for the Indian child to be placed outside the custody of either parent or Indian custodian in order to prevent removal.

(b) Active efforts to prevent removal of the child must be conducted while investigating whether the child is a member of the tribe, is eligible for membership in the tribe, or whether a biological parent of the child is or is not a member of a tribe.

§ 23.107 What actions must an agency and State court undertake in order to determine whether a child is an Indian child?

(a) Agencies must ask whether there is reason to believe a child that is subject to a child custody proceeding is an Indian child. If there is reason to believe that the child is an Indian child, the agency must obtain verification, in writing, from all tribes in which it is believed that the child is a member or eligible for membership, as to whether the child is an Indian child.

(b) State courts must ask, as a threshold question at the start of any State court child custody proceeding, whether there is reason to believe the child who is the subject of the proceeding is an Indian child by asking each party to the case, including the guardian ad litem and the agency representative, 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) In requiring this certification, courts may wish to consider requiring the agency to provide:

(i) Genograms or ancestry charts for both parents, including all names known (maiden, married and former names or aliases); current and former addresses of the child's parents, maternal and paternal grandparents and great grandparents or Indian custodians; birthdates; places of birth and death; tribal affiliation including all known Indian ancestry for individuals listed on the charts, and/or other identifying information; and/or

(ii) The addresses for the domicile and residence of the child, his or her parents, or the Indian custodian and whether either parent or Indian custodian is domiciled on or a resident of an Indian reservation or in a predominantly Indian community.

(2) If there is reason to believe the child is an Indian child, the court must confirm that the agency used active efforts to work with all tribes of which the child may be a

member to verify whether the child is in fact a member or eligible for membership in any tribe, under paragraph (a) of this section.

(c) An agency or court has reason to believe that a child involved in a child custody proceeding is an Indian child if:

(1) Any party to the proceeding, Indian tribe, Indian organization or public or private agency informs the agency or court that the child is an Indian child;

(2) Any agency involved in child protection services or family support has discovered information suggesting that the child is an Indian child;

(3) The child who is the subject of the proceeding gives the agency or court reason to believe he or she is an Indian child;

(4) The domicile or residence of the child, parents, or the Indian custodian is known by the agency or court to be, or is shown to be, on an Indian reservation or in a predominantly Indian community; or

(5) An employee of the agency or officer of the court involved in the proceeding has knowledge that the child may be an Indian child.

(d) In seeking verification of the child's status, in a voluntary placement proceeding where a consenting parent evidences a desire for anonymity, the agency or court must keep relevant documents confidential and under seal. A request for anonymity does not relieve the obligation to obtain verification from the tribe(s) or to provide notice.

§ 23.108 Who makes the determination as to whether a child is a member of a tribe?

(a) Only the Indian tribe(s) of which it is believed a biological parent or the child is a member or eligible for membership may make the determination whether the child is a member

of the tribe(s), is eligible for membership in the tribe(s), or whether a biological parent of the child is a member of the tribe(s).

(b) The determination by a tribe of whether a child is a member, is eligible for membership, or whether a biological parent is or is not a member, is solely within the jurisdiction and authority of the tribe.

(c) No other entity or person may authoritatively make the determination of whether a child is a member of the tribe or is eligible for membership in the tribe.

(d) The State court may not substitute its own determination regarding a child's membership or eligibility for membership in a tribe or tribes.

§ 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?

(a) Agencies must notify all tribes, of which the child may be a member or eligible for membership, that the child is involved in a child custody proceeding. The notice should specify the other tribe or tribes of which the child may be a member or eligible for membership.

(b) If the Indian child is a member or eligible for membership in only one tribe, that tribe should be designated as the Indian child's tribe.

(c) If an Indian child is a member or eligible for membership in more than one tribe, ICWA requires that the Indian tribe with which the Indian child has the more significant contacts be designated as the Indian child's tribe.

(1) In determining significant contacts, the following may be considered:

(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 custodial parent or Indian custodian; and

(iv) Interest asserted by each tribe in response to the notice that the child is involved in a child custody proceeding;

(2) When an Indian child is already a member of a tribe, but is also eligible for membership in another tribe, deference should be given to the tribe in which the Indian child is a member, unless otherwise agreed to by the tribes. However, if the Indian child is not a member of any tribe, an opportunity should be provided to allow the tribes to determine which of them should be designated as the Indian child's tribe.

(i) If the tribes are able to reach an agreement, the agreed upon tribe should be designated as the Indian child's tribe.

(ii) If the tribes do not agree, the following factors should be considered in designating the Indian child's tribe:

(A) The preference of the parents or extended family members who are likely to become foster care or adoptive placements; and/or

(B) Tribal membership of custodial parent or Indian custodian; and /or

(C) If applicable, length of past domicile or residence on or near the reservation of each tribe; and/or

(D) Whether there has been a previous adjudication with respect to the child by a court of one of the tribes; and/or

(E) Self-identification by the child; and/or

(F) Availability of placements.

(3) Once an Indian tribe is designated as the child's Indian tribe, all tribes which received notice of the child custody proceeding must be notified in writing of the determination and a copy of that document must be filed with the court and sent to each party to the proceeding and to each person or governmental agency that received notice of the proceeding.

(4) A determination of the Indian child's tribe for purposes of ICWA and these regulations does not constitute a determination for any other purpose or situation.

(d) The tribe designated as the Indian child's tribe may authorize another tribe to act as a representative for the tribe in a child custody case.

§ 23.110 When must a State court dismiss an action?

Subject to § 23.113 (emergency procedures), the following limitations on a State court's jurisdiction apply:

(a) The court must dismiss any child custody proceeding as soon as the court determines that it lacks jurisdiction.

(b) The court must make a determination of 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 dismiss the State court proceedings, the agency must notify the tribe of the dismissal based on the tribe's exclusive jurisdiction, and the agency must transmit all available information regarding the Indian child custody proceeding to the tribal court.

(c) If the Indian child has been domiciled or previously resided on an Indian reservation, the State court must contact the tribal court to determine whether the child is a ward of the tribal court. If the child is a ward of a tribal court, the State court must dismiss the State court

proceedings, the agency must notify the tribe of the dismissal, and the agency must transmit all available information regarding the Indian child custody proceeding to the tribal court.

§ 23.111 What are the notice requirements for a child custody proceeding involving an Indian child?

(a) When an agency or court knows or has reason to believe that the subject of a voluntary or involuntary child custody proceeding is an Indian child, the agency or court must send notice of each such proceeding (including but not limited to a temporary custody proceeding, any removal or foster care placement, any adoptive placement, or any termination of parental or custodial rights) by registered mail with return receipt requested to:

- (1) Each tribe where the child may be a member or eligible for membership;
- (2) The child's parents; and
- (3) If applicable, the Indian custodian.

(b) Notice may be sent via personal service or electronically in addition to the methods required by ICWA, but such alternative methods do not replace the requirement for notice to be sent by registered mail with return receipt requested.

(c) Notice must be in clear and understandable language and include the following:

- (1) Name of the child, the child's birthdate and birthplace;
- (2) Name of each Indian tribe(s) in which the child is a member or may be eligible for membership;
- (3) A copy of the petition, complaint or other document by which the proceeding was initiated;
- (4) Statements setting out:

(i) The name of the petitioner and name and address of petitioner's attorney;

(ii) The right of the parent or Indian custodian 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 a parental right.

(iv) If the Indian parent(s) or, if applicable, Indian custodian(s) is unable to afford counsel based on a determination of indigency by the court, counsel will be appointed to represent the parent or Indian custodian where authorized by State law.

(v) The right to be granted, upon request, a specific amount of additional time (up to 20 additional days) to prepare for the proceedings due to circumstances of the particular case.

(vi) The right to petition the court for transfer of the proceeding to tribal court under 25 U.S.C. 1911, absent objection by either parent: *Provided, that* such transfer is subject to declination by the tribal court.

(vii) The mailing addresses and telephone numbers of the court and information related to all parties to the proceeding and individuals notified under this section.

(viii) The potential legal consequences of the proceedings on the future custodial and parental rights of the Indian parents or Indian custodians.

(d) If the identity or location of the Indian parents, Indian custodians or tribes in which the Indian child is a member or eligible for membership cannot be ascertained, but there is

reason to believe 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 (see § 23.111 of this subpart regarding notice requirements). 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.

(e) The original or a copy of each notice sent under this section should be filed with the court together with any return receipts or other proof of service.

(f) If a parent or Indian custodian appears in court without an attorney, the court must inform him or her of the right to appointed counsel, the right to request that the proceeding be transferred to tribal court, the right to object to such transfer, the right to request additional time to prepare for the proceeding and the right (if the parent or Indian custodian is not already a party) to intervene in the proceedings.

(g) If the court or an agency has reason to believe that a parent or Indian custodian possesses limited English proficiency and is therefore not likely to understand the contents of the notice, the court or agency must, at no cost, provide a translated version of the notice or have the notice read and explained in a language that the parent or Indian custodian understands. To secure such translation or interpretation support, a court or agency should contact the Indian child's tribe or the local BIA agency for assistance in locating and obtaining the name of a qualified translator or interpreter.

(h) No substantive proceedings, rulings or decisions on the merits related to the involuntary placement of the child or termination of parental rights may occur until the notice and waiting periods in this section have elapsed.

(i) If the child is transferred interstate, regardless of whether the Interstate Compact on the Placement of Children (ICPC) applies, both the originating State court and receiving State court must provide notice to the tribe(s) and seek to verify whether the child is an Indian child.

§ 23.112 What time limits and extensions apply?

(a) No proceedings regarding decisions for the foster care or termination of parental rights may begin until the waiting periods to which the parents or Indian custodians and to which the Indian child's tribe are entitled have passed. Additional extensions of time may also be granted beyond the minimum required by ICWA.

(b) A tribe, parent or Indian custodian entitled to notice of the pendency of a child custody proceeding has a right, upon request, to be granted an additional 20 days from the date upon which notice was received in accordance with 25 U.S.C. 1912(a) to prepare for participation in the proceeding.

(c) The proceeding may not begin until all of the following dates have passed:

(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 in accordance with 25 U.S.C. 1912(a);

(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 in accordance with 25 U.S.C. 1912(a);

(3) 30 days after the parent or Indian custodian has received notice in accordance with 25 U.S.C. 1912(a), if the parent or Indian custodian has requested an additional 20 days to prepare for the proceeding; and

(4) 30 days after the Indian child's tribe has received notice in accordance with 25 U.S.C. 1912(a), if the Indian child's tribe has requested an additional 20 days to prepare for the proceeding.

(d) The court should allow, if it possesses the capability, alternative methods of participation in State court proceedings by family members and tribes, such as participation by telephone, videoconferencing, or other methods.

§ 23.113 What is the process for the emergency removal of an Indian child?

(a) Any emergency removal or emergency placement of any Indian child under State law must be as short as possible. Each involved agency or court must:

(1) Diligently investigate and document whether the removal or placement is proper and continues to be necessary to prevent imminent physical damage or harm to the child;

(2) Promptly hold a hearing to hear evidence and evaluate whether the removal or placement continues to be necessary whenever new information is received or assertions are made that the emergency situation has ended; and

(3) Immediately terminate the emergency removal or placement once the court possesses sufficient evidence to determine that the emergency has ended.

(b) If the agency that conducts an emergency removal of a child whom the agency knows or has reason to believe is an Indian child, the agency must:

(1) Treat the child as an Indian child until the court determines that the child is not an Indian child;

(2) Conduct active efforts to prevent the breakup of the Indian family as early as possible, including, if possible, before removal of the child;

(3) Immediately take and document all practical steps to confirm whether the child is an Indian child and to verify the Indian child's tribe;

(4) Immediately notify the child's parents or Indian custodians and Indian tribe of the removal of the child;

(5) Take all practical steps to notify the child's parents or Indian custodians and Indian tribe about any proceeding, or hearings within a proceeding, regarding the emergency removal or emergency placement of the child; and

(6) Maintain records that detail the steps taken to provide any required notifications under § 23.111.

(d) A petition for a court order authorizing emergency removal or continued emergency physical custody must be accompanied by an affidavit containing 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) If such persons are unknown, a detailed explanation of what efforts have been made to locate them, including notice to the appropriate BIA Regional Director (see www.bia.gov);

(4) Facts necessary to determine the residence and the domicile of the Indian child;

(5) If either the residence or domicile is believed to be on an Indian reservation, the name of the reservation;

(6) The tribal affiliation of the child and of the parents and/or Indian custodians;

(7) A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action;

(8) 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 transfer the child to the tribe's jurisdiction;

(9) A statement of the specific active efforts that have been taken to assist the parents or Indian custodians so the child may safely be returned to their custody; and

(10) 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.

(e) At any court hearing regarding the emergency removal or emergency placement of an Indian child, the court must determine whether the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(f) Temporary emergency custody should not be continued for more than 30 days.

Temporary emergency custody may be continued for more than 30 days only if:

(1) A hearing, noticed in accordance with these regulations, is held and results in a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness, that custody of the child by the parent or Indian custodian is likely to result in imminent physical damage or harm to the child; or

(2) Extraordinary circumstances exist.

(g) The emergency removal or placement must terminate as soon as the imminent physical damage or harm to the child which resulted in the emergency removal or placement no longer exists, or, if applicable, as soon as the tribe exercises jurisdiction over the case, whichever is earlier.

(h) Once an agency or court has terminated the emergency removal or placement, it must expeditiously:

- (1) Return the child to the parent or Indian custodian within one business day; or
- (2) Transfer the child to the jurisdiction of the appropriate Indian tribe if the child is a ward of a tribal court or a resident of or domiciled on a reservation; or
- (3) Initiate a child custody proceeding subject to the provisions of ICWA and these regulations.

(i) The court should allow, if it possesses the capability, alternative methods of participation in State court proceedings by family members and tribes, such as participation by telephone, videoconferencing, or other methods.

§ 23.114 What are the procedures for determining improper removal?

(a) If, in the course of any Indian 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 immediately stay the proceeding until a determination can be made on the question of improper removal or retention, and such determination must be conducted expeditiously.

(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 parents or Indian custodian, unless returning the child to his parent or custodian would subject the child to imminent physical damage or harm.

Procedures for Making Requests for Transfer to Tribal Court

§ 23.115 How are petitions for transfer of proceeding made?

(a) Either parent, the Indian custodian, or the Indian child's tribe may request, orally on the record or in writing, that the State court transfer each distinct Indian child custody proceeding to the tribal court of the child's tribe.

(b) The right to request a transfer occurs with each proceeding.

(c) The right to request a transfer is available at any stage of an Indian child custody proceeding, including during any period of emergency removal.

(d) The court should allow, if possible, alternative methods of participation in State court proceedings by family members and tribes, such as participation by telephone, videoconferencing, or other methods.

§ 23.116 What are the criteria and procedures for ruling on transfer petitions?

(a) Upon receipt of a petition to transfer by a parent, Indian custodian or the Indian child's tribe, the State court must transfer the case unless any of the following criteria are met:

(1) Either parent objects to such transfer;

(2) The tribal court declines the transfer; or

(3) The court determines that good cause exists for denying the transfer.

(b) The court should expeditiously provide all records related to the proceeding to the tribal court.

§ 23.117 How is a determination of “good cause” not to transfer made?

(a) If the State court believes, or any party asserts, that good cause not to transfer exists, the reasons for such belief or assertion must be stated on the record or in writing and made available to the parties who are petitioning for transfer.

(b) Any party to the 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 may not consider whether the case is at an advanced stage or whether transfer would result in a change in the placement of the child.

(d) In addition, in determining whether there is good cause to deny the transfer, the court may not consider:

(1) The Indian child's contacts with the tribe or reservation;

(2) Socio-economic conditions or any perceived inadequacy of tribal or BIA social services or judicial systems; or

(3) The tribal court's prospective placement for the Indian child.

(e) The burden of establishing good cause not to transfer is on the party opposing the transfer.

§ 23.118 What happens when a petition for transfer is made?

(a) Upon receipt of a transfer petition the State court must promptly notify the tribal court in writing of the transfer petition and request a response regarding whether the tribal court wishes to decline the transfer. The notice should specify how much time the tribal court has to make its decision; provided that the tribal court must be provided 20 days from the receipt of notice of a transfer petition to decide whether to accept or decline the transfer.

(b) If the tribal court accepts the transfer, the State court should promptly provide the tribal court with all court records.

Adjudication of Involuntary Placements, Adoptions, or Terminations or Terminations of Parental

Rights

§ 23.119 Who has access to reports or records?

(a) The court must inform each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child of his or her right to timely examination of all reports or other documents filed with the court and all files upon which any decision with respect to such action may be based.

(b) Decisions of the court may be based only upon reports, documents or testimony presented on the record.

§ 23.120 What steps must a party take to petition a State court for certain actions involving an Indian child?

(a) Any party petitioning a State court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to, and until the commencement of, the proceeding, active efforts have been made to avoid the need to remove the Indian child from his or her parents or Indian custodians and show that those efforts have been unsuccessful.

(b) Active efforts must be documented in detail and, to the extent possible, should involve and use the available resources of the extended family, the child's Indian tribe, Indian social service agencies and individual Indian care givers.

§ 23.121 What are the applicable standards of evidence?

(a) The court may not issue an order effecting 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 with the child's parents or Indian custodian is likely to result in serious physical damage or harm to the child.

(b) The court may not order a termination of parental rights unless the court's order is supported by evidence beyond a reasonable doubt, supported by the testimony of one or more

qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious physical damage or harm to the child.

(c) Clear and convincing evidence must show a causal relationship between the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding.

(d) Evidence that only shows 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 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 should have specific knowledge of the Indian tribe's culture and customs.

(b) Persons with the following characteristics, in descending order, are presumed to meet the requirements for a qualified expert witness:

(1) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.

(2) A member of another tribe who is recognized to be a qualified expert witness by the Indian child's tribe based on their knowledge of the delivery of child and family services to Indians and the Indian child's tribe.

(3) A layperson who is recognized by the Indian child's tribe as having substantial experience in the delivery of child and family services to Indians, and knowledge of

prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

(4) A professional person having substantial education and experience in the area of his or her specialty who can demonstrate knowledge of the prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

(c) 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.

Voluntary Proceedings

§ 23.123 What actions must an agency and State court undertake in voluntary proceedings?

(a) Agencies and State courts must ask whether a child is an Indian child in any voluntary proceeding under § 23.107 of these regulations.

(b) Agencies and State courts must provide the Indian tribe with notice of the voluntary child custody proceedings, including applicable pleadings or executed consents, and their right to intervene under § 23.111 of this part.

§ 23.124 How is consent obtained?

(a) A voluntary termination of parental rights, foster care placement or adoption must be executed in writing and recorded before a court of competent jurisdiction.

(b) Prior to accepting the consent, the court must explain the consequences of the consent in detail, such as any conditions or timing limitations for withdrawal of consent and, if applicable, the point at which such consent is irrevocable.

(c) A certificate of the court must accompany a written consent and must certify that the terms and consequences of the consent were explained in detail in 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) Execution of consent need not be made in open court where confidentiality is requested or indicated.

(e) A consent given prior to or within 10 days after birth of the Indian child is not valid.

§ 23.125 What information should a consent document contain?

(a) The consent document must contain the name and birthdate of the Indian child, the name of the Indian child's tribe, identifying tribal enrollment number, if any, or other indication of the child's membership in the tribe, and the name and address of the consenting parent or Indian custodian. If there are any conditions to the consent, the consent document must clearly set out the conditions.

(b) A consent to foster care placement should contain, in addition to the information specified in paragraph (a) of this section, the name and address of the person or entity by or through whom the placement was arranged, if any, or the name and address of the prospective foster parents, if known at the time.

§ 23.126 How is withdrawal of consent achieved in a voluntary foster care placement?

(a) Withdrawal of consent must be filed in the same court where the consent document was executed.

(b) When a parent or Indian custodian withdraws consent to foster care placement, the child must be returned to that parent or Indian custodian immediately.

§ 23.127 How is withdrawal of consent to a voluntary adoption achieved?

(a) A consent to termination of parental rights or adoption may be withdrawn by the parent at any time prior to entry of a final decree of voluntary termination or adoption, whichever occurs later. To withdraw consent, the parent must file, in the court where the consent is filed, an instrument executed under oath asserting his or her intention to withdraw such consent.

(b) The clerk of the court in which the withdrawal of consent is filed must promptly notify the party by or through whom any preadoptive or adoptive placement has been arranged of such filing and the child must be returned to the parent or Indian custodian as soon as practicable.

Dispositions

§ 23.128 When do the placement preferences apply?

(a) In any preadoptive, adoptive or foster care placement of an Indian child, ICWA's placement preferences apply; except that, if the Indian child's tribe has established by resolution a different order of preference than that specified in ICWA, the agency or court effecting the placement must follow the tribe's placement preferences.

(b) The agency seeking a preadoptive, adoptive or foster care placement of an Indian child must always follow the placement preferences. If the agency determines that any of the preferences cannot be met, the agency must demonstrate through clear and convincing evidence that a diligent search has been conducted to seek out and identify placement options that would satisfy the placement preferences specified in §§ 23.129 and 23.130 of these regulations, and explain why the preferences could not be met. A search should include notification about the placement proceeding and an explanation of the actions that must be taken to propose an alternative placement to:

- (1) The Indian child's parents or Indian custodians;

(2) All of the known, or reasonably identifiable, members of the Indian child's extended family members;

(3) The Indian child's tribe;

(4) In the case of a foster care or preadoptive placement:

(i) All foster homes licensed, approved, or specified by the Indian child's tribe; and

(ii) All Indian foster homes located in the Indian child's State of domicile that are licensed or approved by any authorized non-Indian licensing authority.

(c) Where there is a request for anonymity, the court should consider whether additional confidentiality protections are warranted, but a request for anonymity does not relieve the agency or the court of the obligation to comply with the placement preferences.

(d) Departure from the placement preferences may occur only after the court has made a determination that good cause exists to place the Indian child with someone who is not listed in the placement preferences.

(e) Documentation of each preadoptive, adoptive or foster care placement of an Indian child under State law must be provided to the State for maintenance at the agency. Such documentation must include, at a minimum: the petition or complaint; all substantive orders entered in the proceeding; the complete record of, and basis for, the placement determination; and, if the placement deviates from the placement preferences, a detailed explanation of all efforts to comply with the placement preferences and the court order authorizing departure from the placement preferences.

§ 23.129 What placement preferences apply in adoptive placements?

(a) In any adoptive placement of an Indian child under State law, preference must be given in descending order, as listed below, to placement of the child with:

- (1) A member of the child's extended family;
- (2) Other members of the Indian child's tribe; or
- (3) Other Indian families, including families of unwed individuals.

(b) The court should, where appropriate, also consider the preference of the Indian child or parent.

§ 23.130 What placement preferences apply in foster care or preadoptive placements?

In any foster care or preadoptive placement of an Indian child:

(a) The child must be placed in the least restrictive setting that:

- (1) Most approximates a family;
- (2) Allows his or her special needs to be met; and
- (3) Is in reasonable proximity to his or her home, extended family, and/or

siblings.

(b) 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, licensed, approved or specified by the Indian child's tribe, whether on or off the reservation;
- (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.

§ 23.131 How is a determination for “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 such belief or assertion must be stated on the record or in writing and made available to the parties to the proceeding and the Indian child’s tribe.

(b) The party seeking departure from the preferences bears the burden of proving by clear and convincing evidence the existence of “good cause” to deviate from the placement preferences.

(c) A determination of good cause to depart from the placement preferences must be based on one or more of the following considerations:

(1) The request of the parents, if both parents attest that they have reviewed the placement options that comply with the order of preference.

(2) The request of the child, if the child is able to understand and comprehend the decision that is being made.

(3) The extraordinary physical or emotional needs of the child, such as specialized treatment services that may be unavailable in the community where families who meet the criteria live, as established by testimony of a qualified expert witness; provided that extraordinary physical or emotional needs of the child does not include ordinary bonding or attachment that may have occurred as a result of a placement or the fact that the child has, for an extended amount of time, been in another placement that does not comply with ICWA.

(4) The unavailability of a placement after a showing by the applicable agency in accordance with § 23.128(b) of this subpart, and a determination by the court that active

efforts have been made to find placements meeting the preference criteria, but none have been located. For purposes of this analysis, a placement may not be considered unavailable if the placement conforms 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) The court should consider only whether a placement in accordance with the preferences meets the physical, mental and emotional needs of the child; and may not depart from the preferences based on the socio-economic status of any placement relative to another placement.

Post-Trial Rights

§ 23.132 What is the procedure for petitioning to vacate an adoption?

(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, a parent who executed a consent to termination of paternal rights or adoption of that child may petition the court in which the final adoption decree was entered to vacate the decree and revoke the consent on the grounds that consent was obtained by fraud or duress, or that the proceeding failed to comply with ICWA.

(b) Upon the filing of such petition, the court must give notice to all parties to the adoption proceedings and the Indian child's tribe.

(c) The court must hold a hearing on the petition.

(d) Where the court finds that the parent's consent was obtained through fraud or duress, the court must vacate the decree of adoption, order the consent revoked and order that the child be returned to the parent.

§ 23.133 Who can make a petition to invalidate an action?

(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 where it is alleged that ICWA has been violated:

(1) An Indian child who is 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) There is no requirement that the particular party's rights under ICWA be violated to petition for invalidation; rather, any party may challenge the action based on violations in implementing ICWA during the course of the child custody proceeding.

(d) The court should allow, if it possesses the capability, alternative methods of participation in State court proceedings by family members and tribes, such as participation by telephone, videoconferencing, or other methods.

§ 23.134 What are the rights of adult adoptees?

(a) Upon application by an Indian individual who has reached age 18 who was the subject of an adoptive placement, the court that entered the final decree 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.

(b) Where State law prohibits revelation of the identity of the biological parent, assistance of the BIA should be sought to help an adoptee who is eligible for membership in a tribe to become a tribal member without breaching the Privacy Act or confidentiality of the record.

(c) In States where adoptions remain closed, the relevant agency should communicate directly with the tribe's enrollment office and provide the information necessary to facilitate the establishment of the adoptee's tribal membership.

(d) Agencies should work with the tribe to identify at least one tribal designee familiar with 25 U.S.C. 1917 to assist adult adoptees statewide with the process of reconnecting with their tribes and to provide information to State judges about this provision on an annual basis.

§ 23.135 When must notice of a change in child's status be given?

(a) Notice by the court, or an agency authorized by the court, must be given to the child's biological parents or prior Indian custodians and the Indian child's tribe whenever:

- (1) A final decree of adoption of an 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; or
- (3) Whenever an Indian child is removed from a foster care home or institution to another foster care placement, preadoptive placement, or adoptive placement.

(b) The notice must inform the recipient of the right to petition for return of custody of the child.

(c) A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice filed with the court. The waiver may be revoked at any time by filing with the court a written notice of revocation. A revocation of the right to receive notice does not affect any proceeding which occurred before the filing of the notice of revocation.

§ 23.136 What information must States furnish to the Bureau of Indian Affairs?

(a) Any state entering a final adoption decree or order must furnish a copy of the decree or order to the Bureau of Indian Affairs, Chief, Division of Human Services, 1849 C Street NW, Mail Stop 4513 MIB, Washington, D.C. 20240, along with the following information:

- (1) Birth name of the child, tribal affiliation and name of the 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) Confidentiality of such information must be maintained and is not subject to the Freedom of Information Act, 5 U.S.C. 552, as amended.

§ 23.137 How must the State maintain records?

(a) The State must establish a single location where all records of every voluntary or involuntary foster care, preadoptive placement and adoptive placement of Indian children by courts of that State will be available within seven days of a request by an Indian child's tribe or the Secretary.

(b) The records must contain, at a minimum, the petition or complaint, all substantive orders entered in the proceeding, and the complete record of the placement determination (including, but not limited to the findings in the court record and social worker's statement).

§ 23.138 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-XXXX. 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.

Dated: March 16, 2015

Kevin K. Washburn,
Assistant Secretary – Indian Affairs.

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