Guidelines for

Implementing the Indian Child Welfare Act

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U.S. Department of the Interior
Office of the Assistant Secretary – Indian Affairs
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GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT

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Purpose of These Guidelines

These guidelines are intended to assist those involved in child custody proceedings in understanding and uniformly applying the Indian Child Welfare Act (ICWA) and U.S. Department of the Interior (Department) regulations (also referred to as a "rule"). All such parties – including the courts, state child welfare agencies, private adoption agencies, Tribes, and family members – have a stake in ensuring the proper implementation of this important Federal law designed to protect Indian children, their parents, and Indian Tribes.

ICWA is a statute passed by Congress and codified in the United States Code (U.S.C.). The Department promulgated ICWA regulations to implement the statute; the regulations were published in the Federal Register and will be codified in the Code of Federal Regulations (CFR).

ICWA, the statute: Codified in the United State Code (U.S.C.) at 25 U.S.C. 1901 *et seq.*
ICWA regulations: Published at 81 FR 38864 (June 14, 2016) and codified at 25 CFR part 23.

The regulations apply to any child custody proceeding initiated on or after December 12, 2016, even if the child has already undergone child custody proceedings prior to that date to which the regulation did not apply. The statute defines a "child-custody proceeding" as a foster-care placement, a termination of parental rights (TPR), a preadoptive placement, or an adoptive placement; so, if any one of these types of proceedings is initiated on or after December 12, 2016, the rule applies to that proceeding.[1]

While not imposing binding requirements, these guidelines provide a reference and resource for all parties involved in child custody proceedings involving Indian children. These guidelines explain the statute and regulations and also provide examples of best practices for the implementation of the statute, with the goal of encouraging greater uniformity in the application of ICWA. These guidelines replace the 1979 and 2015 versions of the Department's guidelines.

Reader's Tip: Under each heading of these guidelines is a regulatory provision (if there is one) and then guidelines to provide guidance, recommended practices, and suggestions for implementation. The text of the regulation is included as part of these guidelines for ease of reference and also because it reflects the Department's guidance on ICWA's requirements.

[1] *See* 25 U.S.C. 1903(1); 25 CFR § 23.2.

Context for ICWA, the Regulations, and These Guidelines

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.''[2] 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 . . . . ''[3] Although the crisis flowed from multiple causes, Congress found that non-Tribal 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.[4] 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.[5]

Following ICWA's enactment, the Department issued regulations in July 1979 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.[6] 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, the Department published guidelines for State courts to use in interpreting many of ICWA's requirements in Indian child custody proceedings.[7] 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.[8]

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. Recognizing the need for such regulations, the Department engaged in a notice-and-comment process to promulgate formal ICWA regulations. The Department issued a proposed rule on March 20, 2015.[9] After gathering and reviewing comments on the

[2] H.R. Rep. No. 95-1386, at 9 (1978), reprinted in 1978 U.S.C.C.A.N. 7530, 7531.
[3] 25 U.S.C. 1901(4).
[4] 25 U.S.C. 1901(4)-(5).
[5] 25 U.S.C. 1902.
[6] See 25 CFR part 23.
[7] 44 FR 67584 (Nov. 26, 1979).
[8] See 80 FR 10146 (Feb. 25, 2015).
[9] 80 FR 14480 (Mar. 20, 2015).

proposed rule, the Department issued a final rule on June 14, 2016.[10] When it issued those regulations, the Department noted that it planned to issue updated guidelines, which it is doing with these guidelines.[11] These guidelines replace both the 2015 and the 1979 versions of the Department's guidelines.

The Department has found that, since ICWA's passage in 1978, 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.[12] Native American children, however, are still disproportionately more likely to be removed from their homes and communities than other children.[13] 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 parents and extended families; 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.

For these reasons, and to promote the consistent application of ICWA across the United States, the Department issued the June 2016 regulations and is issuing these guidelines.

[10] 81 FR 38778 (June 14, 2016).
[11] Id. at 38780.
[12] 25 U.S.C. 1901, 1901(2).
[13] 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).

A. General Provisions

A.1 Federal ICWA and ICWA regulations and other Federal and State law

Regulation:

§ 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.

Guidelines:

ICWA establishes the minimum procedural and substantive standards that must be met, regardless of State law. The regulations provide a binding, consistent, nationwide interpretation of ICWA's minimum standards. ICWA displaces State laws and procedures that are less protective.[14]

Many States have their own laws applying to child welfare proceedings involving Indian children that establish protections beyond the minimum Federal standards. In those instances, the more protective State law applies. For example, the Federal ICWA does not require notice requirements in voluntary child custody proceedings (although such notice is a recommended practice). Some States have passed laws that do require notice in voluntary proceedings and that higher standard of protection would apply.

A.2 Tribal-State ICWA agreements

Regulation:

(The statute (at 25 U.S.C 1919) specifies that the Tribe and State may enter into an agreement. The regulation makes clear that the mandatory dismissal provisions in § 23.110 are "[s]ubject to 25 U.S.C. 1919 (Agreements between States and Indian Tribes).")

Guidelines:

Some States and Tribes have entered into negotiated Tribal-State agreements that establish specific procedures to follow in Indian child custody proceedings. The Department strongly encourages both Tribes and States to enter into these cooperative agreements. The statute makes clear these agreements can address the "care and custody of Indian children and jurisdiction over child custody proceedings" and specifically can

[14] *See, e.g., In re Adoption of M.T.S., 489 N.W. 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).*

include agreements that provide for the orderly transfer of jurisdiction on a case-by-case basis and agreements that provide for concurrent jurisdiction between States and Indian tribes. 25 U.S.C. 1919. The regulation provides, for example, that the mandatory dismissal provisions in § 23.110 do not apply if the State and Tribe have an agreement regarding the jurisdiction whereby the Tribes choose to refrain from asserting jurisdiction. Such agreements can also address how States notify Tribes in emergency removal and initial State hearings, financial arrangements between the Tribe and State regarding care of children, mechanisms for identifying and recruiting appropriate placements and other similar topics.

A.3 Considerations in providing access to State court ICWA proceedings

Regulation:

§ 23.133 Should courts allow participation by alternative methods?

If it possesses the capacity, the court should allow alternative methods of participation in the State-court child custody proceedings involving an Indian child, such as participation by telephone, videoconferencing, or other methods.

Guidelines:

Section 23.133 encourages State courts to permit alternative means of participation in Indian child-custody proceedings, such as by phone or video. This enables the court to receive all relevant information regarding the child's circumstances, and also minimizes burdens on Tribes and other parties. Several State court systems permit the use of video-conferencing in various types of proceedings.[15] 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. A service such as Skype would be included in "other methods."

This issue may be particularly relevant to a Tribe's participation in a case. A Tribe's members may live far from the Tribal reservation or headquarters and the Indian child's Tribe may not necessarily be located near the State court Indian child custody proceeding. As such, 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. Allowing alternative methods of participation in a court proceeding can help alleviate that burden.

Another barrier to Tribal participation in State court proceedings is that the Tribe may not have an attorney licensed to practice law in the State in which the Indian child custody proceeding is being held. Many tribes have limited funds to hire local counsel. The Department encourages all State courts to permit Tribal representatives to present before the court in ICWA proceedings regardless of whether they are attorneys or attorneys licensed in that State, as a number of State courts have already done.[16]

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[15] *See, e.g.,* National Center for State Courts Video Technologies Resource Guide (available at www.ncsc.org/Topics/Technology/Video-Technologiesw/Resource-Guide.aspx).

[16] *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).

B. Applicability & Verification

It is important to determine at the outset of any State court child custody proceeding whether ICWA applies. Doing so promotes stability for Indian children and families and conserves resources by reducing the need for delays, duplication, appeals, and attendant disruptions. There are two questions to ask in determining whether ICWA applies:

1. Does ICWA apply to this child?
2. Does ICWA apply to the proceeding?

B.1 Determining whether the child is an "Indian child" under ICWA

Regulation:

§ 23.2 *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.

§ 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.

Guidelines:

Definition of "Indian child"

The 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. ICWA does not apply simply based on a child or parent's Indian ancestry. Instead, there must be a political relationship to the Tribe.

Most Tribes require that individuals apply for citizenship and demonstrate how they meet that Tribe's membership criteria. Congress recognized that there may not have been an opportunity for an infant or minor child to become a citizen of a Tribe prior to the child-custody proceeding, and 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.[17]

[17] *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).*

Inquiry

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.

Timing of inquiry. 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 inquiry into that threshold issue by courts, State agencies, and participants to the proceedings as soon as possible. If this inquiry is not timely, a child-custody proceeding may not comply with ICWA and thus may deny ICWA protections to Indian children and their families or, at the very least, cause inefficiencies. 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 delays and instability in placements for the Indian child.

Subsequent discovery of information. Recognizing that facts change during the course of a child-custody proceeding, courts must 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 agency 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.

Inquiry each proceeding. The rule does not require an inquiry at each hearing within a proceeding; but, if a new child-custody proceeding (such as a proceeding to terminate parental rights or for adoption) is initiated for the same child, the court must make a finding as to whether there is "reason to know" that the child is an Indian child. In situations in which the child was not identified as an Indian child in the prior proceeding, the court has a continuing duty to inquire whether the child is an Indian child.[18]

Reason to Know

If the court has "reason to know" that a child is a member of a Tribe, then certain obligations under the statute and regulations are triggered (specifically, the court must confirm that due diligence was used to: (1) identify the Tribe; (2) 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; and (3) treat the child as an Indian child, unless and until it is determined that the child is not an Indian child).

The regulation lists factors that indicate a "reason to know" the child is an "Indian child." State courts and agencies are encouraged to interpret these factors expansively. When in doubt, it is better to conduct further investigation into a child's status early in the case; this establishes which laws will apply to the case and minimizes the potential for delays or disrupted placements in the future. States or courts may choose to require additional investigation into whether there is a reason to know the child is an Indian child.

When one or more factors is present. If there is "reason to know" the child is an "Indian child," the court needs to ensure that due diligence was used to identify and work with all of the Tribes of which there is a 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). In order to provide the information that the court needs, the State agency or other party seeking placement should ask the child, parents, and potentially extended family which Tribe(s) they have an affiliation with and obtain genealogical information from the family, and contact the Tribe(s) with that information.

[18] *See, e.g., In re Isaiah W.,* 1 Cal.5th 1 (2016).

When none of the factors is present. If there is no "reason to know" the child is an "Indian child," the State agency (or other party seeking placement) should document the basis for this conclusion in the case file.

Verification or documentation of a factor. The rule provides that the court has a "reason to know" the child is an "Indian child" if it is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe. This provision reflects that there may already be sufficient documentation available to demonstrate that the Tribe has concluded that a parent or child is a citizen of the Tribe. However, for the court's determination as to whether the child is an Indian child, the best source is a contemporaneous communication from the Tribe.

Due Diligence to Work with Tribes to Verify

The determination of whether a child is an "Indian child" turns on Tribal citizenship or eligibility for citizenship. The 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)[19] is a contemporaneous communication from the Tribe documenting the determination.

See section B.7 of these guidelines for more information on verification and when a State court determination is appropriate.

Treating the Child as an Indian Child, Unless and Until Determined Otherwise

This requirement (triggered by a "reason to know" the child is an "Indian child") 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. 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 as defined by the statute. If, based on feedback from the relevant Tribe(s) or other information, the court determines that the child is not an "Indian child," then the State may proceed under its usual standards.

B.2 Determining whether ICWA applies

Regulation:

§ 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

[19] These guidelines use the terms "member" and "citizen" interchangeably.

(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.

Guidelines:

ICWA has provisions that apply to "child-custody proceedings." *See* the definition of "child-custody proceeding" and associated guidelines in section L of these guidelines. Child-custody proceedings include both involuntary proceedings and voluntary proceedings involving an "Indian child," regardless of whether individual members of the family are themselves Indian. Thus, for example, a non-Indian parent may avail himself or herself of protections provided to parents by ICWA if her child is an "Indian child."

Involuntary Proceedings

If the child may be involuntarily removed from the parents or Indian custodian or the child may be involuntarily placed, then ICWA applies to the proceeding. If the parent or Indian custodian does not agree to the removal or placement, or agrees only under threat of the child's removal, then the proceeding is involuntary.

Voluntary Proceedings

If the parents or Indian custodian voluntarily agrees to removal or placement of the Indian child, then certain provisions of ICWA still apply. Voluntary proceedings require a determination of whether the child is an

Indian child and compliance with ICWA and the regulation's provisions relating to the placement preferences. *See* section B.3 of these guidelines for a list of which regulatory provisions apply to each type of proceeding.

A proceeding is voluntary only if the parent or Indian custodian voluntarily agrees to placement, of his or her own free will, without threat of removal.

Voluntary Placements Where Custody of the Child Can Be Regained "Upon Demand"

If the parent or Indian custodian has voluntarily placed the child (upon his or her own free will without threat of removal) and can regain custody "upon demand," meaning without any formalities or contingencies, then ICWA does not apply. These excepted voluntary placements are typically done without the assistance of a child welfare agency. An example is where a parent arranges for a relative or neighbor to care for their child while they are out of town for a period of time. If a child welfare agency is involved, it is recommended that placement intended to last for an extended period of time be memorialized in written agreements that explicitly state the right of the parent or Indian custodian to regain custody of the child upon demand without any formalities or contingencies.

The distinction between a voluntary and involuntary placement can be nuanced and depends on the facts. For example:

- If parent wishes to enter a drug treatment and places the child while in treatment, but can get the child back upon demand even if treatment is not completed, then that is likely a voluntary placement.
- If parent is told they will lose the child unless they enter a drug treatment program during which child is placed elsewhere, that is not a voluntary placement.
- If a parent wishes to enter drug treatment and places the child while in treatment, and is told that they can only get child back if treatment is successfully completed, that is not a voluntary placement.

Placements Resulting from a Child's Status Offense

ICWA also applies to placements resulting from a child's status offense. Status offenses are offenses that would not be considered criminal if committed by an adult, and are prohibited only because of a person's status as a minor (such as truancy or incorrigibility). If the child is being removed because he or she committed a status offense, then ICWA applies.

Guardianships/Conservatorships

ICWA also applies to placements with a guardian or conservator, because ICWA includes guardianships in the definition of "foster care placement."

Intra-Family Custody Disputes

The statute and rule exclude custody disputes between parents, but can apply to other types of intra-family disputes—including disputes with grandparents, step-parents, or other family members—assuming that such disputes otherwise meet the statutory and regulatory definitions.

Placement with Parent

Placement with a parent is generally not an "Indian child-custody proceeding" because it is not included as a "foster-care placement." 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. However, if a proceeding seeks to terminate the parental rights of one parent, that proceeding falls within ICWA's definition of "child-custody proceeding" even if the child will remain in the custody of the other parent or a step-parent.

Factors that May Not Be Considered

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 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 parents, whether the parent ever had custody of the child, or the Indian child's blood quantum (sometimes known as the "Existing Indian Family" exception). These factors are not relevant to the inquiry of whether the statute applies. Rather, ICWA applies whenever an "Indian child" is the subject of a "child-custody proceeding," as those terms are defined in the statute. In addition, 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. A standard that requires the evaluation of the strength of these social or cultural ties frustrates ICWA's purpose to provide more objective standards for Indian child-custody proceedings.[20]

Application Even if Child Reaches Age 18

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.

B.3 Determining which requirements apply based on type of proceeding

Regulation:

§ 23.104 What [rule] provisions…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):

Regulatory 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,

[20] *See* 81 FR 38801-38802 (June 14, 2016).

	Voluntary
23.111 (What are the notice requirements for a child-custody proceeding involving an Indian child?)	Involuntary (foster-care placement and TPR)
23.112 (What time limits and extensions apply?)	Involuntary (foster-care placement and TPR)
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 TPR)
23.116 (What happens after a petition for transfer is made?)	Involuntary, Voluntary (foster-care placement and TPR)
23.117 (What are the criteria for ruling on transfer petitions?)	Involuntary, Voluntary (foster-care placement and TPR)
23.118 (How is a determination of “good cause” to deny transfer made?)	Involuntary, Voluntary (foster-care placement and TPR)
23.119 (What happens after a petition for transfer is granted?)	Involuntary, Voluntary (foster-care placement and TPR)
Adjudication of Involuntary Proceedings	
23.120 (How does the State court ensure that active efforts have been made?)	Involuntary (foster-care placement and TPR)
23.121 (What are the applicable standards of evidence?)	Involuntary (foster-care placement and TPR)
23.122 (Who may serve as a qualified expert witness?)	Involuntary (foster-care placement and TPR)
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 rule apply to pending proceedings?)	Emergency, Involuntary, Voluntary
Severability	
23.144 (What happens if some portion of this rule 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.

Guidelines:

As discussed above, ICWA has provisions that apply to both involuntary proceedings and voluntary proceedings involving an "Indian child," regardless of whether individual members of the family are themselves Indian. ICWA also includes a separate category for "emergency" proceedings, which are described in section C of these guidelines, below.

This chart is intended as a quick-reference tool to provide an overview of what regulatory provisions apply to what types of proceedings. For specifics on how each regulatory provision applies, please refer directly to the regulatory provision and appropriate section of these guidelines.

B.4 Identifying the Tribe

Guidelines:

Sometimes, the child or parent may not be certain of their citizenship status in an Indian Tribe, but may indicate they are somehow affiliated with a Tribe or group of Tribes. In these circumstances, State agencies and courts should ask the parent and, potentially, extended family what Tribe or Tribal ancestral group the parent may be affiliated with.

If a specific Tribe is indicated, determine if that Tribe is listed as a federally recognized Indian Tribe on the BIA's annual list, viewable at www.bia.gov. Some Tribes are recognized by States but not recognized by the Federal Government. The Federal ICWA applies only if the Tribe is a federally recognized Indian Tribe and therefore listed on the BIA list.

If only the Tribal ancestral group (e.g., Cherokee) is indicated, then we recommend State agencies or courts contact each of the Tribes in that ancestral group (*see* section B.6 of these guidelines regarding the published list of ICWA designated agents) to identify whether the parent or child is a member of any such Tribe. If the State agency or court is unsure that it has contacted all the relevant Tribes, or needs other assistance in identifying the appropriate Tribes, it should contact the BIA Regional Office. Ideally, State agencies or courts should contact the BIA Regional Office for the region in which the Tribe is located, but if the State agency or court is not aware of the appropriate BIA Regional Office, it may contact any BIA Regional Office for direction.

B.5 Identifying the Tribe when there is more than one Tribe

Regulation:

§ 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.

Guidelines:

If a child meets the definition of "Indian child" through more than one Tribe, it is a best practice to communicate with both (or all) of the Tribes regarding any upcoming actions regarding the child. The Tribes must be informed that the child may be a member or eligible for membership in multiple Tribes, and must be given reasonable opportunity to agree on which Tribe will be designated as the Indian child's Tribe for the purposes of the child-custody proceeding. If the Tribes are unable to reach an agreement, the State court will designate a Tribe, after considering the factors identified in the regulation. It is a best practice to conduct a hearing regarding designation of the Indian child's Tribe so that the court can gather the information about the factors identified in the regulation.

B.6 Contacting the Tribe

Regulation:

§ 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 website 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, D.C. (see www.bia.gov).

Guidelines:

Although the regulation focuses on written contact, it is recommended that, in addition, State agencies contact, by telephone and/or email, the Tribal ICWA agent, as listed in BIA's most recent list of designated Tribal agents for service of ICWA notice (available on www.bia.gov and published annually in the Federal Register). This facilitates open communication and enables the State and Tribal social workers to coordinate on services that may be available to support the family. State agencies should document their conversations with Tribal agents. If, for some reason, the State agency cannot reach the Tribal agent listed in the most recent list on www.bia.gov or in the Federal Register, we recommend contacting the BIA.

B.7 Verifying Tribal membership

Regulation:

§ 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.

***See, also,* § 23.107(b)(1) in section B.1 of these guidelines, above.**

Guidelines:

Tribes, as sovereign governments, have the exclusive authority to determine their political citizenship and their eligibility requirements. A Tribe is, therefore, the authoritative and best source of information regarding who is a citizen (or member) 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.

If the court has "reason to know" the child is an "Indian child" (*see* section B.1 of these guidelines, above), agencies must use due diligence to work with the relevant Tribe(s) 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. The regulation requires that the agency's efforts to identify and work with those Tribes be documented in the court record. It is a best practice for these efforts to be maintained in agency files as well.

Form of Verification

While written verification from the Tribe(s) is an appropriate method for such verification, other methods may be appropriate. 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.

Information in Request for Tribe's Verification

The Department encourages State 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). 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 delays and disruptions. Section 23.111(d) includes categories of information that must be provided in the notice to a Tribe in involuntary foster-care placement or TPR proceedings. Such information may be helpful to provide a Tribe to assist in verification of whether the child an Indian child. It is also important that names, birthdates, and other relevant information be reported accurately to the Tribe, as misspellings or other incorrect information can generate inaccurate or delayed responses.

A primary reason for courts mistakenly not being aware that a child is an Indian child is that the request for verification lacks the information necessary (or lacks accurate information) for the Tribe to make a determination as to membership or eligibility for membership. We therefore recommend parties include as much information as is available regarding the child in order to help the Tribe identify whether the child or the child's parent is a member. If possible, include the following information:

- ✓ Genograms or ancestry/family charts for both parents;
- ✓ All known names of both parents (maiden, married and former names or aliases), including possible alternative spellings;
- ✓ Current and former addresses of the child's parents and any extended family;
- ✓ Birthdates and places of birth (and death, if applicable) of both parents;

- ✓ All known Tribal affiliation (or Indian ancestry if Tribal affiliation not known) for individuals listed on the ancestry/family charts; and
- ✓ The addresses for the domicile and residence of the child, his or her parents, or the Indian custodian and whether this is on an Indian reservation or in an Alaska Native village.

Court's Determination

While a Tribe is the authoritative and best source regarding Tribal citizenship information, the court must ultimately determine whether the child is an Indian child for purposes of the child-custody proceeding. Ideally, that determination would be based on information provided by the Tribe, but may need to be based on other information if, for example, the Tribe(s) fail(s) to respond to verification requests.

The Department encourages prompt responses by Tribes, but if a Tribe fails to respond to multiple 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 sought the assistance of the Bureau of Indian Affairs (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. A finding that a child is an "Indian child" applies only for the purposes of the application of ICWA to that proceeding, and does not establish that child's membership in a Tribe or eligibility for any Federal programs or benefits for any other purpose. If new evidence later arises, the court will need to consider it and should alter the original determination if appropriate.

It is recommended the agency document the requests to the Tribe to obtain information or verification of a child's or parent's Tribal citizenship and provide this information for the court file.

BIA Assistance

BIA does not make determinations as to Tribal citizenship or eligibility for Tribal citizenships except as otherwise provided by Federal or Tribal Law, but BIA can help route the notice to the right place.

B.8 Facilitating Tribal membership

Guidelines:

In many cases, Tribal citizenship would make more services and programs available to the child. Even where it is not clear that Tribal services and programs would assist the child, there are both immediate and long-term benefits to being a Tribal citizen. It is thus a recommended practice for the social worker (or party seeking placement in a voluntary adoption) to facilitate the child becoming a member, such as by assisting with the filing of a Tribal membership application or otherwise.

C. Emergency Proceedings

C.1 Emergency proceedings in the ICWA context

Regulation:

§ 23.2 *Emergency proceeding* means and includes any court action that involves an emergency removal or emergency placement of an Indian child.

Guidelines:

The statute and regulations recognize that emergency proceedings may need to proceed differently from other proceedings under ICWA.[21] 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.[22] 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.

Both the legislative history and the decisions of multiple courts support the conclusion that ICWA's emergency proceedings provisions apply to both: (1) Indian children who are domiciled off of the reservation and (2) Indian children domiciled on the reservation, but temporarily off of the reservation.[23]

C.2 Threshold for removal on an emergency basis

Regulation:

…necessary to prevent imminent physical damage or harm to the child. *See* § 23.113(b)(1), above.

Guidelines:

ICWA allows for removal of a child from his or her parents or Indian custodian, as part of an emergency proceeding only if the child faces "imminent physical damage or harm." The Department interprets this standard as mirroring the constitutional standard for removal of *any* child from his or her parents without providing due process.

As a general rule, before any parent may be deprived of the care or custody of their child without their consent, due process—ordinarily a court proceeding resulting in an order permitting removal—must be provided.[24] A child may, however, be taken into custody by a State official without court authorization or

[21] *See* 25 U.S.C. 1922.
[22] H.R. Rep. No. 9501386; 25 U.S.C. 1922.
[23] *See* 81 FR 38794-38795 (June 14, 2016).
[24] *See, e.g., Tenenbaum v. Williams,* 193 F.3d 581 (2d Cit. 1999); *Doe v. Kearney,* 329 F.3d 1286 (11th Cir. 2003).

parental consent only in emergency circumstances. Courts have defined emergency circumstances as "circumstances in which the child is immediately threatened with harm," including when there is an immediate threat to the safety of the child, when a young child is left without care or adequate supervision, or where there is evidence of serious ongoing abuse and the officials have reason to fear imminent recurrence.[25] The same standards and protections apply when an Indian child is involved. And those standards and protections are reflected in section 1922 of ICWA, which addresses emergency proceedings involving Indian children.

C.3 Standards and processes for emergency proceedings

Regulation:

§ 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.

…

[25] *Hurlman v. Ric,* 927 F.2d 74, 80-81 (2d Cir. 1991 (citing cases).

Guidelines:

Timing of hearing. If any child (including a non-Indian child) is removed from her parents by State officials without court authorization or parental consent, the State must generally provide a meaningful hearing promptly after removal.[26] States may call these proceedings by different names, such as "protective custody," "emergency custody," "shelter care," or "probable cause," among others, but they typically take place within a short time frame after the removal, such as 48 or 72 hours. These hearings should provide parents with a meaningful opportunity to be heard. If the agency determines the emergency has ended, State procedures will dictate whether the agency may return the child without the need for a hearing.

Termination of Emergency Removal. If a child was removed from the home on an emergency basis because of a temporary threat to his or her safety, but the threat has been removed and the child is no longer at risk, the State should terminate the removal, either by returning the child to the parent or transferring the case to Tribal jurisdiction. This comports with standards that apply to all child-welfare cases, and protects the "fundamental liberty interest" that parents have in the care and custody of their children.[27] If circumstances warrant, however, the State agency may instead initiate a child-custody proceeding to which the full set of ICWA protections would apply.

- **Restoring the child to the parent or Indian custodian.** If the agency determines the emergency has ended, State procedures will dictate whether the agency may return the child without the need for a hearing. 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 to the child, 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.

- **Transferring the proceeding to Tribal jurisdiction.** The agency may terminate the emergency proceeding by transferring the child to the jurisdiction of the Tribe. Transfer of a proceeding is discussed below in section F of these guidelines.

- **Initiating a "child custody proceeding."** To initiate a full "child custody proceeding" (as defined in 25 CFR § 23.2), the State agency should set the hearing date and send out notice by registered or certified mail, return receipt requested, to the parent or Indian custodian and Tribe in accordance with ICWA's required timeframes (see section D.7 of these guidelines).

Termination of the emergency proceeding does not necessarily mean that the actual placement of the child must change. If an Indian 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 to which the full set of ICWA protections would apply. 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

[26] *Swipies v. Kofka,* 419 F.3d 709, 715 (8th Cir. 2005).
[27] *See Troxel v. Granville,* 530 U.S. 57 (2000).

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)

ICWA and the rule emphasize that an emergency proceeding under ICWA section 1922 needs to be as short as possible and include provisions that are designed to achieve that result. 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.[28] The rule requires that an emergency removal or placement of an Indian child must "terminate immediately" when it is no longer necessary to prevent imminent physical damage or harm to the child.

C.4 Contents of petition for emergency removal

Regulation:

§ 23.113 What are the standards for emergency proceedings involving an Indian child?

…(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;

[28] 25 U.S.C. 1922.

(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.

…

Guidelines:

The contents listed in this section of the regulation are strongly recommended, but not required (as indicated by the word "should" rather than "must"). A failure to include any of the listed information should not result in denial of the petition if the child faces imminent physical damage or harm.

C.5 Outer limit on length of emergency removal

Regulation:

§ 23.113 What are the standards for emergency proceedings involving an Indian child?

…(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.

Guidelines:

Emergency proceedings—which generally do not include the full suite of due process or ICWA protections for parents and children—must not extend for longer than necessary to prevent imminent physical damage or harm to the child. If there is sufficient evidence of abuse or neglect, the State should promptly initiate a proceeding that provides the full suite of due process and ICWA protections. State laws vary in their handling of emergency proceedings and the initiation of foster-care proceedings, and it may not always be easy to ascertain when the "emergency proceeding" is concluded. The intent of the presumptive outer bound on the length of an emergency proceeding (30 days) is to ensure the safeguards of the Act cannot be evaded by use of long-term emergency proceedings.

States should adapt the regulation to their own procedures, with the goal of ensuring that proceedings (beyond the emergency custody, shelter care, or otherwise named initial hearing) that include the full suite of due process and ICWA protections are commenced within 30 days of any emergency removal. While there may be State-specific types of emergency proceedings with separate timeframes, all of the State requirements may be followed, so long as a proceeding with the full suite of due process and ICWA protections is underway within 30 days, absent extenuating circumstances.

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 all three of the specific findings listed at § 23.113(e). Allowing a court to extend an emergency proceeding if it makes those findings provides appropriate flexibility for a court that finds itself facing unusual circumstances.[29]

C.6 Emergency placements

Regulation:

See § 23.113, above.

Guidelines:

As a matter of general best practice in child welfare, State agencies should try to identify extended family or other individuals with whom the child is already familiar as possible emergency placements. If the child is an Indian child, agencies should strive to provide an initial placement for the child that meets ICWA's (or the Tribe's) placement preferences. This will help prevent subsequent disruptions if the child needs to be moved to a preferred placement once a child-custody proceeding is initiated.

State agencies should also determine if there are available emergency foster homes already licensed by the State or the child's Tribe.

If the Indian child is placed on an emergency basis in a non-preferred placement because a preferred placement is unavailable or has not yet met background check or licensing requirements, State agencies should have a concurrent plan for placement as soon as possible with a preferred placement.

C.7 Identifying Indian children in emergency situations

Regulation:

See § 23.113, above.

Guidelines:

It is recommended that the State agency ask the family and extended family whether the child is a Tribal member or whether a parent is a Tribal member and the child is eligible for membership as part of the emergency removal and placement process. If the State agency believes that the child may be an Indian child, it

[29] *See* 81 FR 38817 (June 14, 2016).

is recommended that it let the Tribe know the child has been removed on an emergency basis, and begin coordination with the Tribe regarding services and placements. If there is still uncertainty regarding who is the Indian child's Tribe, it is recommended that the State agency continue to investigate the applicability of ICWA and document findings.

C.8 Active efforts in emergency situations

Guidelines:

We recommend that State agencies work with Tribes, parents, and other parties as soon as possible, even in an emergency situation, to begin providing active efforts to reunite the family.

C.9 Notice in emergency situations

Regulation:

No regulatory requirements for notice by registered or certified apply in emergency proceedings; however, § 23.113(c) requires agencies to report to the court on their efforts to contact the parents, Indian custodian, and Tribe for the emergency proceeding.

Guidelines:

Neither the statute nor rule requires notice prior to an emergency removal 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' due process and other 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.

D. Notice

D.1 Requirement for notice

Regulation:

§ 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) [See Appendix 1]

(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.

§ 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.

Guidelines:

Prompt notice of a child-custody proceeding is vitally important because it gives the parent, Indian custodian, and Tribe the opportunity to respond to any allegations in the case, to intervene, or to seek transfer jurisdiction to the Tribe. In addition, prompt notice facilitates the early identification of preferred placements as well as the provision of Tribal services to the family.

Notice by registered or certified mail, return receipt requested, to the parents, Indian custodian(s), and Indian child's Tribe is required for:

- ✓ Any involuntary foster-care proceeding; or
- ✓ Any TPR proceeding.

Notice is required for a TPR proceeding, even if notice has previously been given for the child's foster-care proceeding.

This notice is required in addition to the informal contacts made with the Tribe, such as those to verify Tribal membership and open the lines of communication.

Notice by registered or certified mail, return receipt requested is not required for voluntary proceedings, pre-adoptive proceedings, or adoptive proceedings (all of which are defined by the rule), but is a recommended practice.

While not required by the Act or rule, we recommend that State agencies and/or courts provide notice to Tribes and parents or Indian custodians of:

- Each individual hearing within a proceeding;
- Any change in placement – 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;
- Any change to the child's permanency plan or concurrent plan – a change in the ultimate goal may prompt an individual or Tribe to invoke their rights, even though they did not do so before;
- Any transfer of jurisdiction to another State or receipt of jurisdiction from another State.

D.2 Method of notice (registered or certified mail, return receipt requested)

Regulation:

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

…(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.

Guidelines:

The Act requires notice be provided by registered mail, return receipt requested. The regulation also allows for notice to be provided by certified mail, return receipt requested, as a less expensive option that better meets the underlying goal of effecting notice.[30]

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.[31] Even in this case, it is a best practice to also provide notice by registered or certified mail, return receipt requested, because the return receipt provides documentation for the record that notice was received.

We encourage States to act proactively in contacting parents, custodians, and Tribes by phone, email, and through other means, in addition to sending registered or certified mail, so parties can begin gathering documents and making necessary decisions as early as practicable in the process. Tribes may agree to waive their right to challenge the adequacy of notice if the notice to the Tribe was sent by a means other than registered or certified mail (e.g., by e-mail), but may not waive or affect the statutory rights of parents or other parties to the case.

The statute and regulations require notice to the parents; a "parent" includes an unwed father that has 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 would be entitled to notice.

D.3 Contents of notice

Regulation:

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

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

(1) The child's name, birthdate, and birthplace;

[30] *See* 81 FR 38810-38811 (June 14, 2016).
[31] *See* 25 U.S.C. 1921.

(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.

Guidelines:

The rule specifies the information to be contained in the notice in order for the recipients of a notice to be able to exercise their rights in a timely manner.

While notice and verification of Tribal membership are separate concepts (see section B.7 for verification), they can be accomplished through the same communication or separate communications. The BIA has a sample notice form posted at www.bia.gov as an example for States to consider if they are combining their notice and verification.

Confidentiality

While 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. *See* 81 FR 38811. The petition is necessary to provide sufficient information to allow the parents, Indian custodian and Tribes to effectively participate in the proceeding.

D.4 Notice to the Bureau of Indian Affairs

Regulation:

§ 23.11 Notice

(a)…. 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.

Guidelines:

Notice to the BIA may be provided by personal delivery in lieu of registered or certified mail with return receipt requested. To determine the appropriate BIA office to send the copy to, see the list of regional offices at § 23.11(b) (available at Appendix 1). A copy of the notice must be sent to the BIA Regional Director even when the identity of the child's parents, Indian custodian, and Tribes can be ascertained. No notices, except for final adoption decrees, are required to be sent to the BIA Central Office in Washington, DC.

D.5 Documenting the notice with the court

Regulation:

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

(a)….

…(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.

Guidelines:

If the agency or other party seeking placement voluntarily chooses to provide notice in other Indian child welfare proceedings where notice is not required by law, it is helpful to file a copy of the notice with the court so that the court record is as complete as possible.

D.6 Unascertainable identity or location of the parents, Indian custodian, or Tribes

Regulation:

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

…(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.

§ 23.11 Notice.

…(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.

Guidelines:

The party seeking foster-care placement or TPR has responsibility for providing notice. If that party cannot ascertain the identity or location of the parents, Indian custodian, or Tribes, it should contact the BIA Region and provide BIA with as much information as possible regarding potential Tribal affiliations. If the Region cannot assist the party, it can also contact the BIA's central office in Washington, DC. *See* Appendix 1 for a list of BIA regional offices.

D.7 Time limits for notice

Regulation:

§ 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.

Guidelines:

These time limitations ensure that parents, Indian custodians, and the Tribe have time to determine whether a child is an Indian child and respond to and prepare for the proceeding.

Minimum time limit. As the rule states, 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).

Extensions. The parent, Indian custodian, and Indian child's Tribe are entitled to one extension of up to 20 days for each proceeding. Any extension beyond the initial extension up to 20 days is subject to the State court's rules and discretion.

Informal notification. Although the rule sets out the required elements of an ICWA notice, in order to ensure that the proceeding is held promptly, we encourage agencies to contact the Tribe and the parents as soon as there is sufficient information to identify a child who may be a member of or eligible for membership in that Tribe. While the timelines set out in the rule do not begin to run until the service of formal notice as required by the rule, the initial notification may nevertheless be helpful to allow the Tribe to confirm that the child is an Indian child and begin to gather information about the case.

D.8 Translation or interpretation

Regulation:

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

…(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.

Guidelines:

If the parent or Indian custodian requires translation or interpretation in a Native language, it is recommended that the court or party contact the Indian child's Tribe or BIA for assistance.

D.9 Right to an attorney

Regulation:

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

…(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.

Guidelines:

This provision recognizes that parents may not have appointed counsel at early hearings in the case, and helps ensure that parents are notified of their rights under Federal law.

It is a recommended practice, where possible, to appoint the same counsel for the entirety of the trial court case (throughout all proceedings), to ensure parents' rights are addressed consistently throughout the trial court case, rather than appointing different representatives at each stage.

D.10 Lack of response to notice

Regulation:

See § 23.11 and § 23.111 requiring notice of each proceeding.

Guidelines:

If the Tribe does not respond to the notice, or responds that it is not interested in participating in the proceeding, the court or agency must still send the Tribe notices of subsequent proceedings for which notice is required (i.e., a subsequent TPR proceeding). In cases where the Tribe does not confirm receipt of the required notice or otherwise does not respond, the Department recommends following up telephonically. The Tribe may decide to intervene or otherwise participate at a later point even if it has previously indicated it is not interested in participating.

E. Active Efforts

E.1 Meaning of "active efforts"

Regulation:

§ 23.2 *Active efforts* means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family…

Guidelines:

ICWA requires the use of "active efforts" to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family.[32] The statute does not define "active efforts," but the regulation does in § 23.2. The "active efforts" requirement in ICWA reflects Congress' recognition of the particular history of the treatment of Indian children and families. Many Indian children were removed from their homes because of poverty, joblessness, substandard housing, and other situations that could be remediated through the provision of social services. The "active efforts" requirement helps ensure that parents receive the serves that they need so that they can be safely reunified with their children. 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, and helps protect against unwarranted removals by ensuring that parents who are, or may readily become, fit parents are provided with services necessary to retain or regain custody of their child. This is viewed by some child-welfare organizations as part of the "gold standard" of what services should be provided in all child-welfare proceedings, not just those involving an Indian child.[33]

Other Federal and State laws require that child-welfare agencies make at least "reasonable efforts" to provide services that will help families remedy the conditions that brought the child and family into the child-welfare system. And some courts and States 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.[34] Some courts and States consider "active efforts" to be essentially the same as "reasonable efforts."[35] Instead of focusing on such a comparison, the rule defines "active efforts" by focusing on the quality of the actions necessary to constitute "active efforts" (affirmative, active, thorough, and timely) and providing examples and clarification as to what constitutes "active efforts."

ICWA requires "active efforts" prior to foster-care placement of or TPR to an Indian child, regardless of whether the agency is receiving Federal funding.

What constitutes sufficient "active efforts" will vary from case-to-case, and courts have the discretion to consider the facts and circumstances of the particular case before it when determining whether the definition of "active efforts" is met.

Active efforts should be:

- Affirmative;
- Active;

[32] 25 U.S.C. 1912(d).
[33] *See* 81 FR 38813-388-14.
[34] *See, e.g., In re Nicole B.*, 927 A.2d 1194, 1206-07 (Md. Ct. Spec. App. 2007)
[35] *See, e.g., In re C.F.*, 230 Ca. App. 4th 227 (2014); *In re Michael G.*, 63 Cal. App. 4th 700 (1998).

- Thorough; and
- Timely.

E.2 Active efforts and the case plan

Regulation:

§ 23.2 … 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.

Guidelines:

Because active efforts must involve assisting the parents or Indian custodian through the steps of the case plan, and with accessing or developing resources necessary to satisfy the case plan, the State agency may need to take an active role in connecting the parent or Indian custodian with resources. By its plain and ordinary meaning, "active" cannot be merely "passive."

E.3 Active efforts consistent with prevailing social and cultural conditions of Tribe

Regulation:

§ 23.2… 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.

Guidelines:

The rule indicates that, to the maximum 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-custody 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.[36]

Determining the appropriate active efforts may entail discussions with Tribal leadership, elders, or religious figures or academics with expertise concerning a given Tribe as to the type of culturally appropriate services that could be provided to the family.

Culturally appropriate services in the child welfare context could include trauma-informed therapy that incorporates best practices in addressing Native American historical and intergenerational trauma, pastoral

[36] *See* 81 FR 38790-38791 (June 14, 2016).

counseling that incorporates a Native American holistic approach and focus on spirituality, and Tribal/Native faith healers or medicine/holy men or women within the Tribe who utilize prayers, ceremonies, sweat lodge and other interventions. Another example is the use of Positive Indian Parenting curriculum, which is based on Native American beliefs and customs, and provided to clients to improve their parenting skills with a strong culture-based background. These are examples only and not an exhaustive list.

E.4 Examples of active efforts

Regulation:

§ 23.2… 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.

Guidelines:

The examples of active efforts provided in the ICWA regulations reflect best practices in the field of Indian child welfare, but are not meant to be an exhaustive list. Active efforts must be tailored to each child and family within each ICWA case and could include additional efforts by the agency working with the child and family. The minimum actions required to meet the "active efforts" threshold will depend on unique circumstances of the case. It is recommended that the State agency determine which active efforts will best address the specific issues facing the family and tailor those efforts to help keep the family together. This will help active efforts to respond to the unique facts and circumstances of the case. For example, if one of the child's parents has a problem with alcohol abuse, active efforts might include assisting that parent with enrollment in an alcohol treatment program and helping to coordinate transportation to and from meetings. If substance abuse is not an issue, active efforts would not need to include this kind of assistance.

As the examples illustrate, the State agency should actively connect Indian families with substantive services and not merely make the services available. Agency workers and courts should ask whether they have truly taken "active" steps (i.e., affirmative, proactive, thorough, and timely efforts) to provide services and programs to the family, recognizing that resource constraints will always exist.

E.5 Providing active efforts

Regulation:

§ 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.…

Guidelines:

The statute and 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 TPR.[37] 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.

[37] *See* 25 U.S.C. 1912(d); 25 CFR § 23.120.

If reunification with one parent is not possible (e.g., where the parent has severely abused a child or will be incarcerated for a long period of time), the court should still consider whether active efforts could permit reunification of the Indian child with the other parent.

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. The child's family is an "Indian family" because the child meets the definition of an "Indian child."

Checking on status of active efforts. The regulations reflect that the court must conclude that active efforts were made prior to ordering foster-care placement or TPR, but does not require such a finding at each hearing.[38] It is, however, a recommended practice for a court to inquire about active efforts at every court hearing and actively monitor compliance with the active efforts requirement. This will help avoid unnecessary delays in achieving reunification with the parent, or other permanency for the child. The court should not rely solely on past findings regarding the sufficiency of active efforts, but rather should routinely ask as part of a foster-care or TPR proceeding whether circumstances have changed and whether additional active efforts have been or should be provided.

How long to provide active efforts. There are no specific time limits on active efforts, and what is required will depend on the facts of each case. State agencies should keep in mind that the State court must make a finding that active efforts were provided in order to make a foster-care placement or order TPR to an Indian child. Even if a finding was made that sufficient active efforts were made to support the foster-care placement, circumstances may have changed such that the court may require additional active efforts prior to ordering TPR. For example, if a parent initially refused alcohol treatment despite an agency's active efforts to provide services, a court could find that these efforts satisfied the requirement for purposes of the foster-care placement. But, if the parent subsequently completes alcohol treatment and needs additional services to regain custody (such as parenting skills training), the court will need to consider whether active efforts were made to provide these services. The requirement to conduct active efforts necessarily ends at the TPR because, after that point, there is no service or program that would prevent the breakup of the Indian family. 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 TPR.

Applying for Tribal membership. There is no requirement to conduct active efforts to apply for Tribal citizenship for the child. In any particular case, however, it may be appropriate to assist the child or parents in obtaining Tribal citizenship for the child, as this may make more services and programs available to the child. Securing Tribal citizenship may 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 assist in obtaining 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.

E.6 Documenting active efforts

Regulation:

§ 23.120 How does the State court ensure that active efforts have been made?

…(b) Active efforts must be documented in detail in the record.

[38] *See* 25 CFR § 23.120.

Guidelines:

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. The rule therefore requires the court to document active efforts in detail in the record.

State agencies also need to help ensure that there is sufficient documentation available for the court to use in reaching its conclusions regarding the provision of active efforts. Although the court itself determines what level of documentation it will require, the Department recommends that the State agency include the following in its documentation of active efforts, among any other relevant information:

- The issues the family is facing that the State agency is targeting with the active efforts (these should be the same issues that are threatening the breakup of the Indian family or preventing reunification);
- A list of active efforts the State agency determines would best address the issues and the reasoning for choosing those specific active efforts;
- Dates, persons contacted, and other details evidencing how the State agency provided active efforts;
- Results of the active efforts provided and, where the results were less than satisfactory, whether the State agency adjusted the active efforts to better address the issues.

While ICWA does not establish a standard of evidence for review of whether active efforts have been provided, the Department favorably views cases that apply the same standard of proof for the underlying action to the question of whether active efforts were provided (i.e., clear and convincing evidence for foster care placement and beyond a reasonable doubt for TPR).

F. Jurisdiction

F.1 Tribe's exclusive jurisdiction

Regulation:

§ 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.

Guidelines:

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.[39] 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. If the child's domicile[40] or residence is on an Indian reservation or the child is a ward of Tribal court, then the Tribe has exclusive jurisdiction over the proceeding, unless "such jurisdiction is otherwise vested in the State by existing Federal law."[41] To ensure the well-being of the child, State officials should continue to work on the case until the State court officially dismisses the case from State jurisdiction.[42]

The mandatory dismissal provisions in § 23.110 apply "subject to" § 23.113 (emergency proceedings) so that the State may take action through an emergency proceeding when necessary to prevent imminent physical damage or harm to the child. Likewise, the mandatory dismissal provisions do not apply if the State

[39] 25 U.S.C. 1911(a).
[40] *See* definition of "domicile"
[41] 25 U.S.C. 1911(a); Certain courts have interpreted the 'existing federal law' clause as granting state courts in Public Law 280 states concurrent jurisdiction over cases in which jurisdiction would otherwise remain exclusively with the tribe. *See, e.g., Doe v. Mann,* 415 F.3d 1038(9th Cir. 2005).
[42] *See* 25 CFR § 23.110 at Appendix 6.

and Tribe have an agreement regarding jurisdiction because, in some cases, Tribes choose to refrain from asserting jurisdiction. *See* section A.5 of these guidelines.

Contacting court prior to determining whether dismissal is necessary. In determining whether dismissal is necessary, the State court may need to contact the Tribal court and/or Tribal child-welfare agency to:

- Confirm the child's status as a ward of that court; and
- Determine whether jurisdiction over child-custody proceedings for that Tribe is otherwise vested in the State by existing Federal law.[43]

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. Each Tribe's ICWA designated contact will have information on whether the Tribe exercises exclusive jurisdiction.

Coordination of dismissal and transfer. State and Tribal courts and State and Tribal child-welfare agencies are encouraged to work cooperatively to ensure that dismissal and transfer of information proceeds expeditiously and that the welfare of the Indian child is protected. The 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, including the pleadings and any court record.[44] In order to best protect the welfare of the child, State agencies should also work 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.

Safety investigative services. The rule does not affect State authority to provide safety investigative services when a child is domiciled on reservation but located off reservation.

See also the definition of "reservation."

F.2 State's and Tribe's concurrent jurisdiction

Regulation:

§ 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.

Guidelines:

Section 1911(b) of ICWA provides for the transfer of any State court proceeding for the foster-care placement, or TPR to, an Indian child not domiciled or residing within the reservation of the Indian child's

[43] *See* 25 U.S.C. 1911(a).
[44] *See* 25 CFR § 23.110.

Tribe. This provision and § 23.115 recognize that Indian Tribes maintain concurrent jurisdiction over child-welfare matters involving Tribal children, even off of the reservation.

Applicable proceedings. Provisions addressing transfer apply to both involuntary and voluntary foster-care and TPR proceedings. This includes TPR proceedings that may be handled concurrently with adoption proceedings.

Other proceedings. Parties may request transfer of preadoptive and adoptive placement proceedings, but the standards for addressing such motions are not dictated by ICWA or the regulations. Tribes possess inherent jurisdiction over domestic relations, including the welfare of child citizens of the Tribe, even beyond that authority confirmed in ICWA. Thus, it may be appropriate to transfer preadoptive and adoptive proceedings involving children residing outside of a reservation to Tribal jurisdiction in particular circumstances.[45]

Availability at any stage. The rule provides that the right to request a transfer is available at any stage in each foster-care or TPR proceeding. Transfer to Tribal jurisdiction, even at a late stage of a proceeding, will not necessarily entail unwarranted disruption of an Indian child's placement. The Tribe or parent may have reasons for not immediately moving to transfer the case (e.g., because of geographic considerations, maintaining State-court jurisdiction appears to hold out the most promise for reunification of the family). [46]

F.3 Contact with Tribal court on potential transfer.

Regulation:

§ 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.

Guidelines:

It is important for the State court to contact the Tribal court upon receipt of the transfer petition to alert the Tribal court (usually reachable by first contacting the Tribe's designated ICWA agent) and provide it with the opportunity to determine whether it wishes to decline jurisdiction. It is recommended that, in addition to the required written notification, State court personnel contact the Tribe by phone as well.

[45] *See* 81 FR 38821 for additional information on how Congress has repeatedly sought to strengthen Tribal courts.

[46] *See* 81 FR 38823 for information on why the rule does not establish a deadline or time limit for requesting transfer.

F.4 Criteria for ruling on a transfer petition.

Regulation:

§ 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.

Guidelines:

A keystone of ICWA is its recognition of a Tribe's exclusive or concurrent jurisdiction over child-custody proceedings involving Indian children. When the State and Tribe have concurrent jurisdiction, ICWA establishes a presumption that a State must transfer jurisdiction to the Tribe upon request. The rule reflects ICWA section 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 for denying the transfer.

Either Parent Objects

The rule mirrors the statute in respecting a parent's objection to transfer of the proceeding to Tribal court. As Congress noted, "[e]ither parent is given the right to veto such transfer."[47] However, 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.

While, this criterion addresses the objection of either parent, nothing prohibits the State court from considering the objection of the guardian ad litem or child himself under the third criteria (good cause to deny transfer), where appropriate.

Tribe Declines

If the Tribal court explicitly states that it declines jurisdiction, the State court may deny a transfer motion. It is recommended that the State court obtain documentation of the Tribal court's declination to include in the record.

Good Cause Exists

This 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

[47] H.R. Rep. No. 95-1386, at 21.

Tribe are fully protected. State courts may exercise case-by-case discretion regarding the "good cause" finding, but 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.

F.5 Good cause to deny transfer.

Regulation:

§ 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.

Guidelines:

While the statute and the rule provide State courts with the discretion to determine "good cause" based on the specific facts of a particular case, the rule does mandate certain procedural protections if a court is going to conduct a good cause analysis. It 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, they have been shown to frustrate the purposes of ICWA, or would otherwise work a fundamental unfairness. 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 is best positioned to adjudicate the child-custody proceeding, not predictions about the outcome of that proceeding.

Standard of Evidence

Neither the statute nor the rule establishes a Federal 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.[48] The Department notes that the strong trend in State court decisions on this issue is compelling and recommends that State courts follow that trend.

Prohibited Considerations

Advanced stage if notice was not received until an advanced stage. The 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. Parents, custodians, and Tribes who were disadvantaged by noncompliance with ICWA's notice provisions should still have a meaningful opportunity to seek transfer.

The 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 TPR proceeding to request a transfer to Tribal court, because the parents, Indian custodian, and Tribe must receive notice of each proceeding. It is often at the TPR 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.

Prior proceedings for which no petition to transfer was filed. As just discussed, the rule clarifies that "advanced stage" refers to the proceeding, rather than the case as a whole. ICWA clearly distinguishes between foster-care and TPR 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 TPR proceeding.

Effect on placement of the child. The 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 not an appropriate basis for good cause because the State court cannot know or accurately predict which placement a Tribal court might consider or ultimately order. 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. 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.

Cultural connections to the Tribe or reservation. The regulations prohibit 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.[49] As such, State courts must not evaluate the sufficiency of an Indian child's cultural connections with a Tribe or reservation in evaluating a motion to transfer.

Negative perceptions of Tribal or BIA social services or judicial systems. The regulations prohibit consideration of any perceived inadequacy of Tribal or BIA social services or judicial systems. This is consistent with ICWA's strong recognition of the competency of Tribal fora to address child-custody matters

[48] *See* 81 FR 38827 (June 14, 2016) for additional information on States' application of this standard of evidence.
[49] 25 U.S.C. 1901(5).

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.

Socioeconomic conditions within the Tribe or reservation. The regulations prohibit consideration of the perceived socioeconomic conditions within a Tribe or reservation. 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. 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. If a State court considers the distance of the parties from the Tribal court, it must also weigh any available accommodations that may address the potential hardships caused by the distance.

For additional information on the basis for the parameters for "good cause," *see* 81 FR 38821-38822 (June 14, 2016).

F.6 Transferring to Tribal court.

Regulation:

§ 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.

Guidelines:

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.

If the State court does not have contact information for the Tribal court, the court should contact the Tribe's ICWA officer. If this occurs, State court personnel should work with the Tribal court and agency to transfer or provide copies of all records in the Indian child's case file so that the Tribal court and agency may best meet the child's needs. State agencies should share records with Tribal agencies as they would other governmental jurisdictions, presumably at no charge.

G. Adjudication of Involuntary Proceedings

G.1 Standard of evidence for foster-care placement and TPR proceedings

Regulation:

§ 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.

Guidelines:

ICWA and the rule require that a court may not order a foster-care placement of an Indian child or a TPR unless there is a showing 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. The court's determination must be supported by clear and convincing evidence, in the case of a foster-care placement, or by evidence beyond a reasonable doubt, in the case of a TPR. The evidence supporting the determination must also include the testimony of a qualified expert witness.

The rule requires there be a causal relationship between the particular conditions in the home and risk of serious emotional or physical damage to the child. Put differently, the evidence must show 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.

The rule prohibits relying on **any one** of the factors listed in paragraph (d), **absent the causal connection** identified in (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. This provision addresses the types of situations identified in the statute's legislative history where Indian children are removed from their home based on subjective assessments of home conditions that, in fact, are not likely to cause the child serious emotional or physical damage.

"Nonconforming social behavior" may include 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.

These provisions recognize that children can thrive when they are kept with their parents, even in homes that may not be ideal in terms of cleanliness, access to nutritious food, or personal space, or when a parent is single, impoverished, or a substance abuser. Rather, there must be a demonstrated correlation between the conditions of the home and a threat to the specific child's emotional or physical well-being.

G.2 Qualified expert witness

Regulation:

§ 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.

Guidelines:

Qualified expert witnesses must have particular expertise. The 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. 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.[50] Congress noted that "[t]he phrase 'qualified expert witness' is meant to apply to expertise beyond normal social worker qualifications."[51]

Qualified expert witness should have knowledge of prevailing social and cultural standards of the Tribe. In addition, the qualified expert witness should have specific knowledge of the prevailing social and cultural standards of the Indian child's Tribe. 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."[52] 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.[53] 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 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 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. The rule 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.

Separate expert witnesses may be used to testify regarding potential emotional or physical damage to the child and the prevailing social and cultural standards of the Tribe.

A person testifying to the prevailing social and cultural standards of the Indian child's Tribe must be knowledgeable and experienced in the Tribe's society and culture. The Indian child's Tribe may designate a person as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.

Assistance in locating a qualified expert witness. The rule encourages the court or any party to 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. The 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.

Social worker regularly assigned to the child. The qualified expert witness should be someone who can provide a culturally informed, outside opinion to the court regarding whether the continued custody by the parent is likely to result in serious emotional or physical harm to the child. By imposing the requirement for a qualified expert witness, Congress wanted to ensure that State courts heard from experts other than State social workers seeking the action before placing an Indian child in foster care or ordering the TPR. Therefore, the

[50] 25 U.S.C. 1912(e), (f).
[51] H.R. Rep. No. 95-1386, at 22.
[52] *Holyfield,* 490 U.S. at 36 (citing H.R. Rep. No. 95-1386, at 24).
[53] *See* 25 U.S.C. 1901(5).

regulation provides that the social worker regularly assigned to the Indian child (i.e., the State agency seeking the action) may not serve as a qualified expert witness in child-custody proceedings concerning the child. If another social worker, Tribal or otherwise, serves as the qualified expert witness, that person must have expertise beyond the normal social worker qualifications. [54]

Citizen of Tribe. There is no requirement that the qualified expert witness be a citizen of the child's 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. 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.

Number of expert witnesses. ICWA and the rule do not limit the number of expert witnesses that may testify. The court may accept expert testimony from any number of witnesses, including from multiple qualified expert witnesses.

Familiarity with the child. It is also recommended that the qualified expert witness be someone familiar with that particular child. If the expert makes contact with the parents, observes interactions between the parent(s) and child, and meets with extended family members in the child's life, the expert will be able to provide a more complete picture to the court.

See 81 FR 38829-38832 (June 14, 2016) for additional information on qualified expert witnesses.

[54] *See* H.R. Rep. No. 95-1386, at 22.

H. Placement Preferences

H.1 Adoptive placement preferences

Regulation:

§ 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.

Guidelines:

In ICWA, Congress expressed a strong Federal policy in favor of keeping Indian children with their families and Tribes whenever possible, and established preferred placements 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.

Order. Each placement should be considered (without being skipped) in that order; the preferences are in the order of most preferred to least preferred.

Tribe's order of preference. State agencies should determine if the child's Tribe has established, by resolution, an order of preference different from that specified in ICWA. If so, then apply the Tribe's placement preferences. Otherwise, apply ICWA's placement preferences as set out in § 23.131.

The statute requires that a Tribal order of preference be established by "resolution." While different Tribes act through different types of actions and legal instruments, the Department understands that a Tribal "resolution," for this purpose, would be a legally binding statement by the competent Tribal authority that lays out an objective order of placement preferences.

If a Tribal-State agreement on ICWA establishes the order of preference, that would constitute an order of preference established by "resolution," as required by the rule. Such a document would be a legally binding statement by the competent Tribal authority that lays out an objective order of placement preferences. In addition, the statute specifically authorizes Tribal-State agreements respecting care and custody of Indian children.

Consideration of child's or parent's preference. The rule reflects the language of the statute. This language does not require a court to follow a child's or parent's preference, but rather requires that it be considered where appropriate.

H.2. Foster-care placement preferences

Regulation:

§ 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.

Guidelines:

The placement preferences included in ICWA and the rule codify the generally accepted best practice to favor placing the child with extended family. Congress recognized that this generally applicable preference for placing children with family is even more important for Indian children and families, given that one of the

factors 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. In many cases, the placement preferences have 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.

While it may be the practice in some jurisdictions for judges to defer to State agencies to issue placement orders, the statute contemplates court review of placements of Indian children. For this reason, there must be a court determination of the placement and, if applicable, an examination of whether good cause exists to depart from the placement preferences.

Least restrictive setting. The foster-care placement includes the additional requirement that the placement be the least restrictive setting, which means the setting that most approximates a family. The placement decision must take into consideration sibling attachment and the proximity to the child's home, extended family, and/or siblings. If for some reason it is not possible to place the siblings together, then 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 is extended family and would qualify as a preferred placement. The placement should also be one that allows the Indian child's special needs, if any, to be met.

Order. Each placement should be considered (without being skipped) in that order; the preferences are in the order of most preferred to least preferred.

Tribe's order of preference. *See* section H.1 of these guidelines on how to account for the Tribe's order of preference, but note that, for foster-care placements, the Tribe's placement preferences should be applied as long as the placement is the least-restrictive setting appropriate to the particular needs of the Indian child.

Consideration of child's or parent's preference. The 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.

See 81 FR 38838-38843 for additional information on placement preferences.

H.3 Finding preferred placements

Regulation:

[*See* §§ 23.130 and 23.131, above].

Guidelines:

The Department recommends that the State agency or other party seeking placement conduct a diligent search for placements that comply with the placement preferences. The diligent search should be thorough, on-going and in compliance with child welfare best practices. A diligent search should also involve:

- ✓ Asking the parents for information about extended family, whether members of an Indian Tribe or not;
- ✓ Contacting all known extended family, whether members of an Indian Tribe or not;
- ✓ Contacting all Tribes with which the child is affiliated for assistance in identifying placements;

- ✓ Conducting diligent follow-up with all potential placements;
- ✓ Contacting institutions for children approved or operated by Indian Tribes if other preferred placements are not available.

It is recommended that the State agency (or other party seeking placement) document the search, so that it is reflected in the record.

Guidance and assistance for families wishing to serve as placements. As a recommended practice for State agencies, the State agency should provide the preferred placements with enough information about the proceeding so they can avail themselves of the preference. As a recommended practice, State courts should treat any individual who falls into a preferred placement category and who has expressed a desire to adopt (or provide foster care to) the Indian child as a potential preferred placement. The courts should not find that no preferred placement is available simply because the individual has not timely completed the formal steps required, such as filing a petition for adoption. Agencies and courts should be aware that a family member may wish to be a foster-care or adoptive placement for an Indian child but may not know how to file a petition for adoption, may have language or education barriers, or may live far from the State court. As a best practice, States may establish that actions such as testifying in court regarding the desire to adopt, or sending a statement to that effect in writing, may substitute for a formal petition for adoption for purposes of applying the placement preferences. If a State does not have formal requirements regarding how to qualify as a preferred placement, these should be made clear to potential placements.

Availability of preferred placements. The Department 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. See, e.g., National Resource Center for Diligent Recruitment, For Tribes: Tool and Resources (last visited Apr. 27, 2016), www.nrcdr.org/for-tribes/tools-and-resources.

Preferred placements in State. The fact that a no federally recognized Tribe is located within a State where the proceeding is occurring does not mean that there are no family members or members of Tribes residing or domiciled in that State. It is also important to note that a preferred placement may not be excluded from consideration merely because the placement is not located in the State where the proceeding is occurring.

Cooperation with the Tribe. The State agency should cooperate with the Tribe in identifying placement preferences. If a child is ultimately placed in a non-preferred placement, the Tribe may request that the foster or adoptive parent take actions, such as securing membership for the child, to maintain the child's Tribal affiliation.

H.4 Good cause to depart from the placement preferences

Regulation:

§ 23.129 When do the placement preferences apply?

…(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.

§ 23.132 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.

Guidelines:

Congress determined that a placement with the Indian child's extended family or Tribal community will serve the child's best interest in most cases. A court may deviate from these preferences, however, when good cause exists.

A determination that good cause exists to deviate from the placement preferences must be made on the record by the court. It is recommended that the court state the reasons for finding good cause and incorporate agency documentation (required by § 23.141) of its search for placement preferences and other information regarding the child's needs and available placements.

This good cause standard applies to requests to deviate from both the Federal placement preferences and any applicable Tribal-specific preferences being applied in lieu of the Federal preferences.

If a party believes that good cause not to comply with the placement preferences exists because one of the factors in § 23.132(c) applies, the party must provide documentation of the basis for good cause.

Standard of evidence for "good cause" determination. While not mandatory, it is recommended that the documentation meet the "clear and convincing" standard of proof. 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. 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.

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 and if the requirements of 25 U.S.C. 1912(d)-(e) have been met. Regardless of the level of court involvement in the placement, however, the basis for an assertion of good cause must be stated in the record or in writing and a record of the placement must be maintained.

Where a party to the proceeding objects to the placement, however, the 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. 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.

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 rule identifies specific factors that should provide the basis for a finding of good cause to deviate from the placement preferences.

Paragraph (c) of § 23.132 provides specific factors that can support a "good cause determination. Congress intended "good cause" to be a limited exception to the placement preferences, rather than a broad category that could swallow the rule.

Factors that may form the basis for good cause. The rule's list of is not exhaustive. The State court has the ultimate authority to consider evidence provided by the parties and make its own judgment as to whether the moving party has met the statutory "good cause" standard. In this way, the rule 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. The rule thereby retains discretion for courts and agencies to consider any unique needs of a particular Indian child in making a good cause determination.

Flexibility to find there is no good cause even when one or more factors are present. The court retains the discretion to find that good cause does not exist (and apply the placement preferences) even where one or more of the listed factors for good cause is present. Such a finding may be appropriate if other circumstances lead the court to conclude that there is not good cause. For example, if one parent consents and one does not, the court is not mandated to deviate from the preferences – rather it should be able to listen to the arguments of both sides and then decide.

Request of parent. The statute provides that, where appropriate, preference of the parent must be considered.[55] The rule therefore reflects that the request of the parent may provide a basis for a "good cause"

[55] *See* 25 U.S.C. 1915(c).

determination, if the court agrees. The rule requires that the parent or parents making such a request must attest that they have reviewed the placement options that comply with the order of preference. The rule uses the term "placement options" to refer to the actual placements, rather than just the categories.

Request of child. The statute provides that, where appropriate, preference of the Indian child must be considered.[56] The rule adds that the child must be of "sufficient age and capacity to understand the decision that is being made" but leaves it to the fact-finder to make the determination as to age and capacity.

Sibling attachment. The rules governing placement preferences recognize the importance of maintaining biological sibling connections. The sibling placement preference 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. This allows biological siblings to remain together, even if only one is an "Indian child" under the Act.

Extraordinary needs. The rule retains discretion for courts and agencies to consider any extraordinary physical, mental, or emotional needs of a particular Indian child.

Unavailability of suitable placement. The rule provides that the unavailability of a suitable placement may be the basis for a good cause determination. It also requires 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. This provision is required because the Department understands ICWA to require proactive efforts to determine if there are extended family or Tribal community placements available. 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. *See* 81 FR 38839 (June 14, 2016) for additional explanation for why the State must provide documented efforts to comply with the preferences. *See* section H.3 of these guidelines for additional guidance on what a diligent search involves.

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. This showing would occur at the hearing in which the court determines whether a placement or change in placement is appropriate.

The determination of whether a "diligent search" has been completed is left to the fact-finder and will depend on the facts of each case. As a best practice, a diligent search will require a showing that the agency made good-faith efforts to contact all known family members to inquire about their willingness to serve as a placement, as well as whether they are aware of other family members that might be willing to serve as a placement. A diligent search will also generally require good-faith efforts to work with the child's Tribe to identify family-member and Tribal-community placements. If placements were identified but have not yet completed a necessary step for the child to be placed with them (such as filing paperwork or completing a background check), the fact-finder will need to determine whether sufficient time and assistance has been provided.

Safety of placement. While the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community, nothing in the rule eliminates other requirements under State or Federal law for ensuring that placements will protect the safety of the Indian child.

[56] *See* 25 U.S.C. 1915(c).

H.5 Limits on good cause

Regulation:

§ 23.132 How is a determination of "good cause" to depart from the placement preferences made?

…(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.

Guidelines:

The rule identifies certain factors that may not be the basis for a finding of good cause to depart from the preferences. These limits focus on those factors that there is evidence Congress did not wish to be considered, or that have been shown to frustrated 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.

Socioeconomic status. The fact that a preferred placement may be of a different socioeconomic status than a non-preferred placement may not serve as the basis for good cause to depart from the placement preferences.

Ordinary bonding with a non-preferred placement that flowed from time spent in a non-preferred placement that was made in violation of ICWA. If a child has been placed in a non-preferred placement in violation of ICWA and the rule, the court should not base a good-cause determination solely on the fact that the child has bonded with that placement.

A placement is "made in violation of ICWA" if the placement was based on 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 identified earlier in 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.

As a best practice, in all cases, State agencies and courts should carefully consider whether the fact that an Indian child has developed a relationship with a non-preferred placement outweighs the long-term benefits to a child that can arise from maintaining connections to family and the Tribal community. Where a child is in a non-preferred placement, it is a best practice to facilitate connections between the Indian child and extended family and other 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 could ease a transition to that placement.

I. Voluntary Proceedings

I.1 Inquiry and verification in voluntary proceedings

Regulation:

§ 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.

…

Guidelines:

The rule provides minimum requirements for State courts to determine whether a child in a voluntary proceeding is an "Indian child" as defined by statute. That determination is essential in order to assess the State court's jurisdiction and what law applies in voluntary proceedings. 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.

In some cases, it may be undisputed that the child is an Indian child, such as where the parents attest to this fact. If, however, there is reason to believe (i.e., reason to know) 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 has taken all reasonable steps to confirm the child's status. This includes seeking verification of the Indian child's status with the Tribes of which the child might be a citizen. Tribes, like other governments, are equipped to keep such inquiries confidential, and the rule requires this of Tribes.

The regulation's use of the language "reason to believe" echoes, and is intended to be substantively the same as, the statutory language "reason to know."

I.2 Placement preferences in voluntary proceedings

Regulation:

§ 23.124 What actions must a State court undertake in voluntary proceedings?

…(c) State courts must ensure that the placement for the Indian child complies with §§ 23.129 - 23.132.

Guidelines:

This provision explains that the regulatory provisions addressing the application of the placement preferences apply with equal force to voluntary proceedings. The Act and rule require application of the placement preferences in both voluntary and involuntary placements.

As discussed in section H.4 of these guidelines, above, the judge may consider as a basis for good cause to depart from the placement preferences the request of one or both of the parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference. This good cause provision allows birth parents to express their preference for an adoptive family that does not fall within ICWA's placement preferences. It is important, however, for birth parents to be made aware of ICWA's preferences and whether there are available placements within the extended family or Tribal community. This balances the interest of the parent with the other interests protected by ICWA.

Situations in which a step-parent seeks to adopt the child would fall within the first placement preference because step-parents are included in the definition of "extended family member."

I.3 Notice in voluntary proceedings

Guidelines:

The Department recommends that the Indian child's Tribe be provided notice of voluntary proceedings involving that child to allow the Tribe's participation in identifying preferred placements and to promote the child's continued connections to the Tribe. As discussed above, communication with the Tribe may be required in order to verify the child's status as an Indian child. States may choose to require notice to Tribes and other parties in voluntary proceedings.

I.4 Effect of a request for anonymity on verification

Regulation:

§ 23.107 How should a State court determine if there is reason to know the child is an Indian child?

…(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.

Guidelines:

In voluntary proceedings where the consenting parent requests, in writing, to remain anonymous, it is recommended that the party seeking placement notify the Tribe of the request for anonymity; the Tribe is required to keep information related to the verification inquiry confidential.

I.5 Effect of a request for anonymity on placement preferences

Regulation:

§ 23.129 When do the placement preferences apply?

…(b) Where a consenting parent requests anonymity in a voluntary proceeding, the court must give weight to the request in applying the preferences.

Guidelines:

If the consenting parent requests anonymity, it is recommended that the agency work with the Tribe to identify placement preferences that protect the parent's anonymity. The rule does not mandate contacting extended family members to identify potential placements.

I.6 Parent's or Indian custodian's consent

Regulation:

§ 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.

Guidelines:

An individual parent's consent is valid only as to himself or herself.

The rule provides that the consent must be "recorded" before a court; this must be accomplished by providing a written document to the court.

I.7 Contents of consent document

Regulation:

§ 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.

Guidelines:

A State may choose to include or require the inclusion of additional information, beyond what is required in § 23.126.

The BIA has a sample form for consent posted at www.bia.gov as an example for States to consider.

I.7 Withdrawal of consent

Regulation:

§ 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.

Guidelines:

A parent may withdraw consent to a TPR any time before the final decree for that TPR is entered, and a parent may withdraw consent to an adoption any time before the final decree of adoption is entered. However, note that if a parent's or Indian custodian's parental rights have already been terminated, then the parent or Indian custodian may no longer withdraw consent to the adoption, because they no longer legally qualify as a parent or Indian custodian.

The written withdrawal of consent filed with the court (or testimony before the court) is not intended to be an overly formalistic requirement. Parents involved in pending TPR or adoption proceedings can be reasonably expected to know that there are court proceedings concerning their child, and the rule balances the need for a clear indication that the parent wants to withdraw consent with the parent's interest in easily withdrawing consent. States may have additional methods for withdrawing consent that are more protective of a parent's rights that would then apply.

Under the rule, whenever consent has been withdrawn, court must 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.

The BIA has a sample form for withdrawal of consent posted at www.bia.gov as an example for States to consider.

J. Recordkeeping & Reporting

J.1 Record of every placement

Regulation:

§ 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.

Guidelines:

The statute and the rule require that the State maintain a record of each placement, under State law, of an Indian child. The files may be originals or may be true copies of the originals.

The rule ensures States have the flexibility to determine the best way to maintain their records to ensure that they can comply with the 14-day timeframe.

Paragraph (b) of § 23.141 directly addresses only court records because the court records must include all evidence justifying the placement determination. States may require that additional records be maintained.

It is recommended that the record include any documentation of preferred placements contacted and, if any were found ineligible as a placement, an explanation as to the ineligibility.

It is recommended that State agencies coordinate with State courts and private agencies to identify who is best positioned to fulfill this duty.

J.2 Transmission of every final adoption decree

Regulation:

§ 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.

Guidelines:

Providing the information to BIA for each final adoption decree and order allows BIA to serve as a resource for Indian children who, when they become adults, seek information on their adoption.

It is recommended that State agencies coordinate with State courts and private agencies to identify who is best positioned to fulfill this duty.

J.3 Adoptions that are vacated or set aside

Regulation:

§ 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.

Guidelines:

If an adoption is vacated or set aside, or the adoptive parent voluntarily consents to TPR, then the State agency should work with the State court to ensure that the notice requirements of § 23.139 are fulfilled.

This notice is required because, in the particular circumstances where an adoption is vacated or set aside, or the adoptive parent voluntarily consents to TPR, the statute provides certain rights to the biological parent or prior Indian custodian.[57] The notice enables the biological parent or prior Indian custodian to avail himself or herself of those rights.

This section of the rule addresses waiver of notice for two particular situations:

- Where an adoption of an Indian child is subsequently vacated or set aside; or
- Where the adoptive parents decide to voluntarily terminate their parental rights.

In those cases, the biological parent or prior Indian custodian may waive notice of these actions.

J.4 Adult adoptees' access to information about their Tribal affiliation

Regulation:

§ 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

[57] *See* 25 U.S.C. 1916(a).

and provide such other information necessary to protect any rights, which may include Tribal membership, resulting from the individual's Tribal relationship.

Guidelines:

ICWA provides Indian adult adoptees with specific rights to information on Tribal, as reflected in the above rule provision. States may provide additional rights to adoptees.

Some States have registries that allow individuals to obtain information on siblings for purposes of reunification.

It is recommended that the State agency work with the State court to ensure that, with each adoptive placement, there is sufficient information in the record regarding the individual's Tribal relationship to allow the court to meet its requirements under § 23.138 for the protection of any rights that may result from the individual's Tribal membership.

BIA is also adding information to its website (www.bia.gov) to assist adult adoptees who are looking to reconnect with their Tribes.

J.5 Parties' access to the case documents

Regulation:

§ 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.

Guidelines:

Parties to emergency, foster-care-placement, or TPR proceedings are entitled to receipt of documents upon which a decision may be based.

States cannot refuse to provide a party to an ICWA proceeding, including a Tribe that is a party, access to information about the proceedings.

K. Improper Removal, Consent Obtained through Fraud or Duress, Other ICWA Violations

Both the State agency and the court have an independent responsibility under Federal law to follow ICWA. The following addresses regulatory provisions setting out how an Indian child, parent, Indian custodian, or the Tribe can seek redress for certain actions made in violation of ICWA.

K.1 Improper removal

Regulation:

§ 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.

Guidelines:

This regulatory provision 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/her parent or Indian custodian unless returning the child to his/her parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

K.2 Consent obtained through fraud or duress

Regulation:

§ 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.

Guidelines:

The two-year statute of limitations 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.

K.3 Other ICWA violations

Regulation:

§ 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.

Guidelines:

The court of competent jurisdiction referenced in this rule provision may be a different court from the court where the original proceedings occurred.

A party may assert violations of ICWA requirements that may have impacted the ICWA rights of other parties (e.g., a parent can assert a violation of the requirement for a Tribe to receive notice under section

1912(a)). 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.

A 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 TPR may affect an adoption proceeding.

The rule does not require the court to invalidate an action, but requires the court to determine whether it is appropriate to invalidate the action under the standard of review under applicable law.

L. Definitions

L.1 Active Efforts

Regulation:

§ 23.2

…*Active efforts* means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

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

(2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;

(3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;

(4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;

(5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;

(6) Taking steps to keep siblings together whenever possible;

(7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;

(8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and

actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;

(9) Monitoring progress and participation in services;

(10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;

(11) Providing post-reunification services and monitoring.

Guidelines:

See section E of these guidelines.

L.2 Agency

Regulation:

§ 23.102

…*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.

Guidelines:

The 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 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 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 rule. This comports with the statute's broad language imposing requirements on "any party" seeking placement of a child or TPR.

L.3 Child-custody proceeding

Regulation:

§ 23.2

…*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.

Guidelines:

ICWA requirements 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 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 TPR), even though the same child may be involved in both proceedings.

This definition explicitly excludes emergency proceedings from the scope of a child-custody proceeding, as emergency proceedings are addressed separately.

This definition includes proceedings involving status offenses if any part of the proceeding results in the need for out-of-home placement of the child.

Adoptions that do not involve TPR, for example, Tribal customary adoptions, 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 TPR. *See* 25 U.S.C. 1903.

See § 23.103 and section B.2 of these guidelines. *See, also,* 81 FR 38799 (June 14, 2016) for additional information on this definition.

L.4 Continued custody and custody

Regulation:

§ 23.2

…*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.

Guidelines:

The definition of "continued custody" includes custody the parent or Indian custodian "has or had at any point in the past" as there is no evidence that Congress intended temporary disruptions (e.g., surrender of the child to another caregiver for a period) not to be included in "continued custody." The definition also clarifies that the parent or custodian may have physical and/or legal custody under any applicable Tribal law or Tribal custom or State law.

These definitions clarify that physical and/or legal custody may be defined by applicable Tribal law or custom, or by State law, but do not establish an order of preference among Tribal law, Tribal custom, and State law because custody may be established under any one of the three sources.

L.5 Domicile

Regulation:

§ 23.2

…*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.

Guidelines:

This definition reflects the common-law definition, which acknowledges that a person may reside in one place but be domiciled in another.

Note that, while the rule does not define "residing" or "residence," the Department interprets "residence" to mean the location where an individual is currently living but which is not their permanent, fixed home to which they intend to return – for example, a child might be domiciled with his or her parents but residing at a boarding school or university, or with family members while his or her parents are away for an extended period of time.

L.6 Emergency proceeding

Regulation:

§ 23.2

…*Emergency proceeding* means and includes any court action that involves an emergency removal or emergency placement of an Indian child.

Guidelines:

See section C of these guidelines.

L.7 Extended family member

Regulation:

§ 23.2

…*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.

Guidelines:

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 American individuals.

L.8 Hearing

Regulation:

§ 23.2

…*Hearing* means a judicial session held for the purpose of deciding issues of fact, of law, or both.

Guidelines:

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.

L.9 Indian

Regulation:

§ 23.2

…*Indian* means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act, 43 U.S.C. 1606.

Guidelines:

Note that this term includes only those individuals who are members of "Indian Tribes" (i.e., federally recognized Tribes) and members of Alaska Native Claims Settlement Act regional corporations.

L.10 Indian child's Tribe

Regulation:

§ 23.2

…*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.

Guidelines:

Note that while a child may meet the definition of "Indian" through more than one Tribe, ICWA establishes that one Tribe must be designated as the "Indian child's Tribe" for the purposes of the Act.

L.11 Indian custodian

Regulation:

§ 23.2

… *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.

Guidelines:

This definition allows for consideration of Tribal law or custom.

L.12 Indian foster home

Regulation:

§ 23.2

…*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).

Guidelines:

Note that a foster home does not meet the definition of an “Indian foster home” merely by virtue of an Indian child being present in the home; rather, one of the foster parents must meet the definition of “Indian.”

L.13 Indian organization

Regulation:

§ 23.102

… *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.

Guidelines:

This term is used in § 23.107(c), regarding reason to know the child is an Indian child, and § 23.131, regarding foster-care placement preferences (the last preferred placement is 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).

L.14 Indian tribe

Regulation:

§ 23.2

…*Indian tribe* means any Indian tribe, band, nation, or other organized group or community of Indians federally recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 3(c) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1602(c).

Guidelines:

Note that "Indian Tribe" under ICWA includes only federally recognized Tribes. States may have a more inclusive definition of "Indian Tribe" that includes State-recognized or other groups; however, the Federal ICWA statute and rule do not apply to those groups.

L.15 Involuntary proceeding

Regulation:

§ 23.2

… *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.

Guidelines:

See discussion in section B of these guidelines regarding ICWA's applicability to involuntary proceedings.

L.16 Parent or parents

Regulation:

§ 23.2

…*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.

Guidelines:

Note that the rule does not provide a Federal standard for acknowledgment or establishment of paternity. 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.[58]

L.17 Reservation

Regulation:

§ 23.2

…*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.

Guidelines:

Note that this definition includes land that is held in trust but not officially proclaimed a "reservation."

Indian country generally includes lands within the boundaries of an Indian reservation, dependent Indian communities, Indian allotments, and any lands that are either 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. This definition does not include Alaska Native Villages unless they fall within one of these categories.

L.18 Status offenses

Regulation:

§ 23.2

…*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).

Guidelines:

See also the definition of "child custody proceeding," which includes proceedings where a child is placed in foster care or another out-of-home placement as a result of a status offense.

If the placement is based upon a status offense, ICWA provisions apply, regardless of whether the State is a PL-280 State.

[58] *See* 81 FR 38796 (June 14, 2016) for a discussion of case law articulating a constitutional standard regarding the rights of unwed fathers.

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.

L.19 Tribal court

Regulation:

§ 23.2

…*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.

Guidelines:

Note that the definition includes any other administrative body of a tribe vested with authority over child-custody proceedings in recognition that a Tribe may have other mechanisms for making child-custody decisions (e.g., the Tribal council may preside over child-custody proceedings).

L.20 Upon demand

Regulation:

§ 23.2

…*Upon demand* means that the parent or Indian custodian can regain custody simply upon verbal request, without any formalities or contingencies.

Guidelines:

This definition 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. Placements where the parent or Indian custodian can regain custody of the child upon demand are not subject to ICWA.

Examples of formalities or contingencies are formal court proceedings, the signing of agreements, and the repayment of the child's expenses.

L.21 Voluntary proceeding

Regulation:

§ 23.2

…*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.

Guidelines:

The rule refers to "both parents" to allow for situations where both parents are known and reachable. If a parent refuses to consent to the foster-care, preadoptive, or adoptive placement or TPR, 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.

The definition specifies that placements where the parent agrees to the placement only under threat of losing custody is not "voluntary," by including the phrase "without a threat of removal by a State agency." The rule also specifies that a voluntary proceeding must be of the parent's or Indian custodian's free will 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."

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.

L.22 Other definitions

Regulation:

§ 23.2

… *Act* means the Indian Child Welfare Act (ICWA), Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. 1901 et seq.

Assistant Secretary means the Assistant Secretary – Indian Affairs, the Department of the Interior.

Bureau of Indian Affairs (BIA) means the Bureau of Indian Affairs, the Department of the Interior.

Secretary means the Secretary of the Interior or the Secretary's authorized representative acting under delegated authority.

State court means any agent or agency of a state, including the District of Columbia or any territory or possession of the United States, or any political subdivision empowered by law to terminate parental rights or to make foster care placements, preadoptive placements, or adoptive placements.

Tribal government means the federally recognized governing body of an Indian tribe.

Guidelines:

Note that while the regulation often refers to the "Secretary" of the Interior, generally, the Secretary has delegated authority for day-to-day matters arising under ICWA to BIA officials (e.g., BIA ICWA Specialist, BIA social services workers).

M. Additional Context for Understanding ICWA

M.1 ICWA's standards and the "best interests of the child" standard

In a child-custody proceeding, a party might argue that an aspect of ICWA or the rule is in tension with what is in the "best interests of the child." In most cases, this argument lacks merit. First, ICWA was specifically designed by Congress to protect the best interests of Indian children. In order to achieve that general goal, Congress established specific minimum Federal standards for the removal of Indian children from their families 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, that support for reunification is provided. This is entirely consistent with the "best interests" standard applied in state courts, which recognizes the importance of family integrity and the preference for avoiding removal of a child from his or her home. If a child does need to be removed from her home, 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 enacted ICWA specifically to address the problems that arose out of the application of subjective value judgments about what is "best" for an Indian child. Congress found that the unfettered subjective application of the "best interests" standard often failed to consider Tribal cultural practices or recognize the long-term advantages to children of remaining with their families and Tribes.[59] 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.[60]

ICWA and the regulations provide objective standards that are designed to promote the welfare and short- and long-term 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.

[59] H.R. Rep. No. 95-1386 at 19.
[60] See National Council of Juvenile and Family Court Judges, Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases 14 (2000).

N. Additional Resources

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 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.

Appendix 1: BIA regional office addresses

§ 23.11 Notice.

(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).

(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).

(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)), 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).

(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).

(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). 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).

(10) For child-custody proceedings in Arizona (exclusive of notices to the Navajo Nation from those counties listed in paragraph (b)(9)), 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.

* * *