[4337-15]

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

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RIN 1076-AF25

Indian Child Welfare Act Proceedings

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule.

SUMMARY: This final rule adds a new subpart to the Department of the Interior's (Department) regulations implementing the Indian Child Welfare Act (ICWA), to improve ICWA implementation. The final rule addresses requirements for State courts in ensuring implementation of ICWA in Indian child-welfare proceedings and requirements for States to maintain records under ICWA.

DATES: This rule is effective on [INSERT DATE 180 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

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Note: This preamble uses the prefix "FR §" to denote regulatory sections in this final rule, and "PR §" to denote regulatory sections in the proposed rule published March 20, 2015 at 80 FR 14,480.

I. Executive Summary

A. Introduction

This final rule promotes the uniform application of Federal law designed to protect Indian children, their parents, and Indian Tribes. In conjunction with this final rule, the Solicitor is issuing an M Opinion addressing the implementation of the Indian Child Welfare Act by legislative rule. *See* M-37037. Congress enacted the Indian Child Welfare Act (ICWA), 25 U.S.C. 1901 *et seq.,* in 1978 to address an "Indian child welfare crisis [ ] of massive proportions": an estimated 25 to 35 percent of all Indian children had been separated from their families and placed in adoptive homes, foster care, or institutions. H.R. Rep. No. 95-1386, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7531. Although the crisis flowed from multiple causes, Congress found that nontribal public and private agencies had played a significant role, and that State agencies and courts had often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. 25 U.S.C. 1901(4)-(5). To address this failure, ICWA establishes minimum Federal standards for the removal of Indian children from their families and the placement of these children in foster or adoptive homes, and confirms Tribal jurisdiction over child-custody proceedings involving Indian children. 25 U.S.C. 1902.

Since its passage in 1978, ICWA has provided important rights and protections for Indian families, and has helped stem the widespread removal of Indian children from their families and

Tribes. State legislatures, courts, and agencies have sought to interpret and implement this Federal law, and many States should be applauded for their affirmative efforts and support of the policies animating ICWA.

However, the Department has found that implementation and interpretation of the Act has been inconsistent across States and sometimes can vary greatly even within a State. This has led to significant variation in applying ICWA's statutory terms and protections. This variation means that an Indian child and her parents in one State can receive different rights and protections under Federal law than an Indian child and her parents in another State. This disparate application of ICWA based on where the Indian child resides creates significant gaps in ICWA protections and is contrary to the uniform minimum Federal standards intended by Congress.

The need for consistent minimum Federal standards to protect Indian children, families, and Tribes still exists today. The special relationship between the United States and the Indian Tribes and their members upon which Congress based the statute continues in full force, as does the United States' direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian Tribe. 25 U.S.C. 1901, 1901(2). Native American children, however, are still disproportionately more likely to be removed from their homes and communities than other children. *See, e.g.,* Attorney General's Advisory Committee on American Indian and Alaska Native Children Exposed to Violence, *Ending Violence So Children Can Thrive* 87 (Nov. 2014); National Council of Juvenile and Family Court Judges, *Disproportionality Rates for Children of Color in Foster Care, Fiscal Year 2013* (June 2015). In addition, some State court interpretations of ICWA have essentially voided Federal protections for groups of Indian children to whom ICWA clearly applies. And commenters provided numerous anecdotal accounts where Indian children were unnecessarily removed from their

families and placed in non-Indian settings; where the rights of Indian children, their parents, or their Tribes were not protected; or where significant delays occurred in Indian child-custody proceedings due to disputes or uncertainty about the interpretation of the Federal law.

B. Overview of Final Rule

The final rule updates definitions and notice provisions in the existing rule and adds a new subpart I to 25 CFR part 23 to address ICWA implementation by State courts. It promotes nationwide uniformity and provides clarity to the minimum Federal standards established by the statute. In many instances, the standards in this final rule reflect State interpretations and best practices, as reflected in State court decisions, State laws implementing ICWA, or State guidance documents. The rule provisions also reflect comments from organizations and individuals that serve children and families (including, in particular, Indian children) and have substantial expertise in child-welfare practices.

The final rule promotes compliance with ICWA from the earliest stages of a child-welfare proceeding. Early compliance promotes the maintenance of Indian families, and the reunification of Indian children with their families whenever possible, and reduces the need for disruption in placements. Timely notification of an Indian child's Tribe also ensures that Tribal government agencies have meaningful opportunities to provide assistance and resources to the child and family. And early implementation of ICWA's requirements conserves judicial resources by reducing the need for delays, duplication, and appeals.

In particular, the final rule addresses the following issues:

- *Applicability*. The final rule clarifies when ICWA applies, while making clear that there is no exception to applicability based on certain factors used by a minority of courts in defining and applying the so-called "existing Indian family," or EIF, exception.

- *Initial Inquiry*. The final rule clarifies the steps involved in conducting a thorough inquiry at the beginning of child-custody proceedings as to whether the child is an "Indian child" subject to the Act.
- *Emergency proceedings.* Recognizing that emergency removal and placements are sometimes required to protect an Indian child's safety and welfare, the final rule clarifies the distinction between the requirements for emergency proceedings and other child-custody proceedings involving Indian children and includes provisions that help to ensure that emergency removal and placements are as short as possible, and that, when necessary, proceedings subject to the full suite of ICWA protections are promptly initiated.
- *Notice.* The final rule describes uniform requirements for prompt notice to parents and Tribes in involuntary proceedings to facilitate compliance with statutory requirements.
- *Transfer*. The final rule clarifies the requirement that a State court determine whether the State or Tribe has jurisdiction and, where jurisdiction is concurrent, establishes standards to guide the determination whether good cause exists to deny transfer (including factors that cannot properly be considered) and addresses transfer of proceedings to Tribal court.
- *Qualified expert witnesses.* The final rule provides interpretation of the term "qualified expert witness."
- *Placement preferences.* The final rule clarifies when and what placement preferences apply in foster care, pre-adoptive, and adoptive placements, provides presumptive standards for what may constitute good cause to depart from the placement preferences, and prohibits courts from considering certain factors as the basis for departure from placement preferences.

- *Voluntary proceedings.* The final rule clarifies certain aspects of ICWA's applicability to voluntary proceedings, including addressing the need to determine whether a child is an "Indian child" in voluntary proceedings and specifying the requirements for obtaining consent.
- *Information, recordkeeping, and other rights.* The final rule addresses the rights of adult adoptees to information and sets out what records States and the Secretary must maintain.

The Department carefully considered the comments on the proposed rule and made changes responsive to those comments. The reasons for the changes are described in the section-by-section analysis below. In particular, while the proposed rule would have been directed to both State courts and agencies, the Department has focused the final rule on the standards to be applied in State-court proceedings. Most ICWA provisions address what standards State courts must apply before they take actions such as exercising jurisdiction over an Indian child, ordering the removal of an Indian child from her parent, or ordering the placement of the Indian child in an adoptive home. The final rule follows ICWA in this regard. Further, State courts are familiar with applying Federal law to the cases before them. Several ICWA provisions do apply, either directly or indirectly, to State and private agencies, *see, e.g.*, 25 U.S.C. 1915(c); *id.* 1922; *see also id.* 1912(a). Nothing in this rule alters these obligations. And agencies need to be alert to the standards identified in the final rule, since these will determine what a court will require with respect to issues like notice to parents and Tribes (FR § 23.111), emergency proceedings (FR § 23.113), active efforts (FR § 23.120), and placement preferences (FR § 23.129-132).

The Department is cognizant that child-custody matters address some of the most fundamental elements of human life—children, familial ties, identity, and community. They often involve circumstances unique to the parties before the court and may require difficult and

sometimes heart-wrenching decisions. The Department is also fully aware of the paramount importance of Indian children to their immediate and extended families, their communities, and their Tribes. In the final rule, the Department carefully balanced the need for more uniformity in the application of Federal law with the legitimate need for State courts to exercise discretion over how to apply the law to each case, while keeping in mind that Congress enacted ICWA in part to address a concern that State courts were exercising their discretion inappropriately, to the detriment of Indian children, parents, and Tribes. In some cases, the Department determined that particular standards or practices are better suited to guidelines; the Department anticipates issuing updated guidelines prior to the effective date of this rule (180 days from issuance). These considerations are discussed further in the section-by-section analysis below.

II. Background

A. Background Regarding Passage of ICWA

Congress enacted ICWA in 1978 to address the policies and practices that resulted in the "wholesale separation of Indian children from their families." *See* H.R. Rep. No. 95-1386, at 9. After several years of investigation, Congress had found that an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies. 25 U.S.C. 1901(4). The congressional investigation, which resulted in hundreds of pages of legislative testimony compiled over the course of four years of hearings, deliberation, and debate, revealed "the wholesale separation of Indian children from their families."[1] H.R. Rep. No. 95-1386, at 9. The empirical and anecdotal evidence

[1] *See Problems that American Indian Families Face in Raising Their Children and How These Problems Are Affected by Federal Action or Inaction: Hearing Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93rd Cong. (1974) (hereinafter, "1974 Senate Hearing"); Task Force Four: Federal, State, and Tribal Jurisdiction, American Indian

showed that Indian children were separated from their families at significantly higher rates than non-Indian children. In some States, between 25 and 35 percent of Indian children were living in foster care, adoptive care, or institutions. *Id.* Indian children removed from their homes were most often placed in non-Indian foster care and adoptive homes. AIPRC Report at 78-87. These separations contributed to a number of problems, including the erosion of a generation of Indians from Tribal communities, loss of Indian traditions and culture, and long-term emotional effects on Indian children caused by loss of their Indian identity. *See* 1974 Senate Hearing at 1-2, 45-51 (statements of Sen. James Abourezk, Chairman, Subcomm. on Indian Affairs and Dr. Joseph Westermeyer, Dep't of Psychiatry, University of Minn.).

Congress found that removal of children and unnecessary termination of parental rights were utilized to separate Indian children from their Indian communities. The four leading factors contributing to the high rates of Indian child removal were a lack of culturally competent State child-welfare standards for assessing the fitness of Indian families; systematic due-process violations against both Indian children and their parents during child-custody procedures; economic incentives favoring removal of Indian children from their families and communities; and social conditions in Indian country. H.R. Rep. No. 95-1386, at 10-12.

Policy Review Commission Task Force Four, *Report on Federal, State, and Tribal Jurisdiction* (1976) (hereinafter "AIPRC Report"); 123 Cong. Rec. 21042-44 (June 27, 1977); *To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs*, 95th Cong. (1977) (hereinafter "1977 Senate Hearing"); S. Rep. No. 95-597 (1977); 123 Cong. Rec. 37223-26 (Nov. 4, 1977); *To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, To Prevent the Breakup of Indian Families, and for Other Purposes: Hearing on S. 1214 Before the Subcomm. On Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 29 (1978) (hereinafter, "1978 House Hearing"); H.R. Rep. No. 95-1386 (1978); 124 Cong. Rec. H38101-12 (1978).

Congress also found that many of these problems arose from State actions, *i.e.*, that the States, exercising their recognized jurisdiction over Indian child-custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. 25 U.S.C. 1901(5). The standards used by State and private child-welfare agencies to assess Indian parental fitness promoted unrealistic non-Indian socioeconomic norms and failed to account for legitimate cultural differences in Indian families. Time and again, "social workers, ignorant of Indian cultural values and social norms, ma[d]e decisions that [we]re wholly inappropriate in the context of Indian family life and so they frequently discover[ed] neglect or abandonment where none exist[ed]." H.R. Rep. No. 95-1386, at 10. For example, Indian parents might leave their children in the care of extended-family members, sometimes for long periods of time. Social workers untutored in the ways of Indian family life assumed leaving children in the care of anyone outside the nuclear family amounted to neglect and grounds for terminating parental rights. Yet, the House Report noted, this is an accepted practice for certain Tribes. *Id.*

Non-Indian socioeconomic values that State agencies and judges applied in the child-welfare context similarly were found to not account for the difference in family structure and child-rearing practice in Indian communities. *Id.* Layered together with cultural bias, the result, the House Report concluded, was unequal and incongruent application of child-welfare standards for Indian families. *Id.* For example, parental alcohol abuse was one of the most frequently advanced reasons for removing Indian children from their parents; however, in areas where Indians and non-Indians had similar rates of problem drinking, alcohol abuse was rarely used as grounds to remove children from non-Indian parents. *Id.*

Congress heard testimony that removing Indian children from their families had become a regular, encouraged practice. Congress came to understand that "agencies established to place children have an incentive to find children to place." *Id.* at 11. Indian leaders alleged that federally subsidized foster care homes encouraged non-Indians to take in Indian children to supplement their incomes with foster care payments, and that some non-Indian families sought to foster Indian children to gain access to the child's Federal trust account. *See id.*; *See also* 1974 Senate Hearing at 118. While economic incentives encouraged the removal of Indian children, the economic conditions in Indian country prevented Tribes from providing their own foster-care facilities and certified adoptive parents. Poverty and substandard housing were prolific on reservations, and obtaining State foster-care licenses required a standard of living that was often out of reach in Indian communities. Otherwise loving and supportive Indian families were accordingly prevented from becoming foster parents, which promoted the placement of Indian children in non-Indian homes away from their Tribes. *See* H.R. Rep. No. 95-1386, at 11.

In addition, State procedures for removing Indian children from their natural homes commonly violated due process. Social workers sometimes obtained "voluntary" parental-rights waivers to gain access to Indian children using coercive and deceitful measures. 1974 Senate Hearing at 95. Sometimes Indian parents with little education, reading comprehension, and understanding of English signed "voluntary" waivers without knowing what rights they were forfeiting. H.R. Rep. No. 95-1386, at 11. Moreover, State courts failed to protect the rights of Indian children and Indian parents. For example, in involuntary removal proceedings, the Indian parents and children rarely were represented by counsel and sometimes received little if any notice of the proceeding, and termination of parental rights was seldom supported by expert testimony. 1974 Senate Hearing at 67-68; H.R. Rep. No. 95-1386, at 11. Rather than helping

Indian parents correct parenting issues, or acknowledging that the alleged problems were the result of cultural and socioeconomic differences, social workers claimed removal was in the child's best interest. 1974 Senate Hearing at 62.

Congress understood that these issues significantly impacted children who lived off of reservations, not just on-reservation children. Congress was concerned with the effect of the removal of Indian children "whose families live in urban areas or with rural nonrecognized tribes," noting that there were approximately 35,000 such children in foster care, adoptive homes, or institutions. 124 Cong. Rec. H38102; 123 Cong. Rec. H21043. In the Final Report of the American Indian Policy Review Commission, which was included as part of the Senate Report on ICWA, the Commission recommended legislation addressing the fact that, because "[m]any Indian families move back and forth from a reservation dwelling to border communities or even to distant communities, depending on employment and educational opportunities," problems could arise when Tribal and State courts offered competing child-custody determinations, and that legislation therefore had to address situations where "an Indian child is not domiciled on a reservation and [is] subject to the jurisdiction of non-Indian authorities." S. Rep. No. 95-597, at 51-52 (1977).

Congress further recognized that the "wholesale removal of [Tribal] children by nontribal government and private agencies constitutes a serious threat to [Tribes'] existence as on-going, self-governing communities," and that the "future and integrity of Indian tribes and Indian families are in danger because of this crisis." 124 Cong. Rec. H38103. As one Tribal representative testified before Congress, "[t]he ultimate preservation and continuation of [Tribal] cultures depends on our children and their proper growth and development." *See* 1977 Senate Hearing at 169. Commenters on the proposed legislation also noted that, because "[p]robably in

no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships," the "chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their people." *Id.* at 157. Thus, in addition to protecting individual Indian children and families, Congress was also concerned about preserving the integrity of Tribes as self-governing, sovereign entities and ensuring that Tribes could survive both culturally and politically. *See* 124 Cong. Rec. H38,102.

B . Overview of ICWA's Provisions

In light of the information presented about State child-custody practices for Indian children, Congress passed ICWA to "protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." H.R. Rep. No. 95-1386, at 23. Congress further declared that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families. 25 U.S.C. 1902. And although Congress described "the failure of State officials, agencies, and procedures to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future," H.R. Rep. No. 95-1386, at 19, the legislature carefully considered the traditional role of the States in the arena of child welfare outside Indian reservations, and crafted a statute that would balance the interests of the United States, the individual States, Indian Tribes, and Indians, noting:

> While the committee does not feel that it is necessary or desirable to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits, it does feel the need to establish minimum Federal standards

> and procedural safeguards in State Indian child-custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe.

H.R. Rep. No. 95-1386, at 19.

ICWA therefore applies to "child-custody proceedings," defined as foster-care placements, terminations of parental rights, and pre-adoptive and adoptive placements, involving an "Indian child," defined as any unmarried person who is under age eighteen and either is: (a) a member of an Indian tribe; or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. 25 U.S.C. 1903. In such proceedings, Congress accorded Tribes "numerous prerogatives . . . through the ICWA's substantive provisions . . . as a means of protecting not only the interests of individual Indian children and their families, but also of the tribes themselves." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49 (1989). In addition, ICWA provides important procedural and substantive standards to be followed in State-administered proceedings concerning possible removal of an Indian child from her family. *See, e.g.*, 25 U.S.C. 1912(d) (requiring provision of "active efforts" to prevent the breakup of the Indian family); *id.* 1912(e)-(f) (requiring specified burdens of proof and expert testimony regarding potential damage to child resulting from continued custody by parent, before foster-care placement or termination of parental rights may be ordered).

The "most important substantive requirement imposed on state courts" by ICWA is the placement preference for any adoptive placement of an Indian child. *Holyfield*, 490 U.S. at 36-37. In any adoptive placement of an Indian child under State law, ICWA requires that a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family (regardless of whether they are Tribal citizens); (2) other members of the Indian child's Tribe; or (3) other Indian families. 25 U.S.C. 1915(a). ICWA

requires similar placement preferences for pre-adoptive placement and foster-care placement. 25 U.S.C. 1915(a)-(b). These preferences reflect "Federal policy that, where possible, an Indian child should remain in the Indian community." *Holyfield*, 490 U.S. at 36-37 (internal citations omitted).

C. Need for These Regulations

Although the Department initially hoped that binding regulations would not be "necessary to carry out the Act," *see* 44 FR 67,584 (Nov. 23, 1979), a third of a century of experience has confirmed the need for more uniformity in the interpretation and application of this important Federal law.

Need for Uniform Federal Standard. For decades, various State courts and agencies have interpreted the Act in different, and sometimes conflicting, ways. This has resulted in different standards being applied to ICWA adjudications across the United States, contrary to Congress's intent. *See Holyfield*, 490 U.S. at 43-46; *see also* 25 U.S.C. 1902; H.R. Rep. No. 95-1386, at 19; *see generally* Casey Family Programs, *Indian Child Welfare Act: Measuring Compliance* (2015), www.casey.org/media/measuring-compliance-icwa.pdf. Perhaps the most noted example is the "existing Indian family," or EIF, exception, under which some State courts first determine the "Indian-ness" of the child and family before applying the Act. As a result, children who meet the statutory definition of "Indian child" and their parents are denied the protections that Congress established by Federal law. This exception to the application of ICWA was created by some State courts, and has no basis in ICWA's text or purpose. Currently, the Department has identified State-court cases applying this exception in a few states while other State courts have rejected the exception. *See, e.g.*, *Thompson v. Fairfax Cty. Dep't of Family Servs.*, 747 S.E.2d 838, 847-48 (Va. Ct. App. 2013) (collecting cases); *In re Alexandria P.*, 176

Cal. Rptr. 3d 468, 484-85 (Cal. Ct. App. 2014) (noting split across California jurisdictions). The question whether an Indian child, her parents, and her Tribe will receive the Federal protections to which they are entitled must be uniform across the Nation, as Congress mandated.

This type of conflicting State-level statutory interpretation can lead to arbitrary outcomes, and can threaten the rights that the statute was intended to protect. For example, in *Holyfield*, the Court concluded that the term "domicile" in ICWA must have a uniform Federal meaning, because otherwise parties or agencies could avoid ICWA's application "merely by transporting [the child] across state lines." 490 U.S. at 46. State courts also differ as to what constitutes "good cause" for departing from ICWA's child placement preferences, weighing a variety of different factors when making the determination. *See, e.g., In re A.J.S.*, 204 P.3d 543, 551 (Kan. 2009); *In re Adoption of F.H.*, 851 P.2d 1361, 1363-64 (Alaska 1993); *In re Adoption of M.*, 832 P.2d 518, 522 (Wash. 1992). States are also inconsistent as to how to demonstrate sufficient "active efforts" to keep a family intact. *See State ex rel. C.D. v. State*, 200 P.3d 194, 205 (Utah Ct. App. 2008) (noting State-by-State disagreement over what qualifies as "active efforts"). In other instances, State courts have simply ignored ICWA requirements outright. *Oglala Sioux Tribe & Rosebud Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 754 (D.S.D. 2015) (finding that the State had "developed and implemented policies and procedures for the removal of Indian children from their parents' custody in violation of the mandates of the Indian Child Welfare Act"). The result of these inconsistencies is that many of the problems Congress intended to address by enacting ICWA persist today.

The Department's current nonbinding guidelines are insufficient to fully implement Congress's goal of nationwide protections for Indian children, parents, and Tribes. *See* 44 FR at 67,584-95. While State courts will sometimes defer to the guidelines in ICWA cases (*see In re*

Jack C., 122 Cal. Rptr. 3d 6, 13-14 (Cal. Ct. App. 2011); *In the Interest of Tavian B.*, 874 N.W.2d 456, 460 (Neb. 2016)), State courts frequently characterize the guidelines as lacking the force of law and conclude that they may depart from the guidelines as they see fit. *See, e.g.*,*Gila River Indian Cmty. v. Dep't of Child Safety*, 363 P.3d 148, 153 (Ariz. Ct. App. 2015).

These State-specific determinations about the meaning of key terms in the Federal law will continue absent a legislative rule, with potentially devastating consequences for the children, families, and Tribes that ICWA was designed to protect. Consider a child who is a Tribal citizen and who lives with his mother, who is also a Tribal citizen. The mother and child live far from their Tribe's reservation because of her work, and they are not able to regularly participate in their Tribe's social, cultural, or political events. If the State social-services agency seeks to remove the child from the mother and initiates a child-custody proceeding, the application of ICWA to that proceeding—which clearly involves an "Indian child"—will depend on whether that State court has accepted the existing Indian family exception. Likewise, even if the court agrees that ICWA applies, the actions taken to provide remedial and rehabilitative programs to the family will be uncertain because there is no uniform interpretation of what constitutes "active efforts" under ICWA. This type of variation was not intended by Congress and actively undermines the purposes of the Act.

Need for Protections for Tribal Citizens Living Outside Indian Country. The need for more uniform application of ICWA in State courts is reinforced by the fact that approximately 78% of Native Americans live outside of Indian country,[2] where judges may be less familiar with

[2] *See* United States Census Bureau, Fact for Features: American Indian and Alaska Native Heritage Month: November 2012 (Oct. 25, 2012), https://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb12-ff22.html (summary files for 2015 are not yet available).

ICWA requirements generally, or where a Tribe may be less likely to find out about custody adjudications involving their citizens. Some commenters have pointed to the large number of Tribal citizens living off-reservation as proof that off-reservation Indians have made a conscious choice to distance themselves from their Tribe and its culture, and that ICWA's protections are unnecessary. They have accordingly questioned the need for a legislative rule, based on the assumption that off-reservation Indians do not want the Federal protections that accompany their status as Indians.

These comments misapprehend the reasons for high off-reservation Indian populations and the nature of Tribal citizenship generally, and do not diminish the need for the final rule. First, the fact that many Indians live off-reservation is, in part, a result of past, now-repudiated Federal policies encouraging Indian assimilation with non-Indians and, in some cases, terminating Tribes outright. For example, Congress passed the Indian General Allotment Act, 24 Stat. 388, codified at 25 U.S.C. 331 (1887) (repealed), which authorized the United States to allot and sell Tribal lands to non-Indians and take them out of trust status. The purpose of the Act was to "encourage individual land ownership and, hopefully, eventual assimilation into the larger society," *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1205 (9th Cir. 2001), and to "promot[e] interaction between the races and . . . encourage[e] Indians to adopt white ways," *Mattz v. Arnett*, 412 U.S. 481, 496 (1973). Many Indian lands subsequently passed out of Tribal control, which often led to Tribal citizens dispersing from their reservations.

Likewise, during the so-called "termination era" of the 1950s, Congress passed a series of acts severing its trust relationship with more than 100 Tribes. Terminated Tribes lost not only their land base but also myriad Federal services previously arising from the trust relationship,

including education, health care, housing, and emergency welfare. *See Sioux Tribe of Indians v. United States*, 7 Cl. Ct. 468, 478 n.8 (Cl. Ct. 1985) (describing the termination policy). Lacking these basic services, which often did not otherwise exist in rural Tribal communities, many Indians were forced to move to urban areas. And in 1956, the Relocation Act was passed with funds to support the voluntary relocation of any young adult Indian willing to move from on or near a reservation to a selected urban center. Act of Aug. 3, 1956, Pub. L. No. 84-959, 70 Stat. 986. Thus, today's off-reservation population is not a new phenomenon; ICWA itself was enacted with Congress's awareness that many Indians live off-reservation. *See* 1978 House Hearings at 103; H.R. Rep. No. 95-1386, at 15. The fact that an Indian does not live on a reservation is not evidence of disassociation with his or her Tribe. In fact, citizens of many Tribes do not have the option to live on reservation land, as over 40 percent of Tribes have no reservation land.

Second, the comments ignore the fact that, regardless of geographic location of a Tribal citizen, Tribal citizenship (aka Tribal membership) is voluntary and typically requires an affirmative act by the enrollee or her parent. Tribal laws generally include provisions requiring the parent or legal guardian of a minor to apply for Tribal citizenship on behalf of the child. *See, e.g.*, Jamestown S'Klallam Tribe Tribal Code § 4.02.04(A) – Applications for Enrollment. Tribes also often require an affirmative act by the individual seeking to become a Tribal citizen, such as the filing of an application. *See, e.g.*, White Mountain Apache Enrollment Code, Sec. 1-401 – Application Form: Filing. As ICWA is limited to children who are either enrolled in a Tribe or are eligible for enrollment and have a parent who is an enrolled member, that status inherently demonstrates an ongoing Tribal affiliation even among off-reservation Indians.

Rather than simply moving off-reservation, those enrolled Tribal citizens who do want to renounce their affiliation with a Tribe may voluntarily relinquish their citizenship. Tribal governing documents often include provisions allowing adult citizens to relinquish Tribal citizenship, sometimes also requiring a notarized or witnessed written statement. *See, e.g.*, Jamestown S'Klallam Tribe Tribal Code § 4.04.01(C) – Loss of Tribal Citizenship; White Mountain Apache Enrollment Code Sec. 1-702 – Relinquishment. These procedures, and not an individual's geographic location, are the proper determinant of whether an individual retains an ongoing political affiliation with a Tribe (both generally and for the purposes of the ICWA placement preferences).

Commenters who raised this point also argued that a legislative rule would continue to apply Tribal placement preferences to individuals who have low Indian blood quantum. Several noted that the Indian child in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013), purportedly was 3/256 Cherokee by blood, and questioned why ICWA should apply to such individuals, particularly when they live off-reservation. This argument mistakes and over-simplifies the nature of Indian status. Tribes have a wide variety of citizenship-eligibility requirements. For example, the Jamestown S'Klallam Tribe requires the applicant to produce "documentary evidence such as a notarized paternity affidavit showing the name of a parent through whom eligibility for citizenship is claimed." Jamestown S'Klallam Tribe Tribal Code § 4.02.04(C) – Applications for Enrollment. Other Tribes include blood-quantum requirements. For example, the White Mountain Apache Tribe requires the applicant to be at least one fourth (1/4) degree White Mountain Apache blood. *See* White Mountain Apache Constitution, Article II, sec. 1 – Membership. Federal courts have repeatedly recognized that determining citizenship (membership) requirements is a sovereign Tribal function. *See, e.g., Santa Clara Pueblo v.*

Martinez, 436 U.S. 49, 72 n.32 (1978) ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."); *Montgomery v. Flandreau Santee Sioux Tribe*, 905 F. Supp. 740, 746 (D.S.D. 1995) ("Giving deference to the Tribe's right as a sovereign to determine its own membership, the Court holds that it lacks subject matter jurisdiction to determine whether any plaintiffs were wrongfully denied enrollment in the Tribe."); *In re Adoption of C.D.K.*, 629 F. Supp. 2d 1258, 1262 (D. Utah 2009) (holding that "the Indian tribes' 'inherent power to determine tribal membership' entitles determinations of membership by Indian tribes to great deference"). The act of fulfilling Tribal citizenship requirements is all that is necessary to demonstrate Tribal affiliation, and thus qualify as an "Indian" or "Indian child" under ICWA.

These types of objections, which are based on fundamental misunderstandings of Indian law, history, and social and cultural life, actually demonstrate the need for a legislative rule. Too often, State courts are swayed by these types of arguments and use the leeway afforded by the lack of regulations to craft ad hoc "exceptions" to ICWA. A legislative rule is necessary to support ICWA's underlying purpose and to address those areas where a lack of binding guidance has resulted in inconsistent implementation and noncompliance with the statute.

Continued Need for ICWA Protections. ICWA's requirements remain vitally important today. Although ICWA has helped to prevent the wholesale separation of Tribal children from their families in many regions of the United States, Indian families continue to be broken up by the removal of their children by non-Tribal public and private agencies. Nationwide, based on 2013 data, Native American children are represented in State foster care at a rate 2.5 times their presence in the general population. *See* National Council of Juvenile and Family Court Judges, *Disproportionality Rates for Children of Color in Foster Care* tbl. 1 (June 2015). This disparity

has *increased* since 2000. *Id.* (showing disproportionality rate of 1.5 in 2000). In some States, including numerous States with significant Indian populations, Native American children are represented in State foster-care systems at rates as high as 14.8 times their presence in the general population of that State. *Id.* While this disproportionate overrepresentation of Native American children in the foster-care system likely has multiple causes, it nonetheless supports the need for this rule.

Through numerous statutory provisions, ICWA helps ensure that State courts incorporate Indian social and cultural standards into decision-making that affects Indian children. For example, section 1915 requires foster-care and adoptive placement preference be given to members of the child's extended family. This requirement comports with findings that Tribal citizens tend to value extended family more than the Euro-American model, often having several generations of family and aunts and uncles participating in primary child-rearing activities. *See, e.g.*, John G. Red Horse, *Family Preservation: Concepts in American Indian Communities* (Casey Family Programs and National Indian Child Welfare Assoc. Dec. 2000). Likewise, from the adoptee's perspective, extended-family-member involvement and strong connection to Tribe shape reunification. Ashley L. Landers et al., *Finding Their Way Home: The Reunification of First Nations Adoptees*, 10 First Peoples Child & Family Review no. 2 (2015).

D. The Department's Implementation of ICWA

As required by ICWA, the Department issued regulations in 1979 to establish procedures through which a Tribe may reassume jurisdiction over Indian child-custody proceedings, 44 FR 45092 (Jul. 24, 1979) (codified at 25 CFR part 23), as well as procedures for notice of involuntary Indian child-custody proceedings, payment for appointed counsel in State courts, and procedures for the Department to provide grants to Tribes and Indian organizations for Indian

child and family programs. 44 FR 45096 (Jul. 24, 1979) (codified at 25 CFR part 23). In January 1994, the Department revised its ICWA regulations to convert the competitive-grant process for Tribes to a noncompetitive funding mechanism, while continuing the competitive award system for Indian organizations. *See* 59 FR 2248 (Jan. 13, 1994).

In 1979, the Department published recommended guidelines for Indian child-custody proceedings in State courts. 44 FR 24000 (Apr. 23, 1979) (proposed guidelines); 44 FR 32,294 (Jun. 5, 1979) (seeking public comment); 44 FR 67584 (final guidelines). Several commenters remarked then that the Department had the authority to issue regulations and should do so. The Department declined to issue regulations and instead revised its recommended guidelines and published them in final form in November 1979. 44 FR 67584.

More recently, the Department determined that it may be appropriate and necessary to promulgate additional and updated rules interpreting ICWA and providing uniform standards for State courts to follow in applying the Federal law. In 2014, the Department invited public comments to determine whether to update its guidelines to address inconsistencies in State-level ICWA implementation that had arisen since 1979 and, if so, what changes should be made. The Department held several listening sessions, including sessions with representatives of federally recognized Indian Tribes, State-court representatives (e.g., the National Council of Juvenile and Family Court Judges (NCJFCJ) and the National Center for State Courts' Conference of Chief Justices Tribal Relations Committee), the National Indian Child Welfare Association, and the National Congress of American Indians. The Department received comments from those at the listening sessions and also received written comments, including comments from individuals and additional organizations. The Department considered these comments and subsequently

published updated Guidelines (2015 Guidelines) in February 2015. *See* 80 FR 10146 (Feb. 25, 2015).

Many commenters on the 2015 Guidelines requested not only that the Department update its ICWA guidelines but that the Department also issue binding regulations addressing the requirements and standards that ICWA provides for State-court child-custody proceedings. Commenters noted the role that regulations could provide in promoting uniform application of ICWA across the country, along with many of the other reasons discussed above why ICWA regulations are needed. Recognizing that need, the Department began a notice-and-comment process to promulgate formal ICWA regulations. The Department issued a proposed rule on March 20, 2015 that would "incorporate many of the changes made to the recently revised guidelines into regulations, establishing the Department's interpretation of ICWA as a binding interpretation to ensure consistency in implementation of ICWA across all States." 80 FR 14480, 14481 (Mar. 20, 2015).

As part of its process collecting input on the proposed regulations, Interior held five public hearings and five Tribal-consultation sessions across the country, as well as one public hearing and one Tribal consultation by teleconference. Public hearings and Tribal consultations were held on April 22, 2015, in Portland Oregon; April 23, 2015, in Rapid City, South Dakota; May 5, 2015, in Albuquerque, New Mexico; May 7, 2015, in Prior Lake, Minnesota; May 11 and 12, 2015, by teleconference; and May 14, 2015, in Tulsa, Oklahoma. All sessions were transcribed. In addition to oral comments, the Department received over 2,100 written comments.

After the public-comment period closed on May 19, 2015, the Department reviewed comments received and, where appropriate, made changes to the proposed rule in response. This

final rule reflects the input of all comments received during the public-comment period and Tribal consultation. The comments on the proposed rule and the contents of the final rule are discussed in detail below in Section IV.

In crafting this final rule, the Department is drawing from its expertise in Indian affairs generally, and from its extensive experience in administering Indian child-welfare programs specifically. BIA's Office of Indian Services, through its Division of Human Services, collects information from Tribes on their ICWA activities for the Indian Child Welfare Quarterly and Annual Report, ensures that ICWA processes and resources are in place to facilitate implementation of ICWA, administers the notice process under section 1912 of the Act, publishes a nationwide contact list of Tribally designated ICWA agents for service of notice, administers ICWA grants, and maintains a central file of adoption records under ICWA. In addition, BIA provides technical assistance to State social workers and courts on ICWA and Indian child welfare in general, including but not limited to assisting in locating expert witnesses and identifying language interpreters. Currently, BIA employs a team of child protection social workers who provide this assistance on an as-needed basis as part of their daily duties. BIA also employs an ICWA Policy Social Worker, who is both an attorney and a social worker, and who serves as the central BIA expert and liaison on ICWA matters.

The Department is a significant Federal funding source for Indian child-welfare programs run by Tribes. Social-services funding is used to support Tribal and Department-operated Child Protection and Child Welfare Services (CPS/CW) on or near reservations and designated service areas. Tribal and Department caseworkers are the first responders for child and family services on reservations in Indian country. CPS/CW work is labor-intensive, as it requires social-service workers to frequently engage families through face-to-face contacts, assess the safety of children,

monitor case progress, and ensure that essential services and support are provided to the child and her family. This experience is critical toward understanding the areas where ICWA is or is not working at the State level, as well as the necessary standards to address ongoing problems.

Congress also tasked the Department with affirmatively monitoring State compliance with ICWA by accessing State records of placement of Indian children, including documentation of State efforts to fulfill ICWA placement preferences. *See* 25 U.S.C. 1915(e). State courts are further responsible for providing the Department with a final decree or adoptive order for any Indian child within 30 days after entering such a judgment, together with any information necessary to show the Indian child's name, birthdate, and Tribal affiliation, the names and addresses of the biological and adoptive parents, and the identity of any agency having relevant information relating to the adoptive parent. *See* 25 CFR 23.71. The Department's experience administering these programs has informed development of this rule.

The Department has also consulted extensively with the Children's Bureau of the Administration for Children and Families, Department of Health and Human Services, and the Department of Justice in the formulation of this final rule. The Children's Bureau partners with Federal, State, and Tribal agencies to improve the overall health and well-being of children and families, and has significant expertise in child abuse and neglect. The Children's Bureau also administers capacity-building centers for States, Tribes, and courts. The Department of Justice has significant expertise in court practice, Indian law, and court decisions addressing ICWA. This close coordination with the Children's Bureau and the Department of Justice has helped produce a final rule that reflects the expertise of all three agencies.

Finally, in issuing this final rule, the Department has considered the trust obligation of the United States to Indian Tribes, which Congress expressly referenced in ICWA. 25 U.S.C.

1901(3). The Department has also kept in mind the canon of construction, applied by Federal courts, that Federal statutes should be liberally construed in favor of Indians, with ambiguous provisions interpreted for their benefit. *See, e.g.*, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *Doe v. Mann*, 415 F.3d 1038, 1047 (9th Cir. 2005).

III. Authority for Regulations

The Department's primary authority for this rule is 25 U.S.C. 1952. Section 1952 states that, within one hundred and eighty days after November 8, 1979, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter. This expansive language evinces clear congressional intent that the Secretary (or in this case, her delegee, the Assistant Secretary-Indian Affairs, who oversees the Bureau of Indian Affairs) will issue rules to implement ICWA.

As discussed above, the Department issued several rules implementing ICWA in 1979. These included regulations to establish procedures by which an Indian Tribe may reassume jurisdiction over Indian child-custody proceedings as authorized by § 1918 of ICWA, *see* 44 FR 45092 (codified at 25 CFR part 13); regulations addressing topics such as notice in involuntary child-custody proceedings, payment for appointed counsel, grants to Indian Tribes and Indian organizations for Indian child and family programs, and recordkeeping and information availability, *see* 44 FR 45096 (codified at 25 CFR part 23); and interpretive guidelines for State courts to apply in Indian child-custody proceedings. *See* 44 FR 67584. Some of these rules and regulations have been amended since their original issuance. *See, e.g.*, 59 FR 2248 (Jan. 13, 1994).

Having carefully considered public comments on the issue and having reflected on statements the Department made in 1979, all of which are discussed further below, the

Department determines that the rulemaking grant in § 1952 encompasses jurisdiction to issue rules at this time that set binding standards for Indian child-custody proceedings in State courts. ICWA provides a broad and general grant of rulemaking authority that authorizes the Department to issue rules and regulations as may be necessary to implement ICWA. Similar grants of rulemaking authority have been held to presumptively authorize agencies to issue rules and regulations addressing matters covered by the statute unless there is clear congressional intent to withhold authority in a particular area. *See, e.g.*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999); *Am. Hospital Ass'n v. Nat'l Labor Relations Bd.*, 499 U.S. 606, 609-10 (1991) (general grant of rulemaking authority "was unquestionably sufficient to authorize the rule at issue in this case unless limited by some other provision in the Act"); *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973) ("[w]here the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act,' we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation'"); *see also City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013) (finding not "a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field"); *Qwest Communic'ns Int'l Inc. v. FCC*, 229 F.3d 1172, 1179 (D.C. Cir. 2000) ("[t]he grant of authority relied upon by a federal agency in promulgating regulations need not be specific; it is only necessary 'that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued'") (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1979)). As discussed elsewhere in this preamble, the Department finds that this

regulation is "necessary to carry out the provisions" of ICWA, 25 U.S.C. 1952, and thus falls squarely within the statutory grant of rulemaking authority.

ICWA's legislative history is consistent with the understanding that the statute's grant of rulemaking authority is broad and inclusive. The original versions of the House and Senate bills that led to the enactment of ICWA, as well as the version of the bill that passed the Senate, included the general grant of rulemaking authority but also included specific, additional procedural requirements. *See* S. 1214, 95th Cong., 1st Sess., Section 205; *see also* S. Rep. No. 95-597 (Nov. 3, 1977). In particular, the bills required that within six months, the Secretary must consult with Tribes and Indian organizations "in the consideration and formulation of rules and regulations to implement the provisions of this Act"; within seven months, present the proposed rules to congressional committees; within eight months, publish proposed rules for notice and comment; and within ten months, promulgate final rules and regulations to implement the provisions of the Act. *See* S. 1214, sec. 205(b)(1). The bills authorized the Secretary to revise the rules and regulations, but required that they be presented to the congressional committees first. *Id.* 205(c). These requirements were considered during hearings held on February 9 and March 9, 1978, before the House of Representatives Committee on Interior and Insular Affairs. *See* 1978 House Hearings at 47.

During debate of the bill on the House floor, the bill sponsor, Representative Udall, offered an amendment to change the rulemaking grant to its current text. Representative Udall explained that this amendment was designed to remove the burdens of submitting regulations to congressional committees, but did not indicate that the scope of the grant of rulemaking authority was to change in any way. *See* 124 Cong. Rec. H38,107 (1978). ICWA thus does not impose procedural requirements on rulemaking that exceed those required by the Administrative

Procedure Act. Moreover, the Department views it as unlikely that Congress would have introduced and considered bills throughout the 95th Congress that would have imposed burdensome procedural requirements on the agency if Congress did not intend that § 1952 would provide the Department with a broad grant of rulemaking authority.

A. Statements Made in the 1979 Guidelines

The Department has reconsidered and no longer agrees with statements it made in 1979 suggesting that it lacks the authority to issue binding regulations. At that time, although it undertook a notice-and-comment process, the Department made clear that the final issued guidelines addressing State-court Indian-child-custody proceedings were not intended to have binding effect. *See* 44 FR 67584. The Department cited a number of reasons for issuing nonbinding guidelines, a course of action that was opposed by numerous commenters.[3] *Id.* As

[3] *See, e.g.*, Letter from Bob Aitken, Director, Social Services, The Minnesota Chippewa Tribe to David Etheridge (May 23, 1979) (on file with the Department of the Interior) ("I feel strongly the Bureau of Indian Affairs should not be putting any of the act in 'guideline' form. The 'recommended guidelines for state courts' should be in rule or regulation form for state courts to follow. It appears the state courts will have a choice on whether or not to follow the Act. In my opinion, the Act does delegate to the Interior Department the authority to mandate such procedures."); Letter from Henry Sockheson, Chairman, Steering Committee of the National Association of Indian Legal Services, to David Etheridge (May 17, 1979) (on file with the Department of the Interior) ("Fearful of a constitutional challenge by states, a possibility soundly discredited and rejected by the lawmakers, the Secretary has adopted a position which flies in the face of clear Congressional intent to the contrary, i.e., that he, even as a steward of Congressional purpose, cannot mandate procedures for state or tribal courts, the very meat & potatoes of the whole of Title I of the Act. In the place of these badly needed regulations, therefore, was substituted a Notice of 'Recommended Guidelines for State Courts-Indian Child-custody proceedings', which will have the practical effect of regulations without the protections afforded to the public under the Administrative Procedures Act. . . . It is apparent that the delicate relationships sought to be preserved by the Act justified and required regulatory action with regard to state court procedures by the Bureau and cannot be subjected to the whim of what surely Congress believed were recalcitrant state courts now functioning under questionable 'guidelines.'"); Letter from Alexander Lewis, Sr., Governor, Gila River Indian Community, to David Etheridge (May 21, 1979) (on file with the Department of the Interior) ("[A]bsent regulations [and] without force and effect, the guidelines are useless and the aims of the Act will be made more difficult to achieve . . . . By virtue of the Supremacy Clause of the United States

described above, the Department concludes today that this binding regulation is within the jurisdiction of the agency, was encompassed by the statutory grant of rulemaking authority, and is necessary to implement the Act.

While the Department stated in 1979 that binding regulations were "not necessary to carry out the Act," 37 years of real-world ICWA application have thoroughly disproven that conclusion and underscored the need for this regulation. *See* discussion *supra* at Section II.C. The intervening years have shown both that State-court application of the statute has been inconsistent and contradictory across, and sometimes within, jurisdictions. This, in turn, has impeded the statutory intent of providing minimum Federal standards that would protect Indian children, families, and Tribes, and has allowed problems identified in the 1970s to remain in the present day. The lack of clarity and uniformity regarding the meaning of key ICWA provisions also creates confusion, delays, and appeals in individual cases involving Indian children.

For these reasons, the Department's decision to issue binding regulations finds strong support in the Supreme Court's carefully reasoned decision in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). There, the Supreme Court addressed whether a State court had jurisdiction over a child-custody proceeding involving two Indian children. As the sole disputed issue in the case was whether the children were "domiciled" on a reservation for ICWA

Constitution, and this Act of Congress – the Indian Child Welfare Act, the Secretary of the Interior does have authority to promulgate regulations regarding the transfer of jurisdiction of Indian child proceedings from State to Tribal Court. I urge that you reconsider this action and promulgate regulations instead of guidelines, so that the provisions of the Act will not be emasculated."); Letter from Frank Stede, Vice-Chief, Mississippi Band of Choctaw Indians, to David Etheridge (May 22, 1979) (on file with the Department of the Interior) ("[T]he notices should have been issued [as] regulations contrary to what the Interior Department presents as an [argument] for not issuing the guide lines as notices, the Congress clearly gave the Secretary authority to mandate procedures for State or Tribal court by passing legislation which deals with State and Tribal [i]ssue[s] in such an extensive fashion, clearly Congress would not have [g]one to such details if it had intended that compliance to [be] voluntary.").

purposes, the Court confronted the initial question whether Congress intended the definition of "domicile" to be a matter of State law. The Court noted that "the meaning of a federal statute is necessarily a federal question in the sense that its construction remains subject to this Court's supervision." *Id.* at 43. The Court further noted the rule of statutory construction that "Congress when it enacts a statute is not making the application of the federal act dependent on state law." *Id.* The Court explained that one reason for this rule "is that federal statutes are generally intended to have uniform nationwide application" and another reason for the rule is "the danger that the federal program would be impaired if state law were to control." *Id.* at 43-44.

The Court then discussed its prior holding in *NLRB v. Hearst Publications Inc.*, 322 U.S. 111 (1944), where it rejected an argument that the term "employee" in the Wagner Act should be defined by State law. It quoted that decision's finding that "[t]he Wagner Act is . . . intended to solve a national problem on a national scale." 490 U.S. at 44. The Court concluded that what it said of the Wagner Act "applies equally well to the ICWA." *Id.* In explaining the reasons for this conclusion, the Court noted, *inter alia*, that "Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities" and "that Congress perceived the States and their courts as partly responsible for the problem it intended to correct." *Id.* at 45. "Under these circumstances, it is most improbable that Congress would have intended to leave the scope of the statute's key jurisdictional provision subject to definition by state courts as a matter of state law." *Id.* The *Holyfield* Court also recognized that Congress intended the implementation of ICWA to have nationwide consistency, so "Congress could hardly have intended the lack of nationwide uniformity that would result from state-law definitions of domicile." *Id.*

In 1979, the Department had neither the benefit of the *Holyfield* Court's carefully reasoned decision nor the opportunity to observe how a lack of uniformity in the interpretation of ICWA by State courts could undermine the statute's underlying purposes. In practice, the meaning of various provisions of the Act has been subject to differing interpretation by each of the 50 States, and within the States, by various courts. What was intended to be a uniform Federal minimum standard now varies in its application based on the State or even the judicial district. *See* discussion *supra* at Section II.C. The Department thus has come to recognize that, as the Supreme Court stated in *Holyfield*, "a statute under which different rules apply from time to time to the same child, simply as a result of his or her transport from one State to another, cannot be what Congress had in mind." *Id.* at 46.

Many commenters cited, or made comments that repeated, specific statements made by the Department in 1979 in arguing that the Department should or should not issue a binding regulation. These statements, and the reasons why the Department is now departing from them, are discussed further below in the responses to comments.

B. Comments Agreeing that Interior May Issue a Binding Regulation

Some commenters, including a group of law professors and the Tribal Law and Policy Institute, asserted that the Department has sufficient authority to issue binding regulations and that the legal basis for regulatory action is strong. These commenters pointed to 25 U.S.C. 1952 authorizing the Department to promulgate such rules and regulations as may be necessary to carry out the provisions of the Act and 25 U.S.C. 2 and 9, which provide Interior with general authority to prescribe regulations to carry into effect any provision of any Act of Congress relating to Indian affairs. These commenters further pointed to the fact that Congress's intent was to establish "minimum Federal standards" to be applied in State child-custody proceedings, and

noted that in the last few decades, there have been divergent interpretations of ICWA provisions by State courts and uneven implementation by State agencies that undermine this purpose. Congress passed ICWA to address State-court and -agency application of child-welfare laws to provide a minimum Federal floor for such proceedings. These commenters asserted that regulations to enforce the minimum standards and address inconsistencies in implementation are well within the authority that Congress delegated to the Department.

Other commenters stated that deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), would apply to the regulations because the regulations are within the grant of authority from Congress and directly address areas that are enforced inconsistently by the States in derogation of congressional intent. A commenter pointed out that there is no case in which a general conferral of rulemaking authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field.

Some commenters noted that under established case law, the Department's statements in 1979 concerning its authority to issue a binding regulation do not preclude it from issuing this binding regulation. Commenters further stated that issuance of the regulation is fully consistent with the Tenth Amendment, discounted the Federalism concerns potentially implicated by the regulation, and dismissed any suggestion that the regulation is unconstitutional. Some of these commenters stated that domestic family law is no longer the exclusive purview of States, if it ever was. Many commenters urged the Department to include in this preamble a thorough discussion of its authority to issue this binding regulation, including the citations to case law, in an effort to ensure that State courts will adhere to the regulations.

The Department agrees with these comments for the detailed reasons set forth in this preamble.

C. Comments Disagreeing that the Department Has Authority to Issue a Binding Regulation

Other commenters asserted that the Department does not have the authority to promulgate regulations. These commenters generally stated that ICWA provides the Department with authority for rulemaking only with respect to limited matters, such as with respect to grants to Tribes. The reasons cited in support of these comments are discussed separately below.

1. Agency Expertise

Comment: Some commenters stated that the BIA does not have expertise with respect to the child-welfare matters addressed by ICWA. These commenters pointed to a number of Supreme Court cases that establish domestic-relations law as being within the realm of State law.

Response: The Department respectfully disagrees with these commenters. ICWA addresses Indian affairs, is premised on Congress's plenary Indian-affairs power and trust responsibility, and seeks to prevent unwarranted State intrusion into Tribal affairs and sovereignty and to protect the integrity of Indian families. *See* 25 U.S.C. 1901, 1902. An express purpose of the statute was to provide safeguards against State officials who may not understand Tribal cultural or social standards. 25 U.S.C. 1901.

These are all areas squarely within the mandate and expertise of the BIA. The BIA is the Federal agency charged with the management of all Indian affairs and of all matters arising out of Indian relations, 25 U.S.C. 2, and may proscribe such regulations as [it] may think fit for carrying into effect the various provisions of any act relating to Indian affairs. 25 U.S.C. 9. The BIA's special expertise regarding Indian affairs, including Indian cultural values and social norms related to child-rearing, as well as Indian family and child service programs, make it

logical for Congress to have entrusted the Department with rulemaking authority for the statute.[4] *Cf. Runs After v. United States*, 766 F.2d 347, 352 (9th Cir. 1985) ("It cannot be denied that the BIA has special expertise and extensive experience in dealing with Indian affairs."); *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 60 (2d Cir. 1994).

Further, BIA has extensive and longstanding experience in Indian child-welfare matters. Congress statutorily charged BIA with providing child-welfare services to all federally recognized Tribes. BIA social services and law enforcement are often the first responders in matters involving families and children. *See, e.g.*, 25 CFR part 20. These regulations fall squarely under the Department's broad responsibilities for Indian affairs. Finally, BIA has consulted extensively with the Children's Bureau of the Administration for Children and Families, Department of Health and Human Services, in formulating this final rule. The Children's Bureau partners with Federal, State, Tribal, and local governments to improve the overall health and well-being of children and families, and has significant expertise in child abuse and neglect. The Children's Bureau also administers capacity building centers for States, Tribes, and courts. BIA also consulted with the Department of Justice, which has significant expertise in court practice, Indian law, and court decisions addressing ICWA. Close coordination with these agencies has helped produce a final rule that reflects the substantial expertise of the Federal government in this area.

2. *Chevron* Deference

[4] Indeed, the BIA has a long-established hiring preference for qualified Indian individuals, which was designed "to increase the participation of tribal Indians in BIA operations" and "make the BIA more responsive to the needs of its constituent groups." *Morton v. Mancari*, 417 U.S. 535, 543-44, 554 (1974). The BIA is thus particularly well-suited to set standards that ensure consideration of Tribal cultural and social practices, and protect the integrity of Tribes.

Comment: Commenters also asserted that courts will not grant these regulations deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984), because, they assert, *Chevron* deference applies only to interpretations of statutes that the agency administers and the Department has no statutory authority over child welfare. Commenters also asserted that no deference is warranted because of the statements the Department made in 1979 concerning the scope of its rulemaking authority. These commenters also assert that the regulations represent an interpretation of ICWA that is not within the range of reasonable interpretations, and that the Department's interpretation of certain provisions would render ICWA unconstitutional.

Response: The authority of the Department to issue this rule has been addressed above, and the rule is entitled to *Chevron* deference by Federal and State courts. As discussed in more detail in this preamble, the provisions of the final rule represent reasonable interpretations of the statute and do not raise constitutional concerns. Moreover, under any circumstances, the Department's interpretation of a statutory provision in this rule cannot render the *statute* unconstitutional.

3. Primary Responsibility for Interpreting the Act

Comment: Some commenters cited, or made statements that mirrored, the Department's statement in 1979 that "primary responsibility" for interpreting portions of ICWA that do not expressly delegate responsibility to the Department "rests with the courts that decide Indian child custody cases." In support of this statement, these commenters noted that the Department cited ICWA's legislative history, which states that the term "good cause," was "designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child."

Response: As noted above, the language in § 1952 authorizing the Department to "promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter" provides authority for this rulemaking. Accordingly, contrary to the Department's suggestion in 1979, the Department has authority to interpret the portions of ICWA addressed in this rule.

As discussed above, the Department's conclusion is in accord with ICWA's legislative history and the carefully reasoned decision in *Holyfield*, where the Supreme Court noted that the meaning of key ICWA terms and requirements necessarily raises Federal questions and that conflicting interpretations of the statute can lead to arbitrary outcomes that threaten the rights that ICWA was intended to protect. In 1979, the Department gave excessive weight to a single statement in the legislative history indicating that the term "good cause" was designed to provide State courts with flexibility when making certain determinations. 44 FR at 67584. That single statement was not addressing the reach of the Department's rulemaking authority. S. Rep. No. 95-597, at 17. Moreover, to the extent that the Department then believed that providing *any* regulatory guidance on the meaning of terms such as "good cause" improperly intrudes on a State court's flexibility to address particular factual scenarios, that interpretation was incorrect. The Department's standards relating to "good cause" in the final rule continue to leave State courts with flexibility, consistent with the legislative history. And other statements in the legislative history, which were not referenced by the Department in 1979, suggest Congress desired Federal agencies to be more involved in State removals of Indian children. *See, e.g.*, 1974 Senate Hearing at 463-65.

The Department also finds that the congressional purpose in passing ICWA supports its decision to issue this rule. Congress found that the States, exercising their recognized jurisdiction

over Indian child-custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. *See* 25 U.S.C. 1901(5); *see also* H.R. Rep. No. 95-1386, at 10-12 (identifying as two of the leading factors contributing to the high rates of Indian-child removal the lack of culturally competent State child-welfare standards for assessing the fitness of Indian families and systematic due-process violations against both Indian children and their parents during child-custody proceedings).

In *Holyfield*, the Supreme Court reviewed Congress's findings, which demonstrate that Congress "perceived the States and their courts as partly responsible for the problem it intended to correct." 490 U.S. at 45. The Court concluded that "[u]nder these circumstances it is most improbable that Congress would have intended to leave the scope of the statute's key jurisdictional provision subject to definition by state courts as a matter of state law." *Id.* The Department similarly concludes here that "[u]nder these circumstances," it is improbable that Congress intended the broad grant of rulemaking authority in § 1952 to authorize the Department to issue binding rules that interpret only those portions of ICWA that expressly delegate responsibility to the Department.

4. Tenth Amendment and Federalism

Comment: Some commenters asserted that the proposed rule violates the Tenth Amendment of the U.S. Constitution because it commandeers State courts, or for unspecified reasons. Commenters also cited, or made statements that repeated, Federalism concerns that the Department briefly referenced in 1979. These commenters pointed out that the Department stated in 1979 that it would have been extraordinary for Congress to authorize the Department to exercise supervisory authority over State or Tribal courts, or to legislate for them with respect to

Indian child-custody matters, in the absence of an express congressional declaration to that effect. *See* 44 FR 67584. The Department also stated that nothing in ICWA's legislative history indicated that Congress intended to delegate such extraordinary authority. *Id.* Several commenters stated that the rule violates Federalism principles because it tells State-court judges what they may and may not consider, and exactly how to interpret a Federal law.

Response: The Department has reflected on these comments and has reconsidered the statements it made in 1979. While ICWA does not "oust the States of their traditional jurisdiction over Indian children falling within their geographical limits," H.R. Rep. No. 95-1386, at 19, Congress enacted ICWA to curtail State authority in certain respects. At the heart of ICWA are provisions that address the respective jurisdiction of Tribal and State courts. Other important provisions of ICWA require State courts to apply minimum Federal standards and procedural safeguards in child-custody proceedings for Indian children. This rule serves to clarify ICWA's requirements, with the goal of promoting uniform application of the statute across States.

While a few commenters asserted that this rule violates the Tenth Amendment, the Supreme Court repeatedly has reaffirmed the "power of Congress to pass laws enforceable in state courts." *New York v. United States*, 505 U.S. 144, 178 (1992); *Testa v. Katt*, 330 U.S. 386, 394 (1947); *F.E.R.C. v. Mississippi*, 456 U.S. 742, 760-61 (1982). The Court also has explained that "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York*, 505 U.S. at 156. Here, Congress enacted ICWA primarily pursuant to the Indian Commerce Clause, which provides Congress with plenary power over Indian affairs. 25 U.S.C. 1901(1). In clarifying ICWA's requirements, the Department is exercising the authority that Congress delegated to it. Having considered the nature of this rule, the comments received, and the relevant case law, the

Department concludes that this rule does not violate the Tenth Amendment for the same reasons that ICWA does not violate the Tenth Amendment.

The Department also has reflected on the Federalism concerns it noted in 1979. The Department does not view this rule as an "extraordinary" exercise of authority involving an assertion of "supervisory control" over State courts. While the Department's promulgation of this rule may override what some courts believed to be the best interpretation of ambiguous provisions of ICWA or how these courts filled gaps in ICWA's requirements, the Supreme Court has reasoned that such a scenario is not equivalent to making "judicial decisions subject to reversal by executives." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 983 (2005). Rather, the Department's rule clarifies a limited set of substantive standards and related procedural safeguards that courts will apply to the particular cases before them.[5] For these reasons, and because Congress unambiguously provided the Department authority to issue this rule, the Department does not view Federalism concerns as counseling against the issuance of this rule.[6]

5. Federalism Executive Order

Comment: A few commenters additionally stated that the rule has Federalism implications because it has substantial direct effects on States, on the relationship between the

[5] The Supreme Court has explained that "[v]alid regulations establish legal norms. Courts can give them proper effect even while applying the law to newfound facts, just as any court conducting a trial in the first instance must conform its rulings to controlling statutes, rules, and judicial precedents." *United States v. Haggar Apparel Co.*, 526 U.S. 380, 391 (1999). Of course, the construction of ICWA by State courts will "remain[] subject to [the Supreme] Court's supervision." *Holyfield*, 490 U.S. at 43.

[6] In evaluating these concerns, the Department also notes that Congress provides a substantial amount of Federal funding to States for child-welfare programs, *see, e.g.*, Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235); Emilie Stoltzfus, Child Welfare: An Overview of Federal Programs and Their Current Funding (Congressional Research Service 2015), and that other Federal statutes address State family law. *See, e.g.*, 42 U.S.C. 652.

national government and States, and on the distribution of power and responsibilities among the various levels of government. A commenter stated that the Department violates the Federalism executive order because the rule preempts State law, and the Department did not provide "all affected State and local officials" notice and opportunity to comment on that preemption as required.

Response: The Department stated in the proposed rule that "[u]nder the criteria in Executive Order 13132, this rule has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." The Department thus "determined that this rule complies with the fundamental Federalism principles and policymaking criteria established in EO 13132." The Department reaffirms these determinations, and respectfully disagrees with commenters who stated or suggested that these determinations are incorrect.

ICWA balances the Federal interest in protecting the integrity of Indian families and the sovereign authority of Indian Tribes with the States' sovereign interest in child-welfare matters. Congress carefully crafted ICWA's jurisdictional scheme so as to recognize the authority of each of these sovereigns. In crafting this scheme, Congress recognized a need to curtail certain State authority and enacted ICWA to address Indian child welfare through a statutory framework intended to apply uniformly across States. Since 1978, States have been required to comply with ICWA, and this regulation serves to interpret and fill gaps in the Federal minimum standards and procedural safeguards set forth in the statute. Many of the standards included in this rule are already being followed by a number of States.

In the notice of the proposed rule, the Department specifically solicited comments on the proposed rule from State officials, including suggestions for how the rule could be made more

flexible for State implementation. 80 FR 14883. The Department carefully considered and addressed in this rulemaking all comments received concerning this regulation, some of which were submitted by State judges and other State officials.

6. Change in Position from Statements Made in 1979

Comment: Several commenters expressed concern that the Department's issuance of a binding regulation would be inconsistent with, or impermissible in light of, statements the Department made in 1979 regarding its authority to promulgate binding regulations. These commenters asserted that the Department's issuance of a binding regulation would conflict with established case law and that the binding regulation would "sweep aside 37 years of state appellate court decisions regarding rights of children and families."

Response: The Department has described its reasons for departing from the statements it made in 1979. Under well-established case law, the Department's prior statements pose no bar to this regulation. The Department also notes that the final rule does not disregard State appellate-court decisions. To the contrary, the Department carefully considered State appellate-court decisions, State legislation, and State guidance documents in promulgating the final rule. Many State standards and practices are reflected in the final rule. And on many issues, the Department's review of disparate State standards reinforced the Department's view that more uniformity in the interpretation of ICWA is needed.

7. Timeliness

Comment: Some commenters who argued the regulations are unauthorized focused on the fact that ICWA imposed a deadline of November 8, 1978 for the Department to promulgate regulations; these commenters state that the authority for promulgating regulations expired after that date.

Response: ICWA states that "within" 180 days after November 8, 1978, the Department shall promulgate such rules and regulations as may be necessary to carry out ICWA. *See* 25 U.S.C. 1952. Regulations may be issued after the passage of a statutory deadline, however, so long as the statute, as is the case with ICWA, does not spell out explicit consequences for late action. *See, e.g., Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003); *Brock v. Pierce Cty.*, 476 U.S. 253, 262 (1986).

IV. Discussion of Rule and Comments

A. Public Comment and Tribal Consultation Process

1. Fairness in Proposing the Rule

Comment: Commenters asserted that the 2015 Guidelines and the proposed regulations were drafted without any outreach or request for comment from adoption agencies, attorneys, or other adoption professionals. One commenter stated that all the comments that were incorporated into the proposed regulations were only from the position of Indian Tribes, and did not reflect any input from State Attorney Generals, State child-welfare agencies, or others.

Other commenters stated their appreciation for the Department's diligence in seeking input from the public. Commenters stated that the experts on Indian child-welfare matters are Tribes, because they work in the field on a daily basis and have no special interest in determining the best interest of Tribal children beyond wanting the children to succeed and be connected to their culture and community. A number of States commented favorably on the proposed rule, and provided helpful comments to improve the final rule.

Response: The Department disagrees with the assertion that the 2015 Guidelines or proposed rule were developed without public input. As part of the preparation of the updated guidelines, the Department invited comments from federally recognized Indian Tribes, State-

court representatives, and organizations concerned with Tribal children, child welfare, and adoption. *See* 80 FR at 10146-67. Those comments, the recommendations of the Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence, developments in ICWA jurisprudence, and the expertise of the Department and other Federal agencies were all considered in updating the guidelines as well as the drafting of the proposed rule. Since issuing the proposed rule, the Department has engaged in a robust public comment process, as discussed above and as evidenced by the large number of written comments received by BIA on this rulemaking.

2. Locations of Meetings/Consultations

Comment: Several commenters opposed the locations where the Department held the public hearings on the proposed rule during the public comment process. The commenters noted that all the hearings were held west of the Mississippi River, and none were held in any of the most populous States. Some commenters requested additional hearings in various locations.

Response: The Department chose locations for public hearings based on general areas where there are likely to be larger populations of Indian children and thus more ICWA proceedings. The Department also hosted a national teleconference to accommodate other interested persons who were unable to attend an in-person session including, but not limited to, anyone who may reside far from where the in-person sessions were held. A total of 215 persons participated by teleconference. In addition, Tribal consultation sessions and public hearings were held in Oklahoma, Alaska, and several other locations. More than 2,100 written comments were received.

B. Definitions

1. "Active Efforts"

ICWA requires the use of "active efforts" to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. 25 U.S.C. 1912(d). ICWA does not define "active efforts." The Department finds, however, that Congress intended this requirement to provide vital protections to Indian children and their families by requiring that support be provided to keep them together, whenever possible. In particular, Congress recognized that many Indian children were removed from their homes because of poverty, joblessness, substandard housing, and related circumstances. Congress also recognized that Indian parents sometimes suffered from "cultural disorientation, a [] sense of powerlessness, [and] loss of self-esteem," and that these forces "arise, in large measure from our national attitudes as reflected in long-established Federal policy and from arbitrary acts of Government." H.R. Rep. No. 95-1386, at 12. But, Congress concluded, "agencies of government often fail to recognize immediate, practical means to reduce the incidence of neglect or separation." *Id.* The "active efforts" requirement is one of the primary tools provided in ICWA to address this failure, and should thus be interpreted in a way that requires substantial and meaningful actions by agencies to reunite Indian children with their families. The "active efforts" requirement is designed primarily to ensure that services are provided that would permit the Indian child to remain or be reunited with her parents, whenever possible. This is viewed by some child-welfare organizations as part of the "gold standard" of what services should be provided in child-welfare proceedings.

The Department finds that there are compelling reasons for setting a nationwide definition for this critical statutory term. Although there is substantial agreement, among those State courts that have considered the issue, that active efforts requires more than simply formulating a case plan for the parent of an Indian child, there is still variation among the States

as to what level of efforts is required. This means that the standard for what constitutes "active efforts" can vary substantially among States, even for similarly situated Indian children and their parents. The final rule will reduce this variation, thus promoting nationwide consistency in the implementation of this Federal right.

The final rule defines "active efforts" and provides examples of what may constitute active efforts in a particular case. The final rule retains the language from the proposed rule that active efforts means actions intended primarily to maintain and reunite an Indian child with his or her family. The final rule clarifies that, where an agency is involved in the child-custody proceeding, active efforts involve assisting the parent through the steps of a case plan, including accessing needed services and resources. This is consistent with congressional intent—by its plain and ordinary meaning, "active" cannot be merely "passive."

The final rule indicates that, to the extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions of the Indian child's Tribe, and in partnership with the child, parents, extended family, and Tribe. This is consistent with congressional direction in ICWA to conduct Indian child-welfare proceedings in a way that reflects the cultural and social standards prevailing in Indian communities and families. There is also evidence that services that are adapted to the client's cultural backgrounds are better. *See, e.g.*, Mental Health: Culture, Race, and Ethnicity: A Supplement to Mental Health: A Report of the Surgeon General (2001); Substance Abuse and Mental Health Services Administration, A Treatment Improvement Protocol: Improving Cultural Competence (2015); Smith, T.B. et al., (2011), *Culture*, J. Clin. Psychol. 67, 166-175 (meta-analysis finding the most effective psychotherapy treatments tended to be those with greater numbers of cultural adaptations); Benish, S.G. et al., (2011), *Culturally Adapted Psychotherapy and the Legitimacy of Myth: A*

Direct-Comparison Meta-Analysis, 58 J. of Counseling Psychol. No. 3, 279-289 (meta-analysis finding that culturally adapted psychotherapy is more effective than unadapted psychotherapy).

Unlike the proposed rule, the final rule does not define "active efforts" in comparison to "reasonable efforts." After considering public comments on this issue, the Department concluded that referencing "reasonable efforts" would not promote clarity or consistency, as the term "reasonable efforts" is not in ICWA and arises from different laws (e.g., the Adoption Assistance and Child Welfare Act of 1980, as modified by the Adoption and Safe Families Act (ASFA), *see* 42 U.S.C. 670, *et seq.*, as well as State laws). Such reference is unnecessary because the definition in the final rule focuses on what actions are necessary to constitute active efforts.

The Department recognizes that what constitutes sufficient "active efforts" will vary from case-to-case, and the definition in the final rule retains State court discretion to consider the facts and circumstances of the particular case before it.

Comment: Several commenters stated their support for the definition and examples of active efforts. Several commenters, including States and State-court judges, noted the term "active efforts" is in need of clarification. Commenters noted that, while agencies are required to provide active efforts, there has not been a clear understanding of the level and types of services required and the term is interpreted differently from State to State and even county to county. One commenter noted that it receives numerous questions about active efforts each year and published a guide on this topic but that a nationwide regulation would further clarify the requirements. Several commenters supported the language stating that active efforts are above and beyond the reasonable efforts standard for non-ICWA cases. One commenter stated that California courts have construed active efforts as "essentially equivalent to reasonable efforts to provide or offer reunification services to a non-ICWA case." Some of these commenters

requested even stronger language distinguishing the two. Other commenters opposed defining active efforts in relation to reasonable efforts. Commenters stated that BIA has no authority to determine how reasonable efforts and active efforts would compare and that comparing them raises equal protection concerns. One commenter stated that the term does not need a definition.

Response: The proposed rule defined "active efforts" in a manner that compared it to "reasonable efforts" because many understand active efforts and reasonable efforts as relative to each other, where active efforts is higher on the continuum of efforts required and reasonable efforts is lower on that continuum. *See, e.g., In re Nicole B.*, 927 A.2d 1194, 1206-07 (Md. Ct. Spec. App. 2007). However, as commenters pointed out, the terms are used in separate laws and are subject to separate analyses. The term "reasonable efforts" is not used in ICWA; rather, it is used in the Adoption Assistance and Child Welfare Act of 1980, as modified by the Adoption and Safe Families Act (ASFA). *See* 42 U.S.C. 670, *et seq*. ASFA establishes "reasonable efforts" as a State responsibility in order to be eligible for Federal foster-care placement funding. Some State laws also utilize a "reasonable efforts" standard.

ICWA, however, requires "active efforts" prior to foster-care placement of or termination of parental rights to an Indian child, regardless of whether the agency is receiving Federal funding. Having considered the concerns of commenters with the use of the term "reasonable efforts" as a point of comparison, the Department has decided to delete reference to "reasonable efforts" from the definition of "active efforts" in the final rule. Such reference is unnecessary because the definition now focuses on the actions necessary to constitute active efforts, as affirmative, active, thorough, and timely efforts. Instead, the final rule provides additional examples and clarifications as to what constitutes active efforts.

Comment: A commenter pointed out that the "active efforts" requirement in the Act applies only to the "Indian family" and not to the Tribal community.

Response: The final rule deletes reference to "Tribal community" in the definition.

Comment: A commenter noted that the legislative history of the "active efforts" provision demonstrates that Congress intended to require States to affirmatively provide Indian families with substantive services and not merely make the services available.

Response: The Department agrees and the final rule's definition of "active efforts" reflects this.

Comment: A few commenters suggested adding appointment of legal counsel for both parents and children as a requirement for active efforts.

Response: Appointment of legal counsel does not clearly fall within the scope of remedial services and rehabilitative programs designed to prevent the breakup of the Indian family for which active efforts is required. 25 U.S.C. 1912(d). Further, 25 U.S.C. 1912(b) separately provides for appointment of counsel for the parent or Indian custodian in any case in which the court determines indigency.

Comment: Many commenters supported the proposed examples of "active efforts" in the definition, one saying they will be "extremely helpful" for determining whether services comply with the higher standard. The Oregon Juvenile Court Improvement Program noted that many of the examples reinforce Oregon's document "Active Efforts Principles and Expectations." A few commenters suggested clarifying that the list is not exhaustive. Some suggested requiring a minimum number of the items on the list to be met to reach the "active efforts" threshold, while others requested clarifying that not all the items are required to be met to reach the threshold. A few commenters suggested shortening and simplifying the list. Others suggested including in

each item a requirement to work with the Tribe. Several commented on the specifics of each example of "active efforts" listed in the definition. Some suggested adding new examples.

Response: The final rule simplifies the list somewhat by combining similar examples and clarifies that the list is not an exhaustive list of examples. The minimum actions required to meet the "active efforts" threshold will depend on unique circumstances of the case. The final rule also states, consistent with the BIA 1979 and 2015 Guidelines, that whenever possible, active efforts should be provided in partnership with the Indian child's Tribe, and should be provided in a manner consistent with the prevailing cultural and social conditions and way of life of the Indian child's Tribe. This practice is consistent with Congress' intent in ICWA that State child-custody proceedings better incorporate and consider Tribal values and culture. Further, as discussed above, culturally adapted treatment strategies have been shown to be more effective.

Comment: A commenter stated that the definition of "active efforts" reveals an assumption that the child has had a connection with the Tribal community, by using the terms "maintain" and "reunite." The commenter states that this assumption is imbedded in the Act, which suggests that a relationship with the Tribal community was already in existence, and so the Act should not apply to children raised outside their Tribal communities prior to removal; otherwise, the Act would force the child to assume a new cultural identity on the basis of ancestry alone.

Response: The Act and the regulations require "active efforts" to prevent the breakup of the Indian child's family. Neither the text of the statute nor its legislative history suggests that this requirement is limited to circumstances where a State court determines that the Indian child has a sufficient pre-existing connection to a Tribal community. Indeed, Congress applied the "active efforts" requirement to Indian children residing outside of a reservation, and it can be

presumed that Congress understood that for reasons of distance and age, some of these children may not have yet developed extensive connections to their Tribal community. Congress also found that State agencies and courts "have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. 1901(5). In light of this, the Department finds that it would not comport with congressional intent to require State courts to assess an Indian child's connection with her Tribal community.

Nothing in the Act or these regulations forces the child to assume a new cultural identity or assume a relationship with a Tribe or Tribal community that was not pre-existing. ICWA applies only to Indian children who have a political relationship (either through their citizenship, or through the citizenship of a parent and their own eligibility for citizenship) with a federally recognized Indian Tribe.

2. "Agency"

The final rule defines "agency" as an organization that performs, or provides services to biological parents, foster parents, or adoptive parents to assist in, the administrative and social work necessary for foster, preadoptive, or adoptive placements. The definition includes non-profit, for-profit, or governmental organizations. This comports with the statute's broad language imposing requirements on "any party" seeking placement of a child or termination of parental rights. *See, e.g.* 25 U.S.C. 1912 (a), (d).

Comment: A few commenters stated that the definition should clarify that "agencies" are covered by the regulations even if they are not licensed by the State. One commenter stated that the definition should also include attorneys and others who participate in private placements, so that they will also be subjected to requirements for ICWA compliance.

Response: The final rule updates the definition of "agency" to mean organizations including those who may assist in the administrative or social work aspects of seeking placement. An "agency" may also be assisting in the legal aspects of seeking placement, but the definition does not include attorneys or law firms, standing alone, because as used in the final rule, "agencies" are presumed to have some capacity to provide social services. Attorneys and others involved in court proceedings are addressed separately in various provisions in the final rule.

3. "Child-custody proceeding"

See "Applicability" section below.

4. "Continued Custody" and "Custody"

The final rule makes two changes from the proposed rule to the definition of "continued custody," in response to comments. First, it clarifies that physical and/or legal custody may be defined by applicable Tribal law or custom, or by State law. This comports with ICWA's recognition that custody may be defined by any of these sources. *See, e.g.,* 25 U.S.C. 1903(6). Second, it clarifies that an Indian custodian may have continued custody, because the statute recognizes that Indian custodians may have legal or physical custody of an Indian child and are entitled to ICWA's statutory protections. The definition of "custody" did not substantively change from the proposed rule.

Comment: A few commenters suggested adding "Indian custodian" in addition to "parent" in the definition of "continued custody."

Response: The final rule makes this change, as discussed above.

Comment: Several commenters supported the "continued custody" definition as clarifying that parents who may never have had physical custody are nevertheless covered by

ICWA if they had legal custody. A few commenters suggested clarifications in light of the Supreme Court's decision in *Adoptive Couple v. Baby Girl,* 133 S. Ct. 2552 (2013), that the father in that case did not have legal or physical custody. One commenter requested that the final rule add that the father has "continued custody," even without physical or legal custody, unless he abandoned the child prior to birth.

Response: The final rule retains the definition of "continued custody" as proposed, which includes custody the parent or Indian custodian "has or had at any point in the past." It clarifies that the parent or custodian may have physical and/or legal custody under any applicable Tribal law or Tribal custom or State law. The definition is consistent with *Adoptive Couple v. Baby Girl,* which determined under the facts of that case that the father never had custody. The Department finds that this definition is also most consistent with ICWA, which in other contexts defines legal custody as well as parental rights in reference to Tribal and State law. *See* 25 U.S.C. 1903(6), (9).

Comment: A few commenters stated that the definition should require a "preexisting state" of custody prior to the child-custody proceeding, or require custody for a certain period of time.

Response: The final rule does not add the requested requirement for a "preexisting state" of custody because there are situations in which a parent could be considered to have had custody but lost it for some period of time prior to the child-custody proceeding, or may have had, at the time of the commencement of the proceeding, custody for only a brief period of time. There is no evidence that Congress intended temporary disruptions (e.g., surrender of child to another caregiver for a period) not to be included in "continued custody." The Department believes that including this requirement could permit evasion of ICWA's protections, since it

could create incentives to disrupt a parent's custodial rights prior to initiating a child-custody proceeding.

Comment: Some commenters requested that the definition emphasize the narrow holding of the Supreme Court in *Adoptive Couple v. Baby Girl* as not applying to a parent that "at least had at some point in the past" custody of the child.

Response: The proposed and final rule already defined "continued custody" to include custody a parent "had at any point in the past," which is substantively the same as the language used by the Supreme Court in *Adoptive Couple v. Baby Girl.*

Comment: Several commenters suggested adding provisions to "continued custody" allowing putative fathers to assert custodial rights.

Response: Neither the statute nor the final rule directly addresses the ability of putative fathers to assert custodial rights; in the final rule, custodial rights may be established under Tribal law or custom or State law.

Comment: Several commenters supported the proposed definition of "custody" as including Tribal law or Tribal custom. One commenter requested adding that "continued custody," like "custody," is based on Tribal law or Tribal custom. Another commenter suggested adding that State law may only be used in the absence of applicable Tribal law or Tribal custom.

Response: The final rule adds "under any applicable Tribal law or Tribal custom or State law" to the definition of "continued custody" to better parallel the definition of "custody." The final rule does not establish an order of preference among Tribal law, Tribal custom, and State law because the final rule provides that custody may be established under any one of the three sources.

5. "Domicile"

The final rule provides a more complete description of how to determine domicile for an adult, to better comport with Federal common law. The rule's definition is consistent with the definition of domicile provided by Black's Law Dictionary, a standard legal reference resource. The final rule also changes the definition of domicile for an Indian child whose parents are not married to be the domicile of the Indian child's custodial parent, in keeping with legal authority on this point.

Comment: With regard to the first part of the definition of "domicile," addressing the domicile of "parents or any person over the age of 18," a commenter suggested replacing "any person over the age of 18" with "Indian custodian."

Response: The final rule replaces "any person over the age of 18" with "Indian custodian" as suggested in this comment because the context in which the term "domicile" is used includes only parents or Indian custodians (children are addressed in another part of the definition).

Comment: One commenter suggested that domicile should be defined by Tribal law or custom of the Indian child's Tribe, and that a Federal definition should apply only in the absence of such law or custom.

Response: The U.S. Supreme Court found that Congress intended a uniform Federal law of domicile for ICWA. *See Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 44-47 (1989).

Comment: Several commenters stated that the reliance on physical presence in the definition of domicile is too narrow. Some recommended changing the definition to the common-law definition of domicile. These commenters noted that the common-law definition would better consider persons who may leave the reservation temporarily (e.g., to obtain

education, pursue work, or enter the military) and that the court in *Holyfield* stated that "domicile" is not necessarily synonymous with "residence." One commenter suggested changing "physical presence" to "was physically present" to account for this difference. A commenter stated that a person's intent to return should be the main focus.

Response: The final rule adopts the commenters' suggestions by revising the definition of "domicile" to better reflect the common-law definition, which acknowledges that a person may reside in one place but be domiciled in another.

Comment: With regard to the second part of the definition, addressing the domicile of the child, several commenters stated that, in the case of an Indian child whose parents are not married to each other, the domicile is not necessarily that of the Indian child's mother. These commenters pointed out that the father or a guardian may have custody of the child, and some noted that some Tribes are patriarchal and this definition would conflict with those Tribes' cultural traditions. Some stated that the domicile of the child in this case should instead be the domicile of the custodial parent with whom the child lives most often and if the child lives with neither parent, then the domicile should be that of the mother or the Indian child's Tribe. Others stated the domicile should be that of the custodial parent (or primary custodial parent), Indian custodian, or legal guardian.

Response: The Supreme Court stated that a child born out of wedlock generally takes the domicile of his or her mother. *Holyfield*, 490 U.S. at 43-48. This rests on an underlying assumption that the mother is the child's custodial parent. This may generally be true at the time of the birth of the child. The general rule, however, is that a minor has the same domicile as the parent with whom he lives. *See, e.g.* Restatement (Second) of Conflict of Laws 22 (Am. Law. Inst. 1971). As one State court recognized, where the father is the custodial parent, the child's

domicile is not that of the mother but rather follows that of the custodial parent. *Tubridy v. Iron Bear (In re S.S.)*, 657 N.E.2d 935, 942 (Ill. 1995). Thus, the final rule accepts the suggestion that the child's domicile should be the custodial parent's domicile when the parents are unwed.

6. "Emergency proceeding"

The statute treats emergency proceedings differently from other child-custody proceedings. *See* 25 U.S.C. 1922. In response to comments that reflected a lack of clarity on this point, the final rule adds a definition of "emergency proceedings." "Emergency proceedings" are defined as court actions involving emergency removals and emergency placements. These proceedings are distinct from other types of "child-custody proceedings" under the statute. While States use different terminology (e.g., preliminary protective hearing, shelter hearing) for emergency hearings, the regulatory definition of emergency proceedings is intended to cover such proceedings as may necessary to prevent imminent physical damage or harm to the child. *See* "Emergency Proceedings" section below for more information and responses to comments.

7. "Extended Family Member"

This definition has not changed from the proposed rule, and tracks the statutory definition.

Comment: A few commenters suggested expanding the definition of "extended family member" to include various other individuals (e.g., great-grandparents, great-aunts, and great-uncles).

Response: The definition of "extended family member" in the proposed rule and final rule matches the statutory definition. Additional categories of individuals may be included in the meaning of the term if the law or custom of the Indian child's Tribe includes them. "Extended family member" is not limited to Tribal citizens or Native individuals.

8. "Hearing"

See "Applicability" section below.

9. "Imminent Physical Damage or Harm"

The final rule does not provide a definition of "imminent physical damage or harm." The Department has determined that statutory phrase is clear and understandable as written, such that no further elaboration is necessary.

The Department has concluded that the definition it included in the proposed rule, "present or impending risk of serious bodily injury or death," is too constrained and does not capture circumstances that Congress would have considered as presenting "imminent physical damage or harm." Commenters noted that situations of sexual abuse, domestic violence, or child labor exploitation could arguably be excluded by the proposed definition. The Department did not, however, intend that such situations would fall outside the scope of "imminent physical damage or harm." Since the statutory phrase reflects endangerment of the child's health, safety, and welfare, not just bodily injury or death, the Department has decided not to use the proposed definition.

The "imminent physical damage or harm" standard applies only to emergency proceedings, which are not subject to the same procedural and substantive protections as other types of child-custody proceedings, as discussed in Section IV.H below. In using this standard, Congress established a high bar for emergency proceedings that occur without the full suite of protections in ICWA. There are circumstances in which it may be appropriate to provide services to the parent or initiate a child-custody proceeding with the attendant ICWA protections (e.g., those in 25 U.S.C. 1912 and elsewhere in the statute), but removal or placement on an emergency basis is not appropriate. Thus, section 1922 and these rules require that any

emergency proceeding must terminate immediately when the emergency proceeding is not necessary to prevent imminent physical damage or harm to the child. This standard is substantially similar to the emergency removal provisions of many states. See, e.g., W. Va. Code 49-4-6-2 (2015); N.Y. Fam. Ct. Act 1024 (McKinney 2009); Idaho Code 16-1608 (2016); Texas Fam. Code 262.104 (West 2015); N.J. Stat. Ann. 9:6-8.29 (West. 2012); Va. Code Ann. 16.1-251 (2015), Cal. Welf. & Inst. Code 305 (West).

Comment: Many commenters opposed the proposed definition of "imminent physical harm or damage" because they asserted:

- States should be able to define imminent harm in accordance with their State protection laws;
- The proposed definition is too narrow in omitting neglect and emotional or mental (psychological) harm and would preclude emergency measures to protect a child from these types of harms;
- By requiring "serious" bodily injury, the proposed definition would exclude physical harm such as domestic violence that does not rise to a major injury and exclude threatened physical harm (e.g., present or impending sexual abuse, child labor exploitation, or misdemeanor assaults);
- The proposed definition would result in equal protection violations denying Indian children the same level of protections as non-Indian children because research shows that exposure to domestic violence produces significant and long-lasting harm to the child psychologically, even when the child does not himself experience physical injury; and
- The proposed definition would exclude some State and Federal crimes that would normally justify protection of the child.

Several other commenters supported the proposed definition of "imminent physical harm or damage," to the extent it would apply to emergency situations. These commenters asserted:

- A narrow threshold for emergency removal is necessary because, in some jurisdictions, little more than being an Indian child on a reservation apparently constitutes "imminent physical damage or harm," and the proposed definition would require a closer examination of whether the emergency removal was necessary;
- Not including minor physical harm or emotional harm is appropriate for emergency removal because a child experiencing those types of harm could be removed following the commencement of a child-custody proceeding rather than by emergency removal; and
- The proposed definition is in line with State laws that keep a child in his or her home unless the child is in need of immediate protection due to an imminent safety threat.

Even among commenters that supported the proposed definition, many had suggested changes, such as:

- Clarifying that situations like sexual abuse would be grounds for emergency removal;
- Including "serious emotional damage" only if the child displays specific symptoms such as severe anxiety, depression or withdrawal;
- Clarifying "imminent" rather than the degree of harm; and
- Clarifying that imminent physical harm or damage is not present when the implementation of a safety plan or intervention would otherwise protect the child while allowing them to remain in the home.

Response: The final rule does not use the proposed definition of "imminent physical damage or harm" because the Department has concluded that the statutory phrase encapsulates a

broader set of harms than was reflected in the proposed definition. The Department agrees with commenters that the phrase focuses on the child's health, safety, and welfare, and would include, for example, situations of sexual abuse, domestic violence, or child labor exploitation.

The Department also agrees with commenters who emphasized that the section 1922 language focuses on the imminence of the harm, because the immediacy of the threat is what allows the State to temporarily suspend the initiation of a full "child-custody proceeding" subject to ICWA. Where harm is not imminent, issues that might at some point in the future affect the Indian child's welfare may be addressed either without removal, or with a removal on a non-emergency basis (complying with the Act's section 1912 requirements). We also agree with commenters that being an Indian child on a reservation does not justify emergency removal; Congress used the standard of "imminent physical damage or harm" to guard against emergency removals where there is no imminent physical damage or harm.

Comment: A few commenters stated that the only place "imminent physical damage or harm to a child" appears in ICWA is at section 1922, which addresses emergency removal only of children domiciled on a reservation, so it should not apply to State removal of children who are not domiciled on a reservation.

Response: The final rule is based on the premise that the emergency removal or placement of an Indian child may be conducted under State law in order to keep the child safe. *See* FR § 23.113. 25 U.S.C. 1922 requires, however, that any emergency proceeding terminate immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child. Both the legislative history and the decisions of multiple courts support the conclusion that this provision applies to emergency proceedings involving Indian children who are both domiciled off of the reservation and domiciled on the reservation,

but temporarily off of the reservation. *See* H. Rep. No. 95-1386, at 25; *see also Oglala Sioux Tribe v. Hunnik*, No. 13-5020, 2016 WL 697117 (D.S.D. Feb. 19, 2016); *In re T.S.*, 315 P.3d 1030 (Okla. Civ. App. 2013); *In re H.T.*, 343 P.3d 159, 167 n.3 (Mont. 2015); *Cheyenne River Sioux Tribe v. Davis*, 822 N.W.2d 62, 65 (S.D. 2012); *State ex rel. Children, Youth & Families Dep't v. Marlene C. (In re Esther V.)*, 248 P.3d 863, 873 (N.M. 2011). Unless section 1922 is read to apply to children on and off of the reservation, ICWA could be read to prohibit the emergency removal of such Indian child in order to prevent imminent physical harm. *See e.g.*, H. Rep. 95-1386 (section 1922 is intended to "permit" such removal "notwithstanding the provisions of this title").

10. "Indian Child"

The final rule retains the definition used in the statute with the addition of the terms "citizen" and "citizenship" because these terms are synonymous with "member" and "membership" in the context of Tribal government.

Comment: A commenter noted that the regulations sometimes refer to the Indian child being "a member or eligible for membership" without specifying that if the child is not a member, then the child's parent must be a member and the child must be eligible for membership.

Response: The statute specifies that if the child is not a Tribal member, then the child must be a biological child of a member and be eligible for membership, in order for the child to be an "Indian child." 25 U.S.C. 1903(4). The final rule addresses this oversight by clarifying in each instance that the biological parent must be a member in addition to the child being eligible for membership.

Comment: One commenter queried whether it is constitutional to include "eligible" children in the definition, since these children are not yet Tribal members.

Response: The final rule reflects the statutory definition of "Indian child," which is based on the child's political ties to a federally recognized Indian Tribe, either by virtue of the child's own citizenship in the Tribe, or through a biological parent's citizenship and the child's eligibility for citizenship. Congress recognized that there may not have been an opportunity for an infant or minor child to be enrolled in a Tribe prior to the child-custody proceeding, but nonetheless found that Congress had the power to act for those children's protection given the political tie to the Tribe through parental citizenship and the child's own eligibility. *See, e.g.,* H.R. Rep. No. 95-1386, at 17. This is consistent with other contexts in which the citizenship of a parent is relevant to the child's political affiliation to that sovereign. *See, e.g.,* 8 U.S.C. 1401 (providing for U.S. citizenship for persons born outside of the United States when one or both parents are citizens and certain other conditions are met); *id.* 1431 (child born outside the United States automatically becomes a citizen when at least one parent of the child is a citizen of the United States and certain other conditions are met).

Comment: One commenter stated that if the child grows up on the reservation and participates in Tribal rituals and community, that child is an Indian child regardless of whether the child is allowed to be a member.

Response: The statute defines "Indian child" based on a political connection with the Tribe rather than residence or participation in Tribal rituals and community. The regulation reflects the statutory definition.

Comment: Several commenters requested clarification that the child needs to be under age 18 only at the commencement of the initial child-custody proceeding for ICWA to apply for the duration of the case.

Response: ICWA defines an "Indian child" as a person under the age of 18. Other Federal law allows for States receiving Federal funding to extend foster care to persons up to age 21. *See* 42 U.S.C. 675(8)(B)(iii). And, the majority of States have statutes that explicitly allow child-welfare agencies to continue providing foster care to young people after they turn 18. *See* Keely A. Magyar, *Betwixt and Between But Being Booted Nonetheless: A Developmental Perspective on Aging Out of Foster Care*, 79 TEMPLE L. REV. 557 (2006) (summarizing State laws). Where State and/or Federal law provides for a child-custody proceeding to extend beyond an Indian child's 18th birthday, ICWA would not stop applying to the proceeding simply because of the child's age. This is to ensure that a set of laws apply consistently throughout a proceeding, and also to discourage strategic behavior or delays in ICWA compliance in circumstances where a child's 18th birthday is near. Thus, the final rule interprets the statutory definition to mean that the person need be under the age of 18 only at the commencement of the proceeding for ICWA to apply. The final rule adds clarification to the applicability section that ICWA will not cease to apply simply because the child turns 18. *See* FR § 23.103(d).

11. "Indian Child's Tribe"

The final rule retains the definition used in the statute.

Comment: One commenter stated that the definition of "Indian child's Tribe" is too restrictive and could eliminate opportunities for multiple Tribes to be involved in a case because a child could have equal contacts with multiple Tribes for which they are eligible for membership, and each should have the opportunity to ensure the connection is maintained.

Response: The statute contemplates that one Tribe will be designated as the "Indian child's Tribe," *see* 25 U.S.C. 1903(5), and the regulation reflects this.

12. "Indian Custodian"

The definition in the final rule largely tracks the statutory definition. It clarifies that whether an individual has legal custody may be determined by looking to either the relevant Tribe's law or custom, or to State law.

Comment: A few commenters stated their support of the definition of "Indian custodian" and particularly the consideration of Tribal law or custom because there are informal Indian caretakers who may raise Indian children without a court order.

Response: Like the statute, the final rule includes a definition of "Indian custodian" that allows for consideration of Tribal law or custom.

13. "Parent"

The final rule retains the definition used in the statute.

Comment: A few commenters supported the definition of "parent" and recommended no change. Several commented on the definition's approach to unwed fathers and suggested unwed biological fathers should be included. One commenter suggested adding that "parent" includes persons whose paternity has been established by order of a Tribal court, to ensure Tribal court orders acknowledging or establishing paternity are given full faith and credit by State courts. A few commenters suggested adding that paternity may be acknowledged or established "in accordance with Tribal law, Tribal custom, or State law in the absence of Tribal law or Tribal custom."

Response: The rule's definition of "parent" mirrors that of ICWA.

ICWA requires States to give full faith and credit to the public acts, records, and judicial proceedings of any Tribe applicable to Indian child-custody proceedings to the same extent that such entities give full faith and credit to any other entity. 25 U.S.C. 1911(d). This includes Tribal acknowledgement or establishment of paternity.

Comment: A few commenters recommended adding a Federal standard for what constitutes an acknowledgment or establishment of paternity, in accordance with Justice Sotomayor's dissent in *Adoptive Couple v. Baby Girl* and to address a split in State courts. These commenters recommended language requiring an unwed father to "take reasonable steps to establish or acknowledge paternity" and recommended listing examples of such steps to include acknowledging paternity in the action at issue and establishing paternity through DNA testing. Another commenter requested clarification on when the father must acknowledge or establish paternity, because timing impacts due process and permanency for the child.

Response: The final rule mirrors the statutory definition and does not provide a Federal standard for acknowledgment or establishment of paternity. The Supreme Court and subsequent case law has already articulated a constitutional standard regarding the rights of unwed fathers, *see Stanley v. Illinois*, 405 U.S. 645 (1972); *Bruce L. v. W.E.*, 247 P.3d 966, 978-979 (Alaska 2011) (collecting cases)—that an unwed father who "manifests an interest in developing a relationship with [his] child cannot constitutionally be denied parental status based solely on the failure to comply with the technical requirements for establishing paternity." *Bruce L.*, 247 P.3d at 978-79. Many State courts have held that, for ICWA purposes, an unwed father must make reasonable efforts to establish paternity, but need not strictly comply with State laws. *Id.* At this time, the Department does not see a need to establish an ICWA-specific Federal definition for this term.

Comment: One commenter suggested accounting for situations where extended family and non-relatives are exercising both physical and legal custody of the child, by adding that an Indian child may have several parents simultaneously if Tribal law so provides.

Response: The definition of "parent" includes adoptions under Tribal law or custom.

Comment: One commenter suggested deleting the word "lawfully" from the definition of "parent" to avoid disputes over what constitutes a lawful adoption.

Response: The final rule retains the word "lawfully" because it is used in the statute. *See* 25 U.S.C. 1903.

14. "Reservation"

The definition in the final rule tracks the statutory definition.

Comment: Two commenters stated that "reservation" should be expanded to include traditional Tribal territories in Alaska because there is only one reservation in Alaska.

Response: The regulatory definition is similar to the statutory definition, and includes land that is held in trust but not officially proclaimed a "reservation."

15. "Status Offenses"

This definition was not changed from the proposed rule.

Comments: Some commenters supported the definition of "status offenses." Commenters also asked that the final rule clarify that status offenses are included in the definition of child-custody proceedings, pursuant to 25 U.S.C. 1903(1).

Response: See the "Applicability" discussion below. The final rule definition of "child-custody proceeding" is updated to make clear that its scope includes proceedings where a child is placed in foster care or another out-of-home placement as a result of a status offense. This reflects the statutory definition of "child-custody proceeding," which is best read to include

placements based on status offenses, while explicitly excluding placement[s] based upon an act which, if committed by an adult, would be deemed a crime. *See* 25 U.S.C. 1903(1).

16. "Tribal Court"

The final rule retains the definition used in the statute.

Comment: A few commenters suggested changing the definition of "Tribal court" to explicitly recognize that the Tribal governing body, such as the Tribal council, may sit as a court and have jurisdiction over child-custody proceedings. Commenters also suggested that the term "Tribal court" should reflect that a Tribe may have other mechanisms for making child-custody decisions.

Response: The definition of "Tribal court" in both the statute and the final rule addresses these comments because the definition includes any other administrative body of a tribe vested with authority over child-custody proceedings. *See* 25 U.S.C. 1903(12); 25 CFR 23.2.

17. "Upon Demand"

The term "upon demand" is important for determining whether a placement is a "foster-care placement" (because the parent cannot have the child returned upon demand) under § 23.2, and therefore subject to requirements for involuntary proceedings for foster-care placement. The rule also specifies that other placements where the parent or Indian custodian can regain custody of the child upon demand are not subject to ICWA. FR § 23.103(b)(4). The final rule clarifies that "upon demand" means that custody can be regained by a verbal request, and "without any formalities or contingencies." Examples of formalities or contingencies are formal court proceedings, the signing of agreements, and the repayment of the child's expenses.

Comment: A commenter stated that the example "repaying the child's expenses" should be deleted from the definition of "upon demand" because it could unnecessarily limit

interpretation of what is considered a contingency. A few other commenters suggested adding more examples for what "upon demand" means, to include "being placed into custody" because the return of the child upon demand is not a reality when the end result is that the agency may remove the child. Some commenters suggested "upon demand" should mean without having to resort to legal proceedings or make a filing in court.

Response: The final rule eliminated the use of examples, and now refers broadly generally to "formalities or contingencies."

18. "Voluntary Placement," "Voluntary Proceeding," and "Involuntary Proceeding"

Comment: A few commenters requested clarifying the difference between a "voluntary placement" and a "voluntary proceeding."

Response: The final rule distinguishes the terms by eliminating the definition for "voluntary placement" and including only a definition of "voluntary proceeding." For clarity, the rule also includes a definition of "involuntary proceeding." The term "voluntary placement" is now used only in FR § 23.103(b), addressing what the rule does not apply to. The rule does not apply to voluntary placements when the parent or Indian custodian can regain custody of the child upon verbal demand without any formalities or contingencies.

Comment: A few commenters suggested changing the definition of "voluntary placement" from a placement that "either parent" has chosen to instead be a placement that "both known biological parents" have chosen. One commenter suggested addressing the situation where one parent refuses consent, by adding "if either parent refuses to consent to the placement, the placement shall not be considered voluntary."

Response: The proposed rule allowed for "either parent" to choose the placement to address situations where only one parent is known or reachable. The final rule adds "both

parents" to allow for situations where both parents are known and reachable. The final rule does not add that "if either parent refuses to consent to the placement, the placement shall not be considered voluntary" because in some cases, efforts to find the other parent may be unsuccessful. If a parent refuses to consent to the foster-care, preadoptive, or adoptive placement or termination of parental rights, the proceeding would meet the definition of an "involuntary proceeding." Nothing in the statute indicates that the consent of one parent eliminates the rights and protections provided by ICWA to a non-consenting parent.

Comment: A few commenters requested clarification that a placement made only upon the threat of losing custody is not "voluntary," stating that they are aware of instances in which a State agency threatens parents with removal of their children if they do not "voluntarily" place the child elsewhere and then argue that these are "voluntary placements" under ICWA.

Response: The final definition of "voluntary proceeding" specifies that placements where the parent agrees to the placement only under threat of losing custody is not "voluntary," by adding the phrase "without a threat of removal by a State agency." The final rule also specifies that a voluntary proceeding must be of the parent's or Indian custodian's free will. This revision is intended to clarify that a proceeding in which the parent agrees to an out-of-home placement of the child under threat that the child will otherwise be removed is not "voluntary."

Comment: A commenter suggested replacing "voluntary placement" with "voluntary foster-care placement or termination of parental rights" (excluding adoptive placements) to track the language in 25 U.S.C. 1913.

Response: The final rule now defines the term "voluntary proceeding," which includes foster-care, preadoptive, and adoptive placements and termination of parental rights.

Comment: A commenter suggested changing "chosen for" to "consented to" because it could be erroneously interpreted as providing that the parents' choice can override the placement provisions in 25 U.S.C. 1915, which apply in all adoption proceedings (voluntary and involuntary).

Response: This suggestion was adopted. The distinguishing factor for a "voluntary proceeding" is the parent(s) or Indian custodian's consent, not whether they personally "chose" the placement for their child.

19. Suggested New Definitions

a. "Best Interests"

Comment: Several commenters requested that a definition of "best interests of the Indian child" be added because State courts have used a general "best interest of the child" determination to avoid application of ICWA. These commenters point out that ICWA provides a framework to ensure the long-term (for the Indian child's entire life) best interests of an Indian child, rather than just a short-term view of what the best interests of an Indian child may be in that child-custody situation. Some recommended a variation on the definition of "best interest" found in Wisconsin's Indian Child Welfare Act. Another commenter suggested defining best interest "in accordance with the child's indigenous culture, traditions and customs."

Response: It is unnecessary to define the term "best interests" because it does not appear in the final rule.

Comment: Many commenters, without specifically defining what "best interests" means, argued that various provisions of the proposed rule would act to prohibit a judge from protecting the "best interests" of the child.

Response: The Department disagrees with these comments, as ICWA was specifically designed to protect the best interests of Indian children. 25 U.S.C. 1902. In order to achieve that general goal, Congress established specific minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture. *Id.* Congress implemented the general goal of protecting the best interests of children through specific provisions that are designed to protect children and their relationship with their parents, extended family, and Tribe.

One of the most important ways that ICWA protects the best interests of Indian children is by ensuring that, if possible, children remain with their parents and that, if they are separated, support for reunification is provided. This is consistent with the guiding principle established by most States for determining the best interests of the child. *See* U.S. Dept' of Health and Human Servs., Children's Bureau, Child Welfare Information Gateway, *Determining the Best Interests of the Child* (2013) at 2 (identifying the "importance of family integrity and preference for avoiding removal of the child from his/her home" as by far the most frequently stated guiding principle). Should a child need to be removed from her family, however, ICWA's placement preferences continue to protect her best interests by favoring placements within her extended family and Tribal community. Other ICWA provisions also serve to protect a child's best interests by, for example, ensuring that a child's parents have sufficient notice about her child-custody proceeding and an ability to fully participate in the proceeding (25 U.S.C. 1912(a),(b),(c)) and helping an adoptee access information about her Tribal connections (25 U.S.C. 1917).

Congress, however, also recognized that talismanic reliance on the "best interests" standard would not actually serve Indian children's best interests, as that "legal principle is

vague, at best." H.R. Rep. No. 95-1386, at 19. Congress understood, as did the Supreme Court, that "judges [] may find it difficult, in utilizing vague standards like 'the best interests of the child', to avoid decisions resting on subjective values." *Id.* (citing *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 835 n.36 (1977)). These subjective values are exactly what Congress passed ICWA to address, as demonstrated by the legislative history discussed above.

Instead of a vague standard, Congress provided specific procedural and substantive protections through pre-established, objective rules that avoid decisions being made based on the subjective values that Congress was worried about. By providing courts with objective rules that operate above the emotions of individual cases, Congress was facilitating better State-court practice on these issues and the protection of Indian children, families, and Tribes. *See* National Council of Juvenile and Family Court Judges, *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* 14 (2000).

While ICWA and this rule provide objective standards, however, judges may appropriately consider the particular circumstances of individual children and protect the best interests of those children as envisioned by Congress.

b. Other Suggested Definitions

Several commenters suggested adding new definitions, including the following.

Comment: "Abandon" – One commenter suggested adding a definition for abandon to address the Supreme Court's determination that ICWA does not apply to "a parent [who] has abandoned a child prior to birth and the child has never been in the Indian parent's legal or physical custody." *See Adoptive Couple v. Baby Girl*, 133 S. Ct. at 2563. This commenter notes that "abandon" is a term of art that varies greatly from State to State.

Response: The final rule does not define the term "abandon" because it is not used in the Act or final regulations.

Comment: "Guardianship" – A few commenters suggested adding a definition for "guardianship if resulting from placement involving an agency or private adoption attorney." These commenters believe such a definition is necessary because agencies have instructed families to obtain guardianship of children to avoid notice to Tribes and allow time to pass in which to bond with the children prior to giving notice to the Tribe or filing a petition to adopt, in order to avoid ICWA's placement preferences.

Response: The final rule does not add a definition for "guardianship" because the term "guardianship" is not used in the final rule. The statute defines "foster-care placement" as including any action removing an Indian child from its parent or Indian custody for temporary placement in the … home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand. 25 U.S.C. 1903(1). Where a guardianship meets these criteria, it is subject to applicable ICWA requirements for child-custody proceedings. The discussion on applicability, below, addresses guardianships in voluntary proceedings.

Comment: "ICWA-Compliant Placement" – A few commenters recommended adding a definition of an "ICWA-compliant placement" to mean only those placements in accordance with the placement preferences in section 1915. One commenter suggested excluding all placements that are outside the identified placement preferences, regardless of whether there has been a good cause finding to deviate from the placement preferences.

Response: The final rule does not add this term because it is not used in the regulation, and because the Department believes that it could introduce confusion. The statute provides for certain placement preferences "in the absence of good cause to the contrary." 25 U.S.C. 1915(a),

(b). If a State court properly found good cause to not place an Indian child with a preferred placement, the placement complies with ICWA.

Comment: "Indian home" – A few commenters requested a definition for "Indian home" stating that States in the past have identified non-Indian foster families to be "Indian homes" by virtue of the Indian child being placed there.

Response: The final rule includes a definition of "Indian foster home," a term used in 25 U.S.C. 1915(b) and FR § 23.131. The statute already defines the term "Indian" as a person who is a member of a federally recognized Indian Tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 43 U.S.C. 1606. *See* 25 U.S.C. 1903(3). The new definition simply clarifies that an "Indian foster home" is one in which one or more of the foster parents is an Indian.

Comment: "Indian family" – A few commenters requested a definition of "Indian family" as including at least one parent meeting the definition of "Indian" for reasons similar to those forming the basis for the request for a definition of "Indian home." One commenter stated that it witnessed a State agency take the position that a non-Indian foster family was an Indian family due to a vague connection to a Tribe.

Response: The Department declines to add a definition of this term because it finds that the meaning of the term in the statute and regulations is adequately clear. The term "Indian family" is found in 25 U.S.C. 1915(a), which includes "other Indian families" in the placement preferences. The term "Indian" is defined by statute, *see* 25 U.S.C. 1903(3), and the term "Indian family" in this context thus refers to a family with one or more individuals that meet this definition. The term "Indian family" is also found in 25 U.S.C. 1912(d) (requiring active efforts designed to prevent the breakup of the Indian family), and it is clear from context that this means

the Indian child's family. *See also* the discussion of the existing Indian family exception in the Applicability section.

Comment: "Indian" – One commenter stated that the term "Indian" is offensive and should instead be "indigenous peoples" or "First Nations."

Response: The term "Indian" is used in the statute; therefore, the regulation also uses this term.

Comment: "Party" – A few commenters suggested adding a definition of "party" for the purposes of section 1912 to include any party seeking foster-care placement or termination of parental rights because often these placements are made by individuals or attorneys rather than agencies. A few other commenters suggested adding a definition of "party" to exclude "de facto parents," because these are generally foster parents who do not have legal status on par with a parent or Indian custodian.

Response: State courts and Tribal courts define the parties to a proceeding; therefore, the final rule does not add a definition for this term. The Department notes, however, that the statute and regulation define the term "parent" as meaning any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law and custom. *See* 25 U.S.C. 1903(9); 25 CFR 23.2. Thus, a "de facto parent" that does not otherwise qualify under this definition would not be entitled to the rights a "parent" is provided under ICWA.

Comment: "State courts" – One commenter suggested adding a definition of "State courts" to include all officers of the court, to clarify that all legal professionals must comply with ICWA.

Response: The final rule does not add a definition for "State courts" because the term is adequately clear.

Comment: "Indian organization" – A commenter suggested moving the definition for "Indian organization" to § 23.2 (from § 23.102).

Response: The definition of "Indian organization" in § 23.102 applies only to subpart I of part 23 because a different meaning of the term "Indian organization" related to eligibility of grants applies to other subparts of part 23. For this reason, the final rule defines the term at § 23.102 with a definition that applies only to subpart I.

Comment: "Tribal Representative" – Several commenters requested that the final rule add a definition of "Tribal representative" or "Tribal designee" to remove restrictions on Tribes participating in ICWA proceedings via non-attorney representatives. These commenters asserted that the final rule must require States to allow non-attorney representatives because Tribes may not have the resources to send a licensed attorney to appear in every proceeding in multiple courts and may only be able to send social workers or court-appointed special advocates, and the rights and interests of the Tribe to participate in ICWA proceedings outweigh the rights and interests of a State with regard to requiring licensure by all who appear before the court. Commenters also stated that the new definition should clarify that even if the Tribal representative is an attorney, the State may not require licensure in the jurisdiction where the child-custody proceeding is located. A commenter stated that appearing *pro hac vice* is often not a viable alternative because of the cost, number of appearances, requirements for local co-counsel, and ultimately the discretion of the State to deny the application to appear *pro hac vice*.

Response: The Department declines to adopt the comments' suggestion at this time. The suggested definition and requirements for State courts were not included in the proposed rule,

and the Department believes that it is advisable to obtain the views of State courts and other interested stakeholders before such provisions are included in a final rule.

The Department recognizes that it may be difficult for many Tribes to participate in State court proceedings, particularly where those actions take place outside of the Tribe's State. Section 23.133 encourages State courts to permit alternative means of participation in Indian child-custody proceedings in order to minimize burdens on Tribes and other parties. The Department agrees with the practice adopted by the State courts that permit Tribal representatives to present before the court in ICWA proceedings regardless of whether they are attorneys or attorneys licensed in that State. *See e.g., J.P.H. v. Fla. Dep't of Children & Families*, 39 So.3d 560 (Fla. Dist. Ct. App. 2010) (per curiam); *State v. Jennifer M. (In re Elias L.)*, 767 N.W.2d 98, 104 (Neb. 2009); *In re N.N.E.*, 752 N.W.2d 1, 12 (Iowa 2008); *State ex rel. Juvenile Dep't of Lane Cty. v. Shuey*, 850 P.2d 378 (Or. Ct. App. 1993).

C. Applicability

The final rule clarifies the terms "child-custody proceeding" and "hearing." Both of those terms were used at various points in the draft rule, but only "child-custody proceeding" was defined in the proposed rule. The comments demonstrated confusion regarding the use of those terms. Thus, in order to be clearer about the distinctions made in certain provisions of the rule between "child-custody proceedings" and "hearings," the final rule includes definitions for those terms.

The final rule adds a definition of "hearing" that reflects the common understanding of the term as used in a legal context. As defined in the final rule, a hearing is a single judicial session held for the purpose of deciding issues of fact or of law. That definition is consistent with the definition in Black's Law Dictionary, a standard legal reference resource. In order to

demonstrate the distinction between a hearing and a child-custody proceeding, the definition of "child-custody proceeding" explains that there may be multiple hearings involved in a single child-custody proceeding.

Consistent with the proposed rule, the final rule defines a "child-custody proceeding" to be an activity that may culminate in foster-care placement, a preadoptive placement, an adoptive placement, or a termination of parental rights. The final rule uses the phrase "may culminate in one of the following outcomes," rather than the less precise phrase "involves," used in the draft rule, in order to make clear that ICWA requirements would apply to an action that may result in one of the placement outcomes, even if it ultimately does not. For example, ICWA would apply to an action where a court was considering a foster-care placement of a child, but ultimately decided to return the child to his parents. Thus, even though the action did not result in a foster-care placement, it may have culminated in such a placement and, therefore, should be considered a "child-custody proceeding" under the statute.

The final rule deletes as unnecessary the use of the word "proceeding" as part of the definition of child-custody proceeding. It also explicitly excludes emergency proceedings from the scope of a child-custody proceeding, as emergency proceedings are addressed separately in the statute and in the rule. The definition further makes clear that a child-custody proceeding that may culminate in one outcome (e.g., a foster-care placement) would be a separate child-custody proceeding from one that may culminate in a different outcome (e.g., a termination of parental rights), even though the same child may be involved in both proceedings.

The final rule definition of "child-custody proceeding" is also updated to make clear that its scope includes proceedings involving status offenses if any part of the proceeding results in the need for out-of-home placement of the child. This reflects the statutory definition of "child-

custody proceeding," which is best read to include placements based on status offenses, while explicitly excluding placement[s] based upon an act which, if committed by an adult, would be deemed a crime. *See* 25 U.S.C. 1903(1).

As discussed in more depth below, the final rule also removes from the regulatory text an explicit mention by name of the so-called "existing Indian family" (EIF) exception: a judicially created exception to ICWA's applicability that has since been rejected by the court that created it. Although the reference to the EIF exception by name was removed, the final rule makes clear that the inquiry into whether ICWA applies to a case turns solely on whether the child is an "Indian child" under the statutory definition. The rule, consistent with the Act, thus focuses exclusively on a child's political membership with a Tribe, rather than any particular cultural affiliation.

The commenters who asserted that various ICWA provisions are inapplicable to some children who have "assimilated into mainstream American culture" are wrong under a plain reading of the statute. In order to make this clear, the final rule prohibits consideration of listed factors because they are not relevant to the inquiry of whether the statute applies. The inclusion of this prohibition prevents application of any EIF exception, which both "frustrates" ICWA's purpose to "curtail state authorities from making child custody determinations based on misconceptions of Indian family life," *In re A.J.S.*, 204 P.3d at 551 (citation omitted), and encroaches on the power of Tribes to define their own rules of membership.

1. "Child-custody proceeding" and "Hearing" Definitions

--"Any proceeding or action"

Comment: A few commenters requested clarification of "any proceeding or action." A few commenters suggested clarifying that a proceeding or action may include an *ex parte*

placement, a court-ordered placement or "any court hearing, proceeding, or action by an agency or court." One commenter stated that "proceeding" should include any authorized use of State power that may result in a parent losing custody of the child and "action" to be the manner in which such power is employed in discrete instances of conduct (e.g., an emergency removal would be an action). Similarly, another commenter requested clarification that ICWA applies to any situation in which the State has taken action involving an Indian child and there is a possibility that neither parent will have custody.

Response: See the discussion above regarding the definition of "child-custody proceeding" and "hearing." Further, whereas the draft rule stated that a child-custody proceeding "means and includes any proceeding or action that involves" certain outcomes, the final rule uses only the word "action." In addition to the word "proceeding" being duplicative, the use of the term "action" is also more consistent with the statute, as the statute uses that term several times in its definition of "child-custody proceeding." *See* 25 U.S.C. 1903(1).

--Guardianships

Comment: Several commenters suggested clarifying whether ICWA applies to guardianships and conservators. A few commenters noted there have been various State interpretations of this issue. Several commenters stated that the rule should explicitly apply to private guardianships in which someone assumes the role of caretaker without State or Tribal intervention, so that the action of placing the child would still be subject to ICWA.

Response: The statute defines "child-custody proceeding" to include removal of an Indian child for temporary placement in… the home of a guardian or conservator. 25 U.S.C. 1903(1)(i). The fact that an agency places the child in the home of a guardian or conservator

rather than in a foster home or institution does not affect applicability of the Act, as such placement would be a "child-custody proceeding."

If a parent entrusts someone with the care of the child without State or Tribal involvement, that arrangement would not prohibit the parent from having the child returned upon demand, and therefore would not meet the definition of a "child-custody proceeding."

--Custody Disputes Between Family Members

Comment: Several commenters stated that the rule should include intra-family disputes as a "child-custody proceeding" because a minority of State courts have excluded disputes where the petitioner is a family member. Another commenter stated intra-family disputes should not be included as a "child-custody proceeding" and that the rule should clarify that ICWA is not about resolving grandparent custody battles.

Response: The statute and final rule exclude custody disputes between parents (*see* next response), but can apply to other types of intra-family disputes, assuming that such disputes otherwise meet the statutory and regulatory definitions. ICWA can apply to other types of intra-family disputes because the statute makes only two exceptions, neither of which are for intra-family disputes other than parental custody disputes. 25 U.S.C. 1903(1) (ICWA does not apply to the custody provisions of a divorce decree or to delinquency proceedings). While at least one court held that ICWA excludes intra-family disputes (*see In re Bertelson*, 617 P.2d 121, 125-26 (Mont. 1980)), several subsequent court decisions have ruled to the contrary. *See, e.g.*, *Starr v. George*, 175 P.3d 50 (Alaska 2008); *In re Custody of A.K.H.*, 502 N.W.2d 790, 794 (Minn. Ct. App. 1993); *In re Q.G.M.*, 808 P.2d 684, 687-88 (Okla. 1991); *In re S.B.R.*, 719 P.2d 154, 156 (Wash. Ct. App. 1986); *A.B.M. v. M.H.*, 651 P.2d 1170, 1173 (Alaska 1982). BIA has concluded that, if the intra-family dispute meets the definition of a "child-custody proceeding," the

provisions of this rule would apply. There is no general exception from ICWA for actions by grandparents or other family members.

--Divorce Proceedings

Comment: A few commenters stated that many custody cases do not occur within the context of a divorce proceeding because in many cases the parents are not married. These commenters requested clarification that ICWA does not apply to custody cases between parents, regardless of whether the custody case is within the context of a divorce proceeding.

Response: The Act does not include placement with a parent as an "Indian child-custody proceeding" because "foster-care placement" does not include placement with a parent. 25 U.S.C. 1903(1)(i). While the Act specifically exempts from ICWA's applicability awards of custody to one of the parents "in divorce proceedings," the exemption necessarily includes awards of custody to one of the parents in other types of proceedings as well. *See, e.g., John v. Baker*, 982 P.2d 738, 746-47 (Alaska 1999). For this reason, the final rule clarifies that ICWA does not apply to an award of custody to one of the parents, in a divorce proceeding or otherwise.

If, however, the proceeding is one that meets the definition of a "child-custody proceeding," in that the Indian child has been removed from his or her parent and any party seeks to place the Indian child in a temporary placement other than the alternate parent, then provisions of ICWA and this rule would apply. *See e.g., In re Jennifer A.*, 103 Cal. App. 4th 692, 700 (Cal. 2002) (finding that ICWA requirements applied because the "issue of possible foster-care placement was squarely before the juvenile court," even though the child was eventually placed with the noncustodial father). In addition, if a proceeding seeks to terminate the parental rights of one parent, that proceeding squarely falls within ICWA's definition of "child-custody proceeding." *See* 25 U.S.C. 1903(1).

--Adoptions without termination of parental rights, including Tribal customary adoptions

Comment: A commenter noted that while the definition of "child-custody proceeding" is consistent with the definition of preadoptive placement in § 1903(1), there are situations in which preadoptive placements may occur without termination of parental rights under Tribal law or State law. This commenter suggested adding that "child-custody proceeding" does not preclude preadoptive placements after it has been determined that the child cannot or should not be returned to the home of his or her parents or Indian custodian, but where termination of parental rights is not a prerequisite to the finalization of the adoption under State or Tribal law. Likewise, a few commenters requested expanding "adoptive placement" to include Tribal customary adoptions in which there is no termination of parental rights, when such adoptions are conducted as part of a State-court proceeding.

Response: BIA does not believe that the definition of a "child-custody proceeding" needs to be adjusted to address these comments. Adoptions that do not involve termination of parental rights are included within the definition of "child-custody proceeding" as either a "foster-care placement" or an "adoptive placement," because these terms, as defined, do not require termination of parental rights. *See* 25 U.S.C. 1903.

--Withdrawal of consent as "upon demand"

Comment: A few commenters suggested that the "foster-care placement" portion of the definition of "child-custody proceeding," which states that foster-care placement is when the parent or Indian custodian "cannot have the child returned upon demand" conflicts with section 1913 of the Act, which provides that the parent can withdraw consent to a foster-care placement. These commenters suggest adding the following language to the definition after "cannot have the

child returned upon demand:" "(except as provided in § 103(b) [25 U.S.C. 1913(b)] of the Act)." *See In re Adoption of K.L.R.F.*, 515 A.2d 33 (Pa. Super. Ct. 1986).

Response: The term "foster-care placement" as used in the Act includes only foster care where the parent cannot have the child returned "upon demand." The final rule clarifies the definition of "upon demand" to mean simply a verbal demand without any formalities or contingencies. A parent's withdrawal of consent to a foster-care placement under section 1913 of the Act is also a situation where the parent cannot have the child returned "upon demand" because the withdrawal of consent must be more formal than a mere verbal request. FR § 23.127. Truly voluntary placements not covered by ICWA are those in which the parent can have the child returned upon a mere verbal request, without any express or implied formalities or contingencies.

2. Juvenile Delinquency Cases

Comment: Several commenters requested clarification on the interplay between PR § 23.102(a) and (e) as to whether "juvenile delinquency proceedings" are covered by ICWA, noting that § 1903(1) of the statute states that ICWA does not apply to placements based on an act that would be deemed a crime if committed by an adult. These commenters requested clarification that ICWA would apply to placements based on "status offenses" (an act that would not be deemed a crime if committed by an adult, such as truancy or incorrigibility). The proposed rule provided that "juvenile delinquency proceedings" involving status offenses are not covered by the Act, but one commenter pointed out that in New York, juvenile delinquency proceedings, by definition, exclude status offenses because the term refers only to proceedings for youth who committed an act that would constitute a crime if committed by an adult. Another commenter noted that the California Supreme Court has ruled that placements in delinquency proceedings

are presumptively exempt from ICWA, but noted that an Indian child may be placed in a foster home rather than a detention center as a result of delinquency proceedings.

Response: The final rule deletes the term "juvenile delinquency proceedings" and instead clarifies in FR § 23.103(a) that ICWA applies to proceedings involving acts that are status offenses (as defined in the rule to be acts that would not be a crime if committed by an adult) and in FR § 23.103(b) that ICWA does not apply to proceedings involving criminal acts that are not status offenses. While ICWA does not apply to proceedings involving non-status offense crimes, States may nevertheless determine that it is appropriate to notify the Tribe in these instances and provide other protections to the parents and child.

Comment: A commenter stated that the final rule should clarify the Tribe has jurisdiction in cases in which the placement is based on a status offense, even in PL-280 States.

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

Comment: Several commenters recommended adding that ICWA applies to "any placement of an Indian child in foster care as a result of a juvenile delinquency proceeding" or to proceedings that "have the potential to result in" (rather than "result in") the need for foster care, preadoptive or adoptive placement or the termination of parental rights. Some commenters suggested additional factors for ICWA applicability to juvenile delinquency proceedings.

Response: The final rule continues to state that ICWA applies to any status offense proceeding that results in a placement of the Indian child because of the status offense. *See* FR § 23.103(a). The final rule does not incorporate the commenters' suggestion for ICWA applicability where the proceeding has the "potential to result in" the need for foster care because this language is overly broad, in that nearly all status offense proceedings initially have a

potential to result in foster care. The final rule's language makes clear that if a child is placed in foster care or another out-of-home placement as a result of a status offense, that proceeding is an ICWA proceeding and ICWA's standards (e.g., notice, timing, intervention) apply.

Comment: One commenter requested clarification as to whether foster care is intended to include facilities operated primarily for the detention of children who are determined to be delinquent.

Response: A placement, including juvenile detention, resulting from status offense proceedings meets the statutory definition of "foster-care placement" and such placement is therefore subject to ICWA.

3. Existing Indian Family Exception

Comment: A large number of commenters expressed their strong support of the proposed provision stating that there is no "existing Indian family exception" to ICWA. Many stated that this judicially created exception has denied ICWA protections to Indian children. These commenters stated that the clarification is a confirmation of the Supreme Court's decision in *Adoptive Couple v. Baby Girl*, and mirrors the "overwhelming trend in State legislatures and courtrooms." A few commenters stated that the clarification is necessary for consistency because a small number of States are continuing to apply the exception, and parties continue to argue in favor of its application. These commenters note that the exception inappropriately invites scrutiny into Indian culture and identity and allows a court to substitute its judgment for a Tribe's determination of a child's membership. A few commenters noted that the court that created the exception (Kansas Supreme Court) in 1982 has since rejected it. Commenters also pointed out that Congress identified "Indian child" as the threshold for ICWA applicability and that the definition does not invite State court investigation into a child's blood quantum, the extent to

which the parent or child is involved with the Tribal cultural or other activities, or stereotypical ideas of "Indian-ness."

Other commenters opposed the rejection of the EIF exception. A few stated that the Department lacks the authority to override the interpretations of those remaining State courts that still apply the EIF exception. These commenters stated that the EIF exception addresses whether ICWA may be constitutionally applied to children who are classified as "Indian" solely because of their heritage, when they have no social, cultural, or political connection to a Tribe. One commenter stated that ICWA assumes the parent maintains social and cultural ties with the Tribe, and points to various locations within the Act referring to prevailing standards of Indian communities, values of Indian culture, and contacts with the Tribe. Another commenter stated that the EIF exception is consistent with ICWA because Congress was not concerned with children whose families were fully assimilated, lived far from Indian country, and maintained little contact with the Tribe. This commenter stated that ICWA cannot treat a child from a reservation the same as a child that never lived near a reservation and that has not been exposed to any Tribal culture. Another commenter argued that the EIF exception must be available for families and children that choose not to live on a reservation.

Response: Congress clearly defined when ICWA would apply to a State court child-custody proceeding—when the child-custody proceeding involves an "Indian child" as defined by statute. *See, e.g.,* 25 U.S.C. 1903(1), 1903(4), 1911, 1912, 1915. "Indian child" is defined based on the child's political affiliation with a federally recognized Indian Tribe. *See* 25 U.S.C. 1901 (defining "Indian child" as a Tribal member or child of a Tribal member who is eligible in a Tribe). The statute includes no provision for a court to determine the applicability of ICWA based on an Indian child's or parent's social, cultural, or geographic ties to the Tribe. To the

contrary, Congress expressly recognized that State courts and agencies often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. 25 U.S.C. 1901(5). It would be illogical to read into the statute a requirement that State courts conduct the very inquiry that Congress determined they were often ill-equipped to make. *In re A.J.S.*, 204 P.3d at 551 (citation omitted). Reliance on the EIF both "frustrates" ICWA's purpose to "curtail state authorities from making child custody determinations based on misconceptions of Indian family life," *id*. (citation omitted), and encroaches on the power of Tribes to define their own rules of membership.

As noted by a commenter, the court that first created the EIF exception has since rescinded it. *In re S.M.H.*, 103 P.3d 976 (Kan. Ct. App. 2005). Only a handful of courts continue to recognize the exception (including only one of six appellate districts in California, Alabama, Indiana, Kentucky, Louisiana, Nevada, Missouri, Tennessee).[7] In contrast, a swelling chorus of other States have affirmatively rejected the EIF exception (including Alaska, Arizona, Colorado, Idaho, Illinois, Iowa, Michigan, Montana, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Virginia and Utah).[8]

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[7] *See, e.g., In re Alexandria Y.*, 53 Cal. Rptr. 2d 679 (Cal. Ct. App. 1996) (4th Dist.); *Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996); *Hampton v. J.A.L.*, 27-869 (La. App. 2 Cir. 7/6/95); 658 So. 2d 331; *C.E.H. v. L.M.W.*, 837 S.W.2d 947 (Mo. Ct. App. 1992); *In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880 (Tenn. Ct. App. Nov. 19, 1997); *S.A.* v. *E.J.P.*, 571 So. 2d 1187 (Ala. Civ. App. 1990); *In re Adoption of T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988); *In re N.J.*, 221 P.3d 1255 (Nev. 2009).

[8] *See, e.g., In re Alexandria P.*, 176 Cal. Rptr. 3d 468, 484-86 (Cal. Ct. App. 2014); *J.W. v. R.J.*, 951 P.2d 1206 (Alaska 1998); *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960 (Ariz. Ct. App. 2000); *In re N.B.*, No. 06CA1325 (Colo. Ct. App. Sept. 6, 2007); *In re Baby Boy Doe*, 849 P.2d 925 (Idaho 1993); *In re S.S.*, 657 N.E.2d 935 (Ill. 1995); *In re R.E.K.F.*, 698 N.W.2d 147 (Iowa 2005); *In re Elliott*, 554 N.W.2d 32 (Mich. Ct. App. 1996); *In re Riffle*, 922 P.2d 510 (Mont. 1996); *In re Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988); *In re Baby Boy C.*, 805 N.Y.S.2d 313 (N.Y. App. Div. 2005); *In re A.D.L.*, 612 S.E.2d 639 (N.C. Ct. App. 2005); *In re A.B.*, 663 N.W.2d 625 (N.D. 2003); *In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004); *Quinn v.*

Those courts that have rejected the EIF exception are correct. As explained above, ICWA applies to any child-custody proceeding involving an Indian child. And where Congress intended a categorical exemption, it provided one expressly. Congress thus excepted from the definition of a "child-custody proceeding" "an award, in a divorce proceeding, of custody to one of the parents" and also a "placement" resulting from a juvenile delinquency proceeding. 25 U.S.C. 1903(1). It provided no such exception for cases that, in a State court's view, do not involve an "existing Indian family." In addition, the Supreme Court did not adopt the EIF exception, even though some parties urged the Court to adopt it in the *Adoptive Couple* case. *See Adoptive Couple v. Baby Girl*, 133 S. Ct. at 2552.

Congress did not intend to limit ICWA's applicability to those Tribal citizens actively involved in Indian culture. Contrary to the commenters' assertions, Congress was concerned with children whose families lived far from Indian country, and might only maintain sporadic contact with the Tribe. For example, Congress expressly distinguished between children domiciled on-reservation and off-reservation for the purposes of jurisdiction, and applied the vast majority of ICWA provisions to off-reservation Indian children. For these reasons, the final rule continues to clarify that there is no EIF exception to the application of ICWA.

The final rule no longer uses the nomenclature of the exception, and instead focuses on the substance, rather than the label, of the exception. Thus, the final rule imposes a mandatory prohibition on consideration of certain listed factors, because they are not relevant to the inquiry of whether the statute applies. If a child-custody proceeding concerns a child who meets the statutory definition of "Indian child," then the court may not determine that ICWA does not

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Walters, 881 P.2d 795 (Or. Ct. App. 1994); *In re Baade*, 462 N.W.2d 485 (S.D. 1990); *In re W.D.H., III*, 43 S.W.3d 30 (Tex. App. 2001); *In re D.A.C.*, 933 P.2d 993 (Utah Ct. App. 1997); *Thompson v. Fairfax County Dep't of Family Servs.*, 747 S.E.2d 838 (Va. Ct. App. 2013).

apply to the case based on factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her Indian parents, whether the parent ever had custody of the child, or the Indian child's blood quantum.

One of the factors that the rule prohibits a court from considering in determining whether ICWA will apply to a proceeding is "the Indian child's blood quantum." FR § 23.103(c). That factor is intended to make clear that, in a case involving a child who meets the statutory definition of an Indian child, a court may not then go on to determine that ICWA should not apply to that proceeding because the child has a certain blood quantum. That factor is, however, not intended to prohibit a court from examining a child's blood quantum for the limited purpose of determining whether the child meets the statutory definition of "Indian child," if a Tribe does not respond to requests for verification of a child's citizenship or eligibility for citizenship. In that limited circumstance, a State court may review whether the child is eligible under a Tribe's citizenship criteria. Likewise, in that limited instance, and if the Tribe's criteria necessitates examining blood quantum to determine citizenship or eligibility, then the State court may consider blood quantum for the purpose of making a determination as to whether the child is eligible for citizenship and therefore an "Indian child" under the statute. If the Tribe responds to requests for verification of the child's citizenship or eligibility for citizenship, the court must accept the Tribe's verification and may not substitute its own determination regarding a child's citizenship in a Tribe, a child's eligibility for citizenship in a Tribe, or a parent's citizenship in a Tribe.

4. Other Applicability Provisions

Comment: Several commenters recommended adding that ICWA applies to any domestic-violence proceeding in which the Court restricts a parent's access to the Indian child.

Response: The final rule does not add the suggested language because a restriction of parental access to the child under these circumstances may not a meet the definition of a "child-custody proceeding" under the Act.

Comment: One commenter suggested clarifying that "foster care" includes any placement that may use Title IV-E funding, since there are various definitions of foster care.

Response: The final rule's definition of "foster-care placement" mirrors that of the ICWA and generally includes placements that use Title IV-E funding where parental rights have not been terminated.

Comment: One commenter requested clarification here, in addition to in the definition of "Indian child," that once ICWA applies, it applies throughout the duration of the case, regardless of whether the child turns 18.

Response: The final rule adds clarification to the applicability section that ICWA will not cease to apply simply because the child turns 18. *See* FR § 23.103(d).

Comment: One commenter questioned the provision stating that ICWA does not apply to Tribal court proceedings.

Response: Tribes may have their own laws similar to ICWA, but the Federal ICWA provides standards applicable only to State-court proceedings (except for provisions regarding transfer of jurisdiction to Tribal court or Tribal intervention).

D. Inquiry and Verification

The applicability of ICWA to a child-custody proceeding turns on the threshold question of whether the child in the case is an Indian child. It is, therefore, critically important that there

be an inquiry into that threshold issue as soon as possible. If this inquiry is not timely, a child-custody proceeding may not comply with ICWA and thus may deny IWCA protections to Indian children and their families. The failure to timely determine if ICWA applies also can generate unnecessary delays, as the court and the parties may need to redo certain processes or findings under the correct standard. This is inefficient for courts and parties, and can create delays and instability in placements for the Indian child.

The final rule, therefore, requires courts to inquire into whether a child is an Indian child at the commencement of a proceeding. The court is to ask each participant in the proceeding, including attorneys, whether they know or have reason to know that the child is an Indian child. Such participants could also include the State agency, parents, the custodian, relatives or trial witnesses, depending on who is involved in the case. Further, recognizing that facts change during the course of a child-custody proceeding, courts are to instruct the participants to inform the court if they subsequently learn information that provides reason to know the child is an Indian child. Thus, if the State subsequently discovers that the child is an Indian child, for example, or if a parent enrolls the child in an Indian Tribe, they will need to inform the court so that the proceeding can move forward in compliance with the requirements of ICWA.

ICWA's notice provisions are triggered if a court "has reason to know" that a child is an Indian child. 25 U.S.C. 1912(a). The final rule, therefore, uses the statutory language "reason to know," rather than "reason to believe," as was used in the proposed rule. This is to be more consistent with the statutory text and to be clear that the rule does not set a different standard for triggering notice than what is provided for in ICWA. The final rule does, however, provide specific guidance regarding what constitutes "reason to know" that a child is an Indian child. The

court would have reason to know that a child was an Indian child if, for example, it was informed that the child lives on a reservation or has been a ward of a Tribal court.

If the court has reason to know that a child is an Indian child, then the court is to treat the child as an Indian child unless and until it determines that the child is not an Indian child. This requirement ensures that ICWA's requirements are followed from the early stages of a case. It is also intended to avoid the delays and duplication that would result if a court moved forward with a child-custody proceeding (where there is reason to know the child is an Indian child) without applying ICWA, only to get late confirmation that a child is, in fact, an Indian child. For example, it makes sense to place a child that the court has reason to know is an Indian child in a placement that complies with ICWA's placement preferences from the start of a proceeding, rather than having to consider a change a placement later in the proceeding once the court confirms that the child actually is an Indian child. Notably, the early application of ICWA's requirements—which are designed to keep children, when possible, with their parents, family, or Tribal community—should benefit children regardless of whether it turns out that they are Indian children.

The determination of whether a child is an Indian child turns on Tribal citizenship or eligibility for citizenship. The final rule recognizes that these determinations are ones that Tribes make in their sovereign capacity and requires courts to defer to those determinations. The best source for a court to use to conclude that a child or parent is a citizen of a Tribe (or that a child is eligible for citizenship) is a contemporaneous communication from the Tribe documenting the determination. Thus, if the court has reason to know that a child is a member of a Tribe, it should confirm that due diligence was used to identify and work with the Tribe to verify whether the child is a citizen (or a biological parent is a citizen and the child is eligible for citizenship).

The final rule does, however, allow a court to rely on facts or documentation indicating a Tribal determination such as Tribal enrollment documentation. This provision was added to the final rule in response to comments noting that sometimes Tribes are slow to respond to inquiries seeking verification of Tribal citizenship. It also reflects the fact that it may be unnecessary to obtain verification from a Tribe, if sufficient documentation is already available to demonstrate that the Tribe has concluded that a parent or child is a citizen of the Tribe or the child is eligible for citizenship.

The proposed rule included a suggested requirement that State agencies provide courts with genograms and other specifically-listed information in order to inform the court about whether a child is an Indian child. The final rule does not include that suggestion, as the Department has determined that suggestions on how agencies may conduct inquiries are more appropriate for guidance than regulation.

The final rule also includes provisions that are designed to assist courts and others in contacting Tribes to obtain verification of citizenship or eligibility of citizenship. In addition, BIA is available to assist in contacting Tribes and is taking steps to facilitate the ease of contact. For example, BIA has compiled a list of designated Tribal ICWA officials and is working to make that list more user-friendly.

1. How to Contact a Tribe

Comment: One commenter stated that the information in PR § 23.104 (now located in FR § 23.105) on how to contact a Tribe is helpful to assist in compliance. Several Tribal commenters recounted their experiences in having notices sent to various addresses other than the designated Tribal agent address listed in the Federal Register. A few commenters requested that BIA do more to keep the list of designated ICWA agents up-to-date.

A State commenter requested revisions to clarify that BIA publishes the "official" list of contacts in the Federal Register, and to require BIA to make the list available on its website with updates provided by Tribes between official Federal Register publications. A few commenters requested making the list easier to use, by including historical Tribal affiliations to facilitate notification of the correct Tribe or by grouping by Tribal heritage (e.g., Chumash, Pomo) in addition to their specific band.

Response: In conjunction with this final rule, BIA is working to make its list of designated ICWA officials more user-friendly and maintaining an updated list on its website.

Comment: One commenter suggested that States be required to maintain a list of the ICWA contacts for Tribes in their State.

Response: The Department encourages States to maintain a list of designated ICWA officials of Tribes in their States, but the final rule does not require that they do so.

Comment: One commenter stated that the court should call Tribes for court hearings.

Response: The final rule does not require this.

Comment: One commenter recommended changing the rule to read you "should" seek BIA assistance in contacting the Tribe if you do not have accurate contact information or the Tribe fails to respond, rather than "may," to avoid providing too much leeway.

Response: The final rule adopts this suggestion and changes the language to "should." *See* FR § 23.105(c).

2. Inquiry

Comment: Many commenters stated that the provisions requiring early identification of Indian children will be particularly helpful. These commenters stated that children and families are too often denied ICWA protections because a court or agency did not ask whether the child

was Indian. These commenters stated that a failure to ask whether a child is an Indian child risks the Indian children not being identified at all, creates a risk of insufficient efforts to reunify the family, delay, or repetition in court proceedings, and increases the risk of placement instability. They noted that early identification is a best practice that will promote placement stability for children.

Commenters also supported the requirement that the courts ask every party, on the record, whether there is reason to believe the child is an Indian child. Commenters relayed their experiences with child-welfare agencies inadvertently failing to apply ICWA. A commenter noted that there is a tendency for those who are geographically proximate to Tribal lands to make greater efforts to comply with ICWA despite the fact that 78 percent of Native Americans do not live on Tribal lands. The National Council of Juvenile and Family Court Judges noted that they have long recommended this practice to judges because failing to make the necessary inquiries and notify the necessary parties, etc., can result in the case having to start over from the beginning. Commenters noted the importance of this provision because all the rights and responsibilities of ICWA flow from the determination as to whether ICWA applies.

One commenter opposed the requirement to ask if every child is subject to ICWA as a "callous and unwarranted intrusion." One commenter opposed asking whether the child is an "Indian child" in the context of adoption because it would make adoption problematic by allowing the Tribe to declare the child an "Indian child."

Response: The Department agrees with the comments that stress the importance of early inquiry into the applicability of ICWA. As discussed above, the rule requires such early inquiry. The final rule retains the requirement for State courts to ask in every proceeding whether the child is an "Indian child" because this inquiry is necessary to determine if ICWA applies. The

inquiry is a limited, non-burdensome imposition on State courts that is designed to ensure that they abide by Federal law and appropriately address key questions that go to jurisdictional, procedural, and substantive requirements under ICWA. ICWA applies to children that meet the definition of an "Indian child" and imposes obligations on a court when it knows or has reason to know that a child is an Indian child. In order for a court to determine whether it has reason to know that a child is an Indian child, the court needs to inquire into the issue. Asking if every child is subject to ICWA ensures that ICWA is implemented early on where applicable and thereby avoids the problems and inefficiencies generated by late identification that ICWA is applicable to a particular case.

Comment: Several commenters stated that PR § 23.103(c) and § 23.107, which require agencies and courts to ask whether the child "is or could be an Indian child" or whether there is "reason to believe that the child is an Indian child" are overly broad and apply when the child *could become* an Indian child. These commenters stated that determining whether ICWA applies and requiring notices to Tribes is expensive, time consuming, and causes undue delay, especially when a parent has only a vague notion of a distant Tribal ancestor, and when the Tribe does not require the parent to be a citizen for the child to be eligible for citizenship. Another commenter stated that the rule should impose a greater burden on State agencies to determine whether a child is eligible for Tribal citizenship. Other commenters noted the discrepancy between the phrases "reason to believe" and the statutory phrase "reason to know."

Response: The inquiry into whether a child is an "Indian child" under ICWA is focused on only two circumstances: (1) whether the child is a citizen of a Tribe; or (2) whether the child's parent is a citizen of the Tribe and the child is also eligible for citizenship. For clarity, the terminology "could be an Indian child" is deleted from the final rule and the final rule changes

the language in § 23.107(a) to reflect the statutory language as to whether there is knowledge or a "reason to know" the child is an "Indian child." As discussed above, the final rule also provides clear guidance regarding when a court has "reason to know" the child is an "Indian child."

Comment: Several commenters discussed the terminology in PR § 23.107 regarding inquiry into whether the child "is an Indian child" or there is "reason to believe" the child is an Indian child. A few commenters suggested changing the requirement to ask whether the child "is an Indian child" to a requirement to ask whether the child "may be an Indian child." Alternatively, one commenter stated that the agency or court should be required to ask if the child "is an Indian child," not if they have a "reason to believe" the child is Indian—because the child may be Indian even if there is no apparent "reason to believe."

Response: As stated in the previous response, the final rule changes the § 23.107(a) language to reflect the statutory language as to whether there is knowledge or a "reason to know" the child is an "Indian child."

Comment: A few commenters stated that the regulations should be clear about whom, at a minimum, agencies should ask about the child's ancestry (e.g., parents, custodians, other relatives that have a close relationship with the child), what should be asked (any potential Indian heritage that could indicate citizenship or eligibility) and when the questions should be asked (at a minimum, the onset of each new proceeding). Likewise, commenters asserted that State courts need specificity as to what will satisfy the investigation requirements.

A few commenters stated their support for requiring certification on the record of whether the child is an Indian child, to hold those responsible for the inquiry accountable. A commenter stated support of genograms and ancestry charts as supporting social work practice and skills. The National Council of Juvenile and Family Court Judges stated that the ICWA

checklists it provides to judges and others also recommend family charts or genograms be created to facilitate Tribal citizenship identification as a best practice. A few commenters suggested making it mandatory for State courts to require agencies to provide the information, while others opposed the requirement as putting an undue burden on courts and agencies because the cost and time to investigate and prepare a history where there is no firm evidence of Indian heritage will waste scarce resources.

Several commenters opposed requiring genograms or ancestry charts as a burden on courts, agencies, and biological parents for voluntary adoptions. Commenters stated that parents rarely have more than basic information even about their own parents and said that requiring such information will discourage adoption. A few commenters stated that the rule imposes unfunded mandates by requiring States to create genealogies for all children. A State agency commented that the rule will create significant additional workload for it, State attorneys and courts without providing increased funding, all while facing record-high numbers of reports, investigations and children in out-of-home placement. Other commenters stated that the logistics and standards imposed on State courts are unworkable, labor-intensive, and extremely costly. Commenters also offered additional suggestions for information courts may wish to consider requiring agencies to provide in support of certification regarding whether there is information suggesting the child is an Indian child.

Response: The final rule directly addresses courts only, as discussed above. It requires the court to ask all participants in the case whether there is reason to know the child is an Indian child on the record. It does not, however, require the agency to provide genograms or other information that was listed in the proposed rule, as the Department has determined that

suggestions on how agencies may conduct inquiries are more appropriate for guidance than regulation.

Comment: A few commenters suggested requiring the inquiry to be made, not only at each child-custody proceeding, but also "at subsequent hearings" because children may become enrolled during this time.

Response: The final rule does not require an inquiry at each hearing. Instead, it requires that the State court should instruct parties to inform it if they later discover information that provides reason to know the child is an Indian child. *See* FR § 23.107(a). This instruction reflects that ICWA requirements apply throughout a child-custody proceeding, if a child is an Indian child. Thus, the instruction insures that if parties find out that there is reason to know the child is an Indian child, the court will be informed and can then conduct the requisite inquiry and provide the appropriate ICWA protections. And, if a new child-custody proceeding is initiated for the same child, the court should again inquire into whether there is reason to know that the child is an Indian child.

Comment: A few commenters suggested a requirement to proactively discover whether there is a "reason to believe" the child is an "Indian child" because parties could do nothing to discover and then truthfully certify they have no reason to believe.

Response: The final rule retains the provision at § 23.107 requiring State courts to ask participants in the proceeding if they know or have reason to know that the child is an "Indian child." States or courts may choose to require additional investigation into whether there is a reason to know the child is an Indian child, and may choose to explain the importance of answering questions regarding whether the child is an Indian child.

Comment: A few commenters stated that the term "active efforts" in PR § 23.107(b) should be replaced with "actively sought" or "due diligence" to avoid confusion with use of the phrase "active efforts" in the statute.

Response: The final rule replaces the term "active efforts" with "due diligence" in the context of identifying the Tribes of which the child may be a citizen because "due diligence" is a common term in child-welfare cases with which practitioners are already familiar. *See* FR § 23.107(b); *see e.g.*, 42 U.S.C. 671(a)(29) (specifying funding requirement that within 30 days after the removal of a child from the custody of the parent or parents of the child, the State shall exercise due diligence to identify and provide notice to the following relatives: all adult grandparents, all parents of a sibling of the child, where such parent has legal custody of such sibling, and other adult relatives of the child (including any other adult relatives suggested by the parents)).

Comment: A few commenters supported PR § 23.107(b) requiring certification on the record regarding whether the child is an Indian child and recommended adding a requirement that the certification include information documenting diligent search efforts or "good faith effort" to obtain information and all findings of the search. These commenters also recommended providing copies of the certifications and documents to the Tribe.

Response: The rule requires that, if the court has reason to know the child is an Indian child but does not have sufficient evidence to determine that the child is or is not an "Indian child," the court must confirm that the agency or other party worked with Tribes to verify the child's citizenship; the court will necessarily require some evidence in the record to make that confirmation. *See* FR § 23.107(b).

Comment: A few commenters stated that the requirement in PR § 23.107(b) to work with "all Tribes" in which the child may be a citizen is overly burdensome.

Response: The final rule requires State courts to confirm that the agency used due diligence to work with all Tribes for which there is reason to know the child may be a citizen. The requirement does not mean an agency must work with all federally recognized Tribes because the reason to know will indicate a certain Tribe or group of Tribes with which the child may have political affiliations. It is necessary to work with all of the Tribes of which there is reason to know the child may be a citizen to identify the "Indian child's Tribe" as defined in the statute and comply with statutory requirements for notice and jurisdiction.

Comment: One commenter stated that the provision in PR § 23.107(c)(4), stating that there is a reason to know the child is an Indian child if the child or parents are domiciled in a predominantly Indian community, confuses Tribal enrollment with race.

Response: The final rule no longer uses the standard "predominantly Indian community," as that phrase was overbroad. Instead, the regulation states that a court has reason to know that a child is an Indian child if the court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native Village. The regulation does not presume that the child is an Indian child if that provision is triggered; rather, such domicile or residence is a factor that requires further investigation because it gives the court "reason to know" that the child is an Indian child.

If a child or the child's parents reside on a Tribe's reservation, it is reasonable to contact that Tribe to find out if the child is a citizen (or the child's parent is a citizen and the child is eligible). In addition to reservations, the provision highlights Alaska Native Villages because Alaska is home to approximately half the federally recognized Indian Tribes, but there is only a

single reservation. Thus it is similarly reasonable to contact the Tribe associated with the Alaska Native Village where the child or her parents reside.

Comment: A commenter suggested adding a new § 23.107(c)(6) to state "[t]he child is or has been a ward of a Tribal court" and a new § 23.107(c)(7) to state "[e]ither parent or child possesses a Tribal membership card or certificate of Indian blood."

Response: The final rule includes an identification card indicating citizenship in an Indian Tribe. *See* FR § 23.107(c)(5)-(6).

Comment: A commenter stated that it may be duplicative to require the court to ask whether a child is an Indian child if it is already stated on record.

Response: The inquiry may be appropriate even if it has already been established that the child is an "Indian child" to ensure that all Tribes through which the child meets the definition of "Indian child" have been identified.

3. Treating Child as an "Indian Child" Pending Verification

Comment: Several commenters stated their support for treating a child as an Indian child pending verification under PR § 23.103(d), noting that it is a best practice to allow time for notice to the Tribe and verification from the Tribe, keeps Indian children with their families and Tribes, and helps avoid multiple placements. California Indian Legal Services noted that this approach is consistent with California law. A few commenters stated that ICWA has been viewed as the "gold standard of child-welfare practice" so there is no harm in temporarily applying ICWA standards to a child who may be Indian, even if it is ultimately determined that he or she is not. Commenters stated that this provision will help prevent the unpredictability that results where ICWA is not applied at the outset and it is determined later that ICWA applies.

Several commenters opposed the provision requiring treatment of a child as if ICWA applies. Some stated that it will result in overbroad application in violation of children's constitutional rights because, without confirmation of the political affiliation, it treats children as Indian children solely due to racial identification. A commenter noted that this requirement places a large burden on State agencies to provide active efforts for all possibly Indian children when Tribes may take months to respond to a request for verification. Another commenter stated that the provision removes any discretion from the court and eliminates its role as fact-finder because "any reason" is too broad and presumes the court is not capable of determining if the evidence is sufficient to show the child is an Indian child. One commenter suggested it will be difficult to explain to the child that he or she is being treated as an Indian child, especially when it is later discovered the child was not an Indian child.

Response: The final rule moves this provision to FR § 23.107(b) and clarifies that the trigger for treating the child as an "Indian child" is the reason to know that the child is an Indian child. This is not based on the race of the child, but rather indications that the child and her parent(s) may have a political affiliation with a Tribe. As discussed above, this requirement ensures that ICWA's requirements are followed from the early stages of a case and that harmful delays and duplication resulting from the potential late application of ICWA are avoided. If, based on feedback from the relevant Tribe(s) or other information, it turns out that the child is not an "Indian child," then the State may proceed under its usual standards.

Comment: A few commenters suggested adding an end point to when the child should no longer be treated as an Indian child, to add clarity. A few commenters noted that Tribes often fail to respond to repeated inquiries as to whether children are Tribal citizens. One of these commenters stated that the rule should require Tribes to respond and another stated that imposing

obligations on the Tribe would expand beyond the statute. A few commenters added that at some point, if the Tribe fails to respond, the court must be free to determine the child is not an Indian child.

Response: The rule requires that, if there is reason to know the child is an Indian child, the court is to treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an "Indian child." The end point would be the court's determination that the child is not an Indian child. State courts have discretion as to when and how to make this determination. If a Tribe fails to respond to multiple repeated requests for verification regarding whether a child is in fact a citizen (or a biological parent is a citizen and the child is eligible for citizenship), and the agency has repeatedly sought the assistance of BIA in contacting the Tribe, a court may make a determination regarding whether the child is an Indian child for purposes of the child-custody proceeding based on the information it has available. If new evidence later arises, the court will need to consider it and if he or she is an Indian child, ICWA applies. The Department encourages prompt responses by Tribes, and encourages courts and agencies to include enough information in the requests for verification to allow the Tribes to readily determine whether the child is a Tribal citizen (or whether the parent is a Tribal citizen and the child is eligible for citizenship).

Comment: One commenter stated that this provision requires proving a negative and that if a Tribe fails to respond to notice, continuing to treat the child as an Indian child overrules the Tribe's power to determine its own citizenship.

Response: As noted above, if a Tribe repeatedly fails to respond, a court may make a determination regarding whether the child is an Indian child based on the information it has available. Treating the child as an Indian child in the interim does not overrule the Tribe's power

to determine its citizenship. The determination of whether a child is an Indian child is made only for purposes of the particular child-custody proceeding. In addition, the Tribe remains free to respond in the affirmative or negative as to whether the child is a citizen (and as to whether the parent is a citizen and the child is eligible for citizenship).

Comment: A commenter notes that under ICWA, the burden of proof is on the party asserting ICWA to provide evidence that the child is Indian.

Response: Under the statute, ICWA requirements apply when the court and agency know or have a reason to know the child involved in the Indian child-custody proceeding is an Indian child. The applicability of ICWA can affect a State court's jurisdiction as well as the applicable law. Even if a party fails to assert that ICWA may apply, the court has a duty to inquire as to ICWA's applicability to the proceeding.

4. Verification from the Tribe

Comment: Several commenters stated that requiring States to "obtain verification" in PR § 23.107(a) is unfair because it holds the States responsible even if the Tribe fails to respond. Several commenters stated that written verification from the Tribe should not be required and the parties should be free to produce, under rules of evidence, whatever verification is available to allow the judge to determine whether the evidence suffices. One commenter stated that the requirement is unfair to Tribes because it places the obligation on the Tribe to verify, and the Tribe may lack the resources to respond to all requests for verification. A few provided alternate suggestions including requiring States to "solicit verification" or "seek verification." Another commenter suggested adding that written notice to a Tribe is not sufficient to meet the requirements, unless the notice results in verification.

Response: The final rule requires the State court to ensure the agency worked with the Tribe(s) to obtain verification, but does not require that "the agency must obtain verification," as required by the proposed rule. *See* FR § 23.107(b). It is expected that the agency would work with the Tribe(s) that the court has reason to know is/are the Indian child's Tribe to obtain verification regarding whether the child is a citizen (or a biological parent is a citizen and the child is eligible for citizenship). The Department encourages agencies to contact Tribes informally, in addition to providing written notice, to seek such verification. While written verification from the Tribe(s) is an appropriate method for such verification, other methods may be appropriate, so the final rule does not specify that the verification needs to be in writing.

Comment: A commenter stated that appearance by the Tribe's representative at a hearing should constitute verification.

Response: A Tribal representative's testimony at a hearing regarding whether the child is a citizen (or a biological parent is a citizen and the child is eligible for citizenship) is an appropriate method of verification by the Tribe.

Comment: A commenter suggested that § 23.107(a) should require that agencies provide certain information in the request for verification to allow Tribes to make a determination, including at least: (1) the name of the child, child's birthdate and birth place; (2) the names of the parents, their birthdates and birthplaces; and (3) the names of the child's grandparents, their birthdates and birthplaces, to the extent known or readily discoverable.

Response: The request for verification is a meaningful request only if it provides sufficient information to the Tribe to make the determination as to whether the child is a citizen (or the parent is a citizen and the child is eligible for citizenship). Providing as much information as possible facilitates earlier identification of an Indian child and helps prevents disruptions. FR

§ 23.111(d) includes categories of information that must be provided in the notice to a Tribe in involuntary foster-care placement or termination of parental rights proceedings. Such information may be helpful to provide for other types of proceedings to assist in verification of whether the child an Indian child.

Comment: A commenter stated that § 23.107 should be revised to state that it is never appropriate for a State court to determine the child is not Indian, if there is any reason to believe the child is Indian, without providing notice to the Tribe.

Response: The Department agrees. ICWA establishes that notice to the Tribe is required for involuntary child-custody proceedings when the court has reason to know that an Indian child is involved. *See* 25 U.S.C. 1912(a). This provision avoids a determination that a child for whom there is "reason to know" was an Indian child is not an "Indian child" without notice to the Tribe.

5. Tribe Makes the Determination as to Whether a Child is a Citizen of the Tribe

Comment: A few commenters opposed the provision at PR § 23.108 stating that the Tribe makes the determination as to whether the child is a citizen, pointing out that courts have held that the parent has the burden to prove the child is an Indian child and that if the parent fails to prove that, then the court is free to determine the child is not an Indian child.

Several commenters stated their support of the provision that the Tribe makes the determination as to citizenship. These commenters stated that the provision recognizes Tribes' exclusive authority, as sovereign governments, to determine their political membership. One commenter noted that the State has no authority to determine whether ICWA applies based on items such as whether a Tribal citizen votes or participates in Tribal activities or has a certain blood quantum, and that only the Tribe may decide who is a citizen. A commenter stated that the

emphasis should be that if a Tribe determines a child is a citizen, that determination is conclusive and binding on the State and any other entity or person.

A few commenters stated that while they support the provision, there should be a mechanism for the State court to determine the child is an Indian child if the Tribe fails to respond. One commenter suggested adding at the end of PR § 23.108(d) "provided that if the Tribe does not respond following a good faith effort to obtain verification, the court must still treat the child as an Indian child if it otherwise has reason to believe that the child may be an Indian child." Likewise, a commenter requested a reference to PR § 23.108 be added to PR § 23.107 so it would read "unless and until it is determined pursuant to PR § 23.108 that the child is not a member…" to make clear only the Tribe makes the determination.

Response: Tribes, as sovereign governments, have the exclusive authority to determine their political membership and their eligibility requirements. A Tribe is, therefore, the authoritative and best source of information regarding who is a citizen of that Tribe and who is eligible for citizenship of that Tribe. Thus, the rule defers to Tribes in making such determinations and makes clear that a court may not substitute its own determination for that of a Tribe regarding a child's citizenship or eligibility for citizenship in a Tribe.

While a Tribe is the authoritative and best source regarding Tribal citizenship information, the court must determine whether the child is an Indian child for purposes of the child-custody proceeding. That determination is intended to be based on the information provided by the Tribe, but may need to be based on other information if, for example, the Tribe(s) fail(s) to respond. For example, the final rule clarifies that a Tribal determination of citizenship or eligibility for citizenship may be reflected in a preexisting document issued by a Tribe, such as Tribal enrollment documentation.

Comment: A few commenters stated that allowing Tribes the sole authority to determine membership is unfair to those who willfully left behind Indian country. They stated that families, rather than Tribes, should have the final say on membership.

Response: Because ICWA only applies when the child is a member or when the child's parent is a member, the individual does, in fact, have the final say on membership, as Tribal membership can be renounced. *See, e.g., Means v. Navajo Nation*, 432 F.3d 924, 934 n. 68 (9th Cir. 2005) ("The authorities suggest that members of Indian tribes can renounce their membership."); *Thompson v. County of Franklin*, 180 F.R.D. 216, 225 (N.D.N.Y. 1998) (giving effect to individual's unequivocal renunciation of Tribal membership); *see, e.g.*, Fort Peck Comprehensive Code of Justice Title 4, Enrollment, sec. 217A(b) (1989) ("Any adult member of the Assiniboine and/or Sioux Tribes may apply for relinquishment of their respective tribal enrollment, at any time.").

Comment: A commenter stated that PR § 23.108 is too narrow because it fails to account for Tribes that make membership determinations based on biological grandparent membership.

Response: The final rule does not affect how Tribes determine citizenship, whether based on biological grandparent citizenship or otherwise. For the purposes of ICWA applicability, if a child is eligible for Tribal citizenship based on a grandparent's citizenship, that is not the end of the inquiry. The statute still requires that the child must either himself or herself be a citizen, or that child's parent must be a citizen, in order for the child to be an "Indian child."

Comment: One commenter requested clarification that BIA will no longer make any membership decisions in lieu of a Tribe.

Response: The rule does not provide for BIA to make determinations as to Tribal citizenship or eligibility for Tribal citizenships except as otherwise provided by Federal or Tribal

Law. BIA can help route the notice to the right place. The existing regulation at § 23.11(b) and the final regulation at FR § 23.111(e) state that, if the identity or location of the parents, Indian custodians or Tribe cannot be determined, notice must be sent to the BIA regional office. This mirrors the statutory requirement. *See* 25 U.S.C. 1912. To ensure response at the regional level, the final rule requires that notice be sent to the Regional Director and deletes the provision at § 23.11(a) requiring a copy of each notice be sent to Secretary.

Comment: A few commenters suggested strengthening this section by changing "may" to "shall" to confirm that only the Tribe may define its membership.

Response: The final rule adopts the substance of this suggestion by deleting "may" and instead providing that the Tribe "determines."

Comment: One commenter requested clarification that a child may be a member in a Tribe without necessarily being enrolled.

Response: Tribes determine their citizenship; neither the statute nor the rule address how a Tribe determines who its citizens are (by enrollment, or otherwise).

Comment: A commenter requested adding language stating that a Tribe that previously made a determination as to Tribal membership may revisit and/or correct that decision.

Response: The Tribe determines citizenship and may provide new evidence as to Tribal citizenship to the court.

Comment: One commenter stated there should be a presumed Tribe the same way there is a presumed parent because it often takes a Tribe years to recognize a child as eligible for enrollment.

Response: The rule does not include a provision establishing a presumed Tribe. ICWA establishes that a child is an "Indian child" if the child is enrolled, or if the parent is enrolled and the child is eligible for enrollment.

E. Jurisdiction: Requirement to Dismiss Action

With limited exceptions, ICWA provides for Tribal jurisdiction "exclusive as to any State" over child-custody proceedings involving an Indian child who resides or is domiciled within the reservation of such Tribe. 25 U.S.C. 1911(a). ICWA also provides for exclusive Tribal jurisdiction over an Indian child who is a ward of a Tribal court, notwithstanding the residence or domicile of the child. *Id.*

A court's subject-matter jurisdiction is essential to the exercise of judicial power, is not a subject of judicial discretion, and cannot be waived. *See, e.g., Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006). Thus, the final rule identifies the determinations that a State court must make to assess its jurisdiction. If the State court does not have jurisdiction, either because the Indian child is domiciled on a reservation, where the Tribe exercises exclusive jurisdiction over child-custody proceedings, or because the Indian child is a ward of a Tribal court, the final rule instructs the State court to notify the Tribal court of the pending dismissal, dismiss the State-court proceedings, and send all relevant information to the Tribal court. State and Tribal courts and State and Tribal child-welfare agencies are encouraged to work cooperatively to ensure that this process proceeds expeditiously and that the welfare of the Indian child is protected.

Comment: A commenter stated that the court should be required to "immediately" dismiss a proceeding under PR § 23.110 as soon as it determines it lacks jurisdiction. A few commenters requested additions to ensure that the State diligently contacts the Tribe and transfers the case in a timely manner.

Response: The final rule does not include a requirement to dismiss a case within a certain time frame because the timing may depend upon coordination with the Tribal court. *See* FR § 23.110. The final rule does add a requirement that the State must "expeditiously" notify the Tribe of a pending dismissal. The State court may also need to reach out to the Tribal court or Tribal child-welfare agency to determine whether jurisdiction over child-custody proceedings for that Tribe is otherwise vested in the State by existing Federal law. *See* 25 U.S.C. 1911(a).

Comment: A few commenters suggested revising PR § 23.110(b) to specify that the documentation the agency must submit includes "all agency documentation as well as reporter information" because a Tribal court to which a case is transferred is at a disadvantage without reporter information on key witnesses and other details.

Response: The final rule requires the court to transmit all information in its possession regarding the Indian child-custody proceeding to the Tribal court. Such information would include all the information within the court's possession regarding the Indian child-custody proceeding; the final rule adds examples for clarity. The final rule also changes "all available information" to "all information" regarding the proceeding. *See* FR § 23.110. In order to best protect the welfare of the child, State agencies may wish to share information that is not contained in the State court's records but that would assist the Tribe in understanding and meeting the Indian child's needs.

Comment: A few commenters suggested an amendment to clarify that the mandatory dismissal provisions do not apply if the State and Tribe have an agreement regarding jurisdiction because, in some cases, Tribes choose to refrain from asserting jurisdiction.

Response: The final rule adds a reference to § 1919 of the Act, which allows for Tribal-State agreements governing jurisdiction.

Comment: A commenter stated that PR § 23.110(b) would apparently preclude the State from providing safety investigative services it currently provides when a child is domiciled on reservation but located off reservation.

Response: The final rule addresses dismissals of State-court child-custody proceedings based on lack of jurisdiction. It does not affect State authority to provide safety investigative services when a child is domiciled on reservation but located off reservation.

Comment: A commenter suggested adding to PR § 23.110(c) that the State court must contact the Tribal court not only when the child has lived on a reservation, but also if the State court has reason to believe the child may be a ward of Tribal court.

Response: The final rule clarifies that the Tribe has jurisdiction, notwithstanding the Indian child's residence or domicile off reservation, if the child is a ward of the Tribal court. *See* FR § 23.110(b). The State court may need to contact the Tribal court to confirm the child's status as a ward of that court. In addition, the final rule identifies the child's status as a ward of a Tribal court as one of the "reasons to know" that the child is an Indian child, FR § 23.107(c)(5), a status which may trigger certain notice requirements. *See* FR § 23.111.

Comment: A few commenters suggested allowing an exemption for dismissal in emergency cases. These commenters stated that this exemption is necessary to ensure the safety of the child, so the State does not dismiss proceedings until the Tribe has asserted jurisdiction.

Response: FR § 23.110 includes the introductory provision "subject to § 23.113 (emergency proceedings)" to ensure that the child is not subjected to imminent physical damage or harm.

Comment: One commenter noted that if PR § 23.110(c) continues to require the State court to contact the Tribal court, then BIA should maintain a comprehensive list of Tribal courts and their contact information.

Response: If the State court does not have contact information for the Tribal court, the Tribe's designated ICWA agent may provide that information. The BIA publishes, on an annual basis, a list of contacts designated by each Tribe for receipt of ICWA notices in the Federal Register and makes the list available at www.bia.gov.

Comment: A commenter suggested BIA compile a list of which reservations are subject to a Tribe's exclusive jurisdiction for child-welfare proceedings and make this information readily available to States, to allow them to determine whether the Tribe exercises exclusive jurisdiction over a particular reservation.

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

F. Notice

The notice provisions included in section 1912(a) are one of ICWA's core procedural requirements in involuntary child-custody proceedings for protecting the rights of children, parents, Indian custodians, and Tribes. Prompt notice is necessary to ensure that parents, Indian custodians, and Tribes have the opportunity to participate in the proceeding. Without notice of the proceeding, they will not be able to exercise other rights guaranteed by ICWA, such as the right to intervene in or seek transfer of the proceedings. In addition, notice may facilitate early actions that will minimize disruptions for the children and families through, for example, enabling placement of Indian children in preferred placement homes as early as possible. It will also allow for prompt provision of Tribal resources and early transfer to Tribal courts.

In order for the recipients of a notice to be able to exercise their rights in a timely manner, the notice needs to provide sufficient information about the child, the proceeding, and the recipient's rights in the proceeding. The final rule, therefore, specifies the information to be contained in the notice. Some of the information that is required to be provided, such as identifying and Tribal enrollment information, is necessary so that that Tribes can determine whether the child is a member of the Tribe or eligible for membership. Other information, such as a copy of the petition initiating the child-custody proceeding and a description of the potential legal consequences of the proceeding, is necessary to provide the recipient with sufficient information about the proceeding to understand the background and issues that may be addressed in the proceeding and the consequences that may flow from the proceeding. Finally, other information, such as descriptions of the intervention rights and timelines, is necessary to inform the recipient of the rights that are available to the recipient.

The final rule deletes the provision PR § 23.135(a)(3) requiring notice of a change in placement. The Department, however, recommends that information about such changes regularly be provided. The statute provides rights to parents, Indian custodians and Tribes (e.g., right to intervene) and a change in circumstances resulting from a change in placement may prompt an individual or Tribe to invoke those rights, even though they did not do so before.

ICWA also provides for minimum notice periods that are designed to allow notice recipients time to evaluate the notice and prepare to participate in the proceeding. The final rule, therefore, reiterates the minimum time limits required by the Act. In many instances, however, more time may be available under State-court procedures or because of the circumstances of the particular case. The final rule, therefore, makes clear that additional time may be available.

1. Notice, Generally

Comment: Several commenters stated their support of the provision at PR § 23.111(a) clarifying what information must be included in notices and to whom notices must be sent. Several commenters noted that too often, appropriate parties are not notified of a child-custody proceeding in a timely manner. Several commenters noted the importance of rigorous notice requirements in involuntary proceedings as necessary to: facilitate parents', Indian custodians', and Tribes' participation and make available Tribal resources; facilitate placement of Indian children in preferred placement homes as early as possible and minimize the possibility that children will face a disruption in the future; and allow Tribes the opportunity to fully participate in proceedings affecting their citizens, advocate for their citizens, and transfer to Tribal courts without delay. One commenter noted that Tribes have rights to transfer and intervene that they can exercise only if they have notice of a proceeding. One commenter stated that the costs of not providing notice are great, in terms of costs to rectify removal and costs to the child in terms of trauma and loss of language and culture.

Response: The Department agrees with these comments, and has crafted the final rule to ensure complete and accurate notices of involuntary proceedings are provided in a timely manner.

Comment: A few commenters also supported the requirement in PR § 23.111(g) for a translated version of the notice or having the notice read and explained in a language understandable to the parents. These commenters stated that many Alaska Natives have limited English proficiency and that parents are often not informed in plain language of the process or their rights under ICWA. A commenter suggested this section change "should" to "shall" to require the court/agency to contact the Tribe or BIA for assistance in locating a translator or interpreter.

Response: The final rule continues to allow for a translator or interpreter, by including the requirement to provide language-access services, as governed by Title VI of the Civil Rights Act and other Federal laws. *See also* 25 CFR 23.82 (assistance in identifying language interpreters).

Comment: A few commenters opposed notice requirements in the emergency context. The Washington Department of Social and Human Services, Children's Administration, and California Department of Social Services opposed notice requirements for emergency proceedings, noting that the timelines associated with notice are unreasonable in this context. In California, for example, if the child has been removed, the detention hearing must be held by the next judicial day after the petition is filed. Requiring ICWA notice, and having to wait 10 days after the receipt of the notice, would make compliance with the detention timeframe impossible.

Response: The commenters point out a potential issue with timing of emergency removals and the section 1912(a) requirements for notice. The final rule addresses this by requiring formal notice and applicable timelines to only those placements covered by section 1912(a) of the Act and do not apply to emergency proceedings. The rule indicates, however, that the petition for emergency removal or emergency placement should include statements of any efforts made to contact the Indian child's parents or Indian custodians and Tribe. *See* FR § 23.113(c)(3), (c)(8). As discussed below, section 1922 of the Act applies in limited circumstances, for short periods of time, to ensure that ICWA's procedural and substantive provisions do not prohibit a State from removing a child under State law on an emergency basis "to prevent imminent physical damage or harm to the child." In such situations, notice should be provided as soon as possible.

Comment: A commenter noted that an issue that constantly causes delay is the Tribe failing to timely respond to notice because often there are processes that have to take place within the Tribe that prevent timely response, causing emotional and financial difficulty for all parties.

Response: Any processes that are internal to a Tribe and may delay a Tribe's response to notice are beyond the scope of this rule. In addition, the final rule may ameliorate that problem by identifying information to be provided in the notice that may allow Tribes to more readily determine the child's status.

Comment: Several commenters had additional suggestions for improving the notice requirements. For example, one commenter suggested a consistent process and format to inform Tribes of ICWA cases. Several commenters suggested adding a deadline to provide notice, such as within 15 days of when a child is removed from the home. These commenters also suggested adding a requirement for the State to prove the Tribe received notice, noting that in Alaska the mail is not always reliable.

Response: The Department is considering whether to provide a sample notice as part of updated guidelines and also encourages States to implement a consistent process and format to inform Tribes of ICWA cases. With regard to a deadline to provide notice, the rule does not establish such a deadline because the rule provision incorporates those deadlines specified by statute. *See* FR § 23.112; 25 U.S.C. 1912(a).

Comment: A few commenters suggested the rule should require States to contact Tribes by phone and email, in addition to mail, and clarify when contact less formal than registered mail is acceptable.

Response: The statute and the final rule require notice by registered or certified mail, return receipt requested. (*See* section IV.F.2 of this preamble for response to comments on registered and certified mail.) The Department encourages States to act proactively in contacting Tribes by phone, email, and through other means, in addition to sending registered or certified mail.

Comment: A commenter suggested that the rule should require notice to the putative father, if a putative father other than the alleged father becomes known, to protect the putative father's rights.

Response: The statute and regulations require notice to the parents; a "parent" includes unwed fathers that have established or acknowledged paternity. If, at any point, it is discovered that someone is a "parent," as that term is defined in the regulations, that parent is entitled to notice.

Comment: A commenter suggested incorporating Colorado's requirement for notice to be sent to the designated Tribal agent (listed in the Federal Register) or the highest Tribal official, or if neither can be determined, then to the highest Tribal court judge with a copy to the Tribe's social services department.

Response: The rule specifically addresses how to contact a Tribe at FR § 23.105, and clarifies that BIA publishes a list of Tribally designated ICWA agents who may receive notice.

Comment: A few commenters requested that BIA forward all notices it receives to the Tribe, to provide checks and balances to ensure the Tribe receives notice and because some States provide notice to BIA without contacting the Tribe.

Response: The party seeking placement is responsible for providing the Tribe with notice under the statute. *See* 25 U.S.C. 1912(a). BIA assists when there is difficulty identifying or

locating a Tribe; however, it is the responsibility of the party seeking placement to send notice directly to the appropriate Tribe(s).

Comment: A few commenters suggested revising PR § 23.111(d) to provide that the court/agency must check the Federal Register contact information for the child's Tribe and send the notice to BIA only if unable to identify the Tribe.

Response: The final rule's directions for how to contact a Tribe includes checking the Federal Register contact information. *See* FR § 23.105.

Comment: A commenter stated that the number of notices required is excessive. Another commenter stated that it is unclear whether PR § 23.111(a) requires notice only once at the initiation of the proceeding, or whether it is required for each hearing within a proceeding. A few commenters suggested requiring registered mail only for the first notice because notice for each subsequent hearing or action and all the data elements is onerous and unnecessary if the Tribe is already noticed and involved in the proceedings. Similarly, another commenter suggested that there be an exception to notice requirements if the Tribe has actual notice of the hearing, so the State does not have to unnecessarily spend additional resources.

Response: Notice of an involuntary proceeding for foster-care placement or termination of parental rights is required by section 1912 of the Act. *See* FR § 23.111(a). Each proceeding may involve more than one court hearing, but only one notice meeting the registered (or certified) mail requirements of section 1912(a) is required for each proceeding (regardless of the number of court hearings within the proceeding). *See* Section IV.C.1 ("Child-custody proceeding" Definition) of this preamble. Consistent with the statute, the final rule requires that notice be given for a termination-of-parental-rights proceeding, even if notice has previously

been given for the child's foster-care proceeding. If a Tribe intervenes or otherwise participates in a proceeding, the Tribe should receive notice of hearings in the same manner as other parties.

Comment: A commenter requested clarification that any time an agency opens an investigation or the court orders the family to engage in services to keep the child in home as part of a diversion, differential, alternative response, or other program, that agencies and courts should follow the verification and notice provisions.

Response: The statute applies to Indian child-custody proceedings. The final rule does not address in-home services that do not meet the Act's definition for "child-custody proceeding."

2. Certified Mail v. Registered Mail

Comment: A few commenters supported requiring notice in PR § 23.111 by registered mail with return receipt requested. One commenter stated that this requirement is important because it establishes proof of notice. A few suggested this requirement replace the requirement for certified mail in § 23.11(a).

Several commenters opposed the requirement for registered mail with return receipt. These commenters noted issues with registered mail with return receipt requested that undermine ICWA compliance: specifically, that registered mail with return receipt requested is approximately three times more costly, and that registered mail is less reliable as timely notification. One commenter noted that, in 1994, BIA considered requiring registered mail with return receipt requested but ultimately rejected it because it determined it undermined the purpose of ICWA notice. A few commenters also stated that registered mail requires the individual to pick up the mail from the postal service whereas certified mail is in-person delivery with a sign-off; and that registered mail can result in delays because only the person whose name

exactly matches the addressee can pick up the mail, and if the person is not present the mail is sent back to the sender.

Response: The final rule requires either registered mail with return receipt requested or certified mail with return receipt requested. Both types of mail provide evidence of delivery with the return receipt. *See* FR § 23.111. As the commenters detail, there is no clear benefit of requiring registered mail over certified mail, because there is no practical difference between the two that impacts any of the interests that ICWA protects. Registered mail offers the added feature of a chain of custody while in transit, but this chain of custody is not necessary to effectuate notice under ICWA and adds delay. In terms of cost and timeliness, certified mail provides benefits over registered mail in that certified mail is less expensive and enables notice more quickly.

Comment: Several commenters opposed the provision stating that personal service may not substitute for registered mail return receipt requested. These commenters stated that personal service is the best guarantee of receipt. Several also stated that actual notice should be a substitute for registered mail.

Response: If State law requires actual notice or personal service, that may be a higher standard for protection of the rights of the parent or Indian custodian of an Indian child than is provided for in ICWA. In that case, meeting that higher standard would be required. *See* 25 U.S.C. 1921.

Comment: One commenter suggested requiring that the postal receipt be filed with the court, to ensure that service is completed before any hearings are held.

Response: Maintaining documentation of notice is important; as courts have emphasized, the “filing of proof of service in the trial court's file would be the most efficient way of meeting

[the] burden of proof" in proving notice. *See In re E.S.*, 964 P.2d 404, 411 (Wash. Ct. App. 1998). The rule requires the court to ensure this documentation is in the record. *See* FR § 23.111(a)(2).

3. Contents of Notice

Comment: Several commenters stated that the notice must contain the names and birthdates of the child's parents for the notice to be useful for the Tribe to determine whether the child is a member or if the parent is a member and the child is eligible for membership. A commenter stated that notices seldom include the father's name but it is necessary to determine if the child is a member. A few of these stated that the rule should also require including the names and birthdates and birthplaces of the child's grandparents to the extent known or readily discoverable. Another commenter suggested the rule require including maiden names or prior names or aliases. Several of these commenters noted that the more information that is provided to Tribes, the more easily the responding Tribes can verify membership or eligibility for membership.

Response: The final rule includes the requirement for the parents' names (including any known maiden or former names or aliases), birthplaces, and birthdates and as much information as is known regarding the child's other direct lineal ancestors. *See* FR § 23.111(d)(2). This information was required under the current § 23.11(d)(3), which the new rule is replacing.

Comment: A few commenters stated that the rule should provide consequences if the notice fails to include the necessary information, such as invalidating State actions or providing a basis for dismissal.

Response: The rule recognizes the importance of providing meaningful notice to meet the goals of the statute. The statute provides that certain parties may seek to invalidate actions based

on ICWA violations, including notice violations. *See* 25 U.S.C. 1914; FR § 23.137. In addition, State courts may also make additional determinations imposing consequences for failure to provide meaningful notice.

Comment: One commenter stated that it is problematic for § 23.111 to require a copy of the petition be provided with the notice because it contains confidential information about the children and parents and the notice may be sent to Tribes that ultimately have no affiliation.

Response: The final rule continues to require a copy of the petition, as the petition contains important information about the proceeding and the child and parties involved. This requirement was required under the former rule at 25 CFR 23.11(d)(4), which this rule is replacing. While it is true that a petition may contain confidential information, providing a copy of the petition with notice to Tribes is a government-to-government exchange of information necessary for the government agencies' performance of duties. Tribes are often treated like Federal agencies for the purposes of exchange of confidential information in performance of governmental duties. *See, e.g.*, Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. 3205 (2012); Family Rights and Education Protection Act, 20 U.S.C. 1232(g) (2012). The substance of the petition is necessary to provide sufficient information to allow the parents, Indian custodian and Tribes to effectively participate in the hearing.

Comment: A few commenters supported PR § 23.111(c)'s requirement for the notice to contain a statement that counsel will be appointed to represent an indigent parent or Indian custodian, but opposed the qualification "where authorized by State law." These commenters stated that the statute does not include the qualification "where authorized by State law."

Response: The statute provides indigent parents/Indian custodians the right to counsel. *See* 25 U.S.C. 1912(b). The final rule restates this right, and deletes the provision "where

authorized by State law" because the statute establishes that the right exists even if State law does not provide for such court-appointed counsel. *See* FR § 23.111(d).

Comment: One commenter stated that where a State appoints counsel because the parents or Indian custodians cannot afford one, at PR § 23.111(c)(4)(iv), that the counsel must represent the party for the entirety of the case to ensure parents' rights are addressed consistently throughout the case rather than appointing different representatives at each stage.

Response: While it is a recommended practice to appoint the same counsel for the entirety of the case (throughout all proceedings), the final rule does not require a single counsel for the duration of a case.

4. Notice of Change in Status

Comment: A State agency commented that requiring notice of a change in placement, as under PR § 23.135, will create additional workload because the notice has to include information about the right to petition for return of the child, which contemplates that the notice must be in writing. This commenter stated that the section should be amended to allow for notice by whatever means is customary to the Tribe that is actively participating and to recognize that confidential information cannot be shared.

Response: The final rule deletes the provision PR § 23.135(a)(3) requiring notice of a change in placement. The Department, however, recommends that information about such changes regularly be provided. The statute provides rights to parents, Indian custodians and Tribes (e.g., right to intervene) and a change in circumstances resulting from a change in placement may prompt an individual or Tribe to invoke those rights, even though they did not do so before.

Comment: A commenter opposed the requirement in PR § 23.135 to provide notice to biological parents whenever the child's adoption is vacated or set aside or the adoptive parents voluntarily consent to termination of parental rights. According to the commenter, this provision violates confidentiality because, at that point, the biological parent has no right to notification about the child.

Response: The final rule continues to use "biological parent" with regard to notice that a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child because the statute provides the biological parent or prior Indian custodian certain rights if the adoption decree is vacated or set aside. *See* 25 U.S.C. 1916(a); FR § 23.139.

Comment: A Tribal commenter requested adding a requirement for the State to notify the Tribe if the child is placed in an approved adoptive placement or with a placement that intends to adopt the child.

Response: The statute requires notice of involuntary proceedings for foster-care placement or termination of parental rights. *See* 25 U.S.C. 1912(a). There is no statutory authority to require notice if a foster family forms an intention to adopt that Indian child or is generally designated an "approved adoptive placement" in addition to being a foster placement. It is a best practice for the State agency to inform the Tribe if a child's permanency plan or a concurrent plan changes, such as from foster care to adoption.

Comment: A commenter requested deletion of the provision at PR § 23.135(c) allowing a parent or Indian custodian to waive the right to notice of a change in an adopted child's status because parents may sign without a full understanding of the legal right they are waiving, especially if the waiver is presented with other documents. Another commenter supported the

provision but suggested adding safeguards because a waiver by vulnerable parents with issues that have given rise to an involuntary proceeding is particularly suspect, and parents or Indian custodians in other cases may have been pressured to waive notice. This commenter suggested that any waiver should be explicitly confirmed before the judge with the consequences explained as part of the section 1913 process, as well as the parent's right to withdraw the waiver and how that can be done. Commenters also stated the court should be required to maintain this information in a database and inform waiving parents that they can obtain that information at any time, notwithstanding the waiver, merely by contacting the court through a clearly defined and simple process that does not require legal counsel.

Response: The statute does not specify that parents or Indian custodians may waive their right to notice if an adoption fails, but there is no prohibition on parents or Indian custodians waiving the right to future notice. Given that parents and Indian custodians may choose to waive their right to notice of failed adoptions, the rule addresses this circumstance to provide safeguards on any such waiver and ensure the right to revoke the waiver. The final rule adds several of the suggested safeguards to ensure ICWA's intent is met. The final rule does not add a requirement for the court to maintain information on the waiver in its database, but does provide that the waiver may be revoked at any time by filing a notice of revocation. *See* FR § 23.139.

Comment: A few commenters stated that the provision in PR § 23.135(c) allowing notice to be waived should not apply to foster-care placement changes where parental rights have not been terminated.

Response: FR § 23.139 limits waiver of notice to two situations: where adoption of an Indian child is vacated or set aside and where the adoptive parents voluntarily terminate their

parental rights. In those cases, the biological parent or prior Indian custodian may waive notice of these actions. Neither of those two situations involves foster-care placements.

Comment: A commenter suggested PR § 23.135(c) should clarify that only "completed proceedings" will not be affected by a revocation of a waiver of right to notice.

Response: The final rule specifies that a waiver of right to notice will not affect completed proceedings. *See* FR § 23.139(c). This clarifies that notice of proceedings that are in progress when the waiver is executed and filed may be affected.

5. Notice to More than One Tribe

Comment: A commenter stated that PR § 23.109(b) should be mandatory, such that if there is only one Tribe in which the child is a member or eligible for membership, that Tribe must be designated as the child's Tribe.

Response: The final rule includes this suggested change. *See* FR § 23.109(a).

Comment: A commenter stated that PR § 23.109(d), allowing one Tribe to authorize another to represent it, should require that the authorization be documented by filing the authorization in court to establish that the Tribe was properly notified.

Response: Nothing in the statute either allows or prohibits one Tribe from authorizing another to represent it. The final rule therefore deletes the provision.

Comment: Several commenters stated that all Tribes should be encouraged to participate in Indian custody proceedings where the child is a member of, or eligible for membership in, more than one Tribe. These Tribes point out that the child and family will benefit from the involvement of all the Tribes and will provide more Tribal resources to increase the likelihood of preferred placement.

Response: The statute establishes one Tribe as the "Indian child's Tribe." *See* 25 U.S.C. 1903(5). As a best practice, other Tribes that are interested in the proceeding may coordinate with the Tribe designated as the "Indian child's Tribe" or with State agencies to ensure involvement and provide Tribal resources to increase the likelihood of a preferred placement.

Comment: A few commented on who makes the determination as to the designation of the Tribe. Several commenters opposed having the State select the Tribe with which the child has more significant contacts. Others recommended clarifying that the court, rather than the agency, makes the determination as to which Tribe should be designated as the child's Tribe.

Response: The statute establishes that the Indian child's Tribe is the Tribe with which the Indian child has more significant contacts. *See* 25 U.S.C. 1903(5). The final rule clarifies that the court must first provide the opportunity for the Tribes to make that determination, but that if the Tribes are unable to agree, the State court must designate, for the purposes of ICWA, which is the child's Tribe for this limited purpose. *See* FR § 23.109(c). In situations where the Tribes are unable to agree, it is a best practice to notify the Tribes and conduct a hearing regarding designation of the Indian child's Tribe.

Comment: A few commenters stated that the preference of the parents should be determinative, rather than the court's determination.

Response: The Act provides that the child's Tribe is the Tribe with which the Indian child has the more significant contacts. *See* 25 U.S.C. 1903(5). The rule provides that the State court may consider the parent's preferences for which Tribe should be designated the Indian child's Tribe as a factor in determining with which Tribe the child is more significant contacts. *See* FR § 23.109(c).

Comment: Several commented on the factors for determining with which Tribe the child has more significant contacts and suggested the list at PR § 23.109(c)(1) should be combined with the list at PR § 23.109(c)(2)(ii). Another commenter suggested adding examples of "more significant contacts" for determining which Tribe is the child's Tribe, to include "relative or extended family contacts, kinship contacts, trips home for cultural events, funerals, or similar events."

Response: The final rule combines the two proposed lists to establish one list of factors indicative of significant contacts because the court is making the same determination on "more significant contacts" in both provisions of the proposed rule. The proposed lists varied slightly from each other, so the final list reconciles them in two ways: first, by including the preferences of parents, rather than both parents and extended family members who may become placements, because that would require speculation about prospective placements that is not directly relevant to the question of which Tribe the child has more significant contacts; and second, by deleting "availability of placements" as a factor, for the reason discussed below. *See* FR § 23.109(c).

Comment: A few commented on inclusion of the availability of placements in the list of factors. One stated that inclusion of this factor is wise as long as courts do not question the suitability of placements. Another stated that it should not be included as a factor because it has nothing to do with the contact the child has had with the Tribe.

Response: The final rule deletes this factor because it is not relevant to the question of with which Tribe the child has more significant contacts.

Comment: One commenter opposed the requirement to notify "all Tribes" that a determination of the child's Tribe has been made because it would require another round of

notices to Tribes that already determined the child is not theirs and another Tribe would be involved.

Response: The final rule does not include the proposed requirement to notify all Tribes of a determination of the child's Tribe.

6. Notice for Each Proceeding

Comment: A commenter stated that the notice should list the date, time, and location of the hearing, the issue to be heard, and the consequences of any requested ruling.

Response: The final rule lists required information in the notice, including the date, time, and location of the hearing if the hearing has been scheduled at the time notice is sent. The final rule requires the notice to include contact information for the court to ensure the recipient may contact the court for information on any hearings and requires the notice to state the potential legal consequences of the proceeding. *See* § 23.111(d)(6)(vii)-(viii).

Comment: A commenter requested clarification that PR § 23.111(h) does not allow parties to waive timely notice.

Response: The statute provides that no placement shall occur if the requirements for notice, including the timing of the notice, are not met. *See* 25 U.S.C. 1912(a). These statutory provisions are implemented at FR § 23.112(a).

7. Notice in Interstate Placements

Comment: A few commenters stated their support of PR § 23.111(i), which requires both the originating and receiving States to provide notice if a child is transferred interstate. Some of these commenters referred to the facts underlying the *Adoptive Couple v. Baby Girl* case and asserted that this provision would help prevent a similar situation.

A few commenters opposed this provision. Most of these commenters suggested the sending State should be responsible for providing notice because the receiving State would not be aware of the placement and have no court case or opportunity to provide notice. Another stated that notice should be required only in the State where the court proceeding is pending. One stated that this requirement will result in duplicative notices and cause potential confusion. A few commenters stated that this requirement would strain already overburdened resources.

Response: The final rule deletes this provision, as this subject is not directly addressed in the statute. However, BIA encourages such notification as a recommended practice.

8. Notice in Voluntary Proceedings

Comments regarding notice in voluntary proceedings are addressed in Section IV.L.2 of this preamble, below.

G. Active Efforts

ICWA requires that any party seeking to effect a foster-care placement of, or termination of parental rights to, an Indian child must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. 25 U.S.C. 1912(d). This is one of the key provisions in ICWA designed to address Congress' finding that the removal of many Indian children was unwarranted. 25 U.S.C. 1901(4). The active-efforts requirement helps protect against these unwarranted removals by ensuring that parents who are or may readily become fit parents are provided with services necessary to retain or regain custody of their child.

The active-efforts requirement embodies the best practice for all child-welfare proceedings, not just those involving an Indian child. Natural parents possess a "fundamental liberty interest" in the care, custody, and management of their child, and this interest "does not

evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). And until a parent has been proven to be unfit, the child shares with the parent "a vital interest in preventing erroneous termination of their natural relationship." *Id.* at 760. For proceedings involving an Indian child, the active-efforts requirement helps protect these interests.

The Department finds compelling the views of child-welfare specialists who opine that "the cornerstone of an effective child-welfare system is the presumption that children are best served by supporting and encouraging their relationship with fit birth parents who are interested in raising them and are able to do so safely." *See, e.g.*, Comments of Casey Family Programs, et al., at 1 (comments submitted on behalf of a group of national organizations, associations, and professors); *see also* Brief of Casey Family Programs, et al., *Adoptive Couple v. Baby Girl*, at 7. These specialists note that "[a]mong the most important components of a sound child-welfare system is the requirement for agencies and others responsible for children's well-being to be vigilant in striving to keep children in their families; to remove them only when necessary to protect them from serious harm; and to work diligently to assist families with overcoming obstacles to children's safe return promptly." Comments of Casey Family Programs, et al., at 3; *see also* National Council of Juvenile and Family Court Judges, *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* 5 (2000). Congress has recognized this principle in other contexts as well. *See* 42 U.S.C. 671 (requiring State plan for foster care and adoption assistance to provide that reasonable efforts will be made to prevent or eliminate the need for removal of the child from his home and to make it possible for the child to return to his home.)

The active-efforts requirement in ICWA reflects Congress' recognition of the particular history of the treatment of Indian children and families, and the need to establish a Federal standard for efforts to maintain Indian families. After extensive hearings in the 1970s, Congress recognized that the social conditions, including poverty, facing many Tribes and Indian people—some brought about or exacerbated by Federal policies—were often cited as a reason for the removal of children by State and private agencies. H.R. Rep. No. 95-1386, at 12. Congress found that "agencies of government often fail to recognize immediate, practical means to reduce the incidence of neglect or separation." *Id.* ICWA's active-efforts requirement is one critical tool to ensure that State actors identify these "means to reduce the incidence of neglect or separation," and provide necessary services to parents of Indian children.

Congress also found that "our national attitudes as reflected in long-established Federal policy and from arbitrary acts of Government" had helped produce "cultural disorientation, a [] sense of powerlessness, []loss of self-esteem" that affected the ability of some Indian parents to effectively care for their children. *Id.* The active-efforts requirement is designed to address this problem where possible, by requiring appropriate services be provided to parents to help them attain the necessary parenting skills or fitness.

Congress also found that States cited alcohol abuse as a frequent justification for removing Indian children from their parents, but failed to accurately assess whether the parent's alcohol use caused actual physical or emotional harm. *Id.* at 10. Congress found that different standards for alcohol use were applied in Indian versus non-Indian homes. *Id.* The active-efforts requirement helps ensure that alcohol, drug, or other rehabilitative services are provided to an Indian child's parent where appropriate, to avoid unnecessary removals or termination of parental rights.

Congress was also clear that it did not feel existing State laws were adequately protective. The House Report accompanying ICWA stated that "[t]he committee is advised that most State laws require public or private agencies involved in child placements to resort to remedial measures prior to initiating placement or termination proceedings, but that these services are rarely provided. This subsection imposes a Federal requirement in that regard with respect to Indian children and families." H.R. Rep. No. 95-1386, at 22.

The Department recognizes that both laws and child-welfare practices in many States may have changed since the passage of ICWA. However, ICWA's active-efforts requirement continues to provide a critical protection against the removal of an Indian child from a fit and loving parent.

The final rule removes PR 23.106 to better reflect 25 U.S.C. 1912(d)'s focus on State court actions and predicate findings.

1. Applicability of Active Efforts

Comment: A few commenters pointed out that the Act requires "active efforts" only to provide remedial services and rehabilitative programs (*see* 25 U.S.C. 1912), while the proposed rule would require active efforts to prevent removal (PR § 23.106), to work with Tribes to verify Tribal membership (PR § 23.107(b)(2)), to assist parents in obtaining the return of their children following emergency removal (PR § 23.113(f)(9)), to avoid removal (PR § 23.120(a)), and to find placements (PR § 23.131(c)(4)).

Response: To avoid confusion, the final rule uses the term "active efforts" only in conjunction with the requirements in 25 U.S.C. 1912. The final rule deletes the provisions at PR § 23.106 to better reflect 25 U.S.C. 1912(d)'s focus on State-court actions. In FR § 23.107, the final rule changes the terminology with regard to working with Tribes to verify citizenship, to

now require "diligence" in working with Tribes to verify a child's Tribal citizenship. The Department agrees with the commenter that this is not clearly within section 1912(d). The term "active efforts" has also been removed from what was PR 23.131(c)(4) (regarding placement preferences) to avoid confusion; FR § 23.132(c)(5) now requires that a "diligent search" be conducted to find suitable placements meeting the preference criteria before a court may find good cause to deviate from the statutory preferences.

Comment: A commenter suggested addressing whether there is an exception to requiring active efforts when there is "shocking" or "heinous" physical or sexual abuse or when active efforts were previously provided to the family and the same conditions exist.

Response: The "active efforts" requirement is a vital part of ICWA's statutory scheme, and the statute does not contain any exceptions. The final rule's definition of "active efforts," however, specifies that what constitutes sufficient active efforts may be based on the facts and circumstances of a particular case. This may include, for example, consideration of whether circumstances exist that other Federal laws have recognized as excusing the mandatory requirement for reasonable efforts to preserve and reunify families. *See e.g.*, 42 U.S.C. 671(a)(15)(D) (reasonable efforts not required where a court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances, or committed murder or other specified felonies). Of course, even in the case where one parent has severely abused a child, the court should consider whether active efforts could permit reunification of the Indian child with a non-abusive parent.

a. Active Efforts to Verify Child's Tribe

Comment: Two commenters supported the proposed requirement at PR § 23.107(b)(2) for active efforts to determine a child's Tribal membership, as one stated that State workers

frequently rely on whether the child "does or does not look Indian." Several commenters suggested using a term other than "active efforts" because Congress's use of the term applied only to providing remedial services and rehabilitative programs. One commenter suggested instead using "due diligence" or "continuing efforts."

Response: As mentioned above, the final rule uses the term "diligent" rather than "active efforts" for verification of Tribal citizenship. *See* FR § 23.107(b)(1).

b. Active Efforts to Avoid Breakup in Emergency Proceedings

Comment: One commenter stated that the requirement for active efforts to begin immediately, even in an emergency, is supported by Oklahoma case law.

Response: The Act does not explicitly apply the active-efforts requirement to emergency proceedings. For this reason, the final rule does not require active efforts prior to an emergency removal or emergency placement.

However, the statute requires a showing of active efforts prior to a foster-care placement. *See* 25 U.S.C. 1912(d). In many cases, this means that active efforts must commence at the earliest stages of a proceeding.

c. Active Efforts to Avoid the Need to Remove the Child

Comment: A few commenters supported the provisions in PR § 23.120 clarifying the requirement for active efforts to avoid the need to remove the Indian child. A few commenters opposed requiring State authorities to demonstrate that active efforts were provided as a precondition for commencing a proceeding because it could subject Indian children to continued harm. A commenter stated that there may be situations where a child is removed for emergency safety reasons (e.g., placed in police protective custody or hospital hold) and the agency may not have the opportunity to make any efforts to prevent removal.

Response: Nothing in the final rule prevents the removal of a child to prevent imminent physical damage or harm. These removals are addressed by the emergency proceeding provisions of the statute and final rule, as well as State law. The statute requires, however, that active efforts must be demonstrated prior to a foster-care placement or termination of parental rights. *See* 25 U.S.C. 1912(d). The ultimate goal is to prevent the long-term breakup of the Indian child's family.

Comment: A few commenters stated that the active-efforts requirement is inapplicable if there is no existing Indian family to break up, citing *Adoptive Couple v. Baby Girl.* Another commenter suggested addressing the holding in *Adoptive Couple v. Baby Girl* by adding "except in the case of a private adoption where the father abandoned the child (having knowledge of the pregnancy) and never had previous legal or physical custody."

Response: As stated earlier in this preamble, there is not an "existing Indian family" exception to ICWA. Under the facts of *Adoptive Couple v. Baby Girl*, the Court held that the requirements in 25 U.S.C. 1912(d) did not apply to a parent that abandoned the child prior to birth and never had legal or physical custody of the child. *See Adoptive Couple*, 133 S. Ct. at 2562-63.

Comment: A few commenters stated that PR § 23.120(a) implies that active efforts are required only to the point a proceeding commences, and requested clarification that the requirement continues during the entirety of the proceeding.

Response: The final rule revises this provision to clarify that the court will review whether active efforts have been made, and that those efforts were unsuccessful, whenever a foster-care placement or termination of parental rights occurs. The court should not rely on past findings regarding the sufficiency of active efforts, but rather should routinely ask as part of a

foster-care or termination-of-parental-rights proceeding whether circumstances have changed and whether additional active efforts have been or should be provided.

Comment: A commenter suggested clarifying in PR § 23.120(a) that the active-efforts requirements apply to parents of an Indian child, not simply to Indian parents.

Response: ICWA applies when an Indian child is the subject of a child-custody proceeding, and the active-efforts requirement of 25 U.S.C. 1912(d) applies to the foster-care placement or termination of parental rights to an Indian child. The child's family is an "Indian family" because the child meets the definition of an "Indian child." As such, active efforts are required to prevent the breakup of the Indian child's family, regardless of whether individual members of the family are themselves Indian.

Comment: A commenter stated that the requirement in PR § 23.120(b) to use the available resources of the extended family, the child's Indian Tribe, Indian social service agencies and individual Indian caregivers should not be mandatory. This commenter stated that practically, it may not be possible to use the available resources listed.

Response: The final rule removes this provision from § 23.120(b) because the concept is already included in the definition of "active efforts," which provides that these resources should be used "to the maximum extent possible" (as the proposed rule did at PR § 23.120(b)). *See* FR § 23.2.

d. Active Efforts to Establish Paternity

Comment: Several commenters suggested adding efforts to establish paternity as an example of active efforts. These commenters asserted that when the father is a Tribal citizen, such acknowledgment or establishment is critical to determining whether the Act applies and is necessary to prevent the breakup of the Indian family.

Response: The rule does not require active efforts to establish paternity because the statute uses the term "active efforts" only with regard to providing remedial services and rehabilitative programs to prevent the breakup of the Indian family. *See* 25 U.S.C. 1912(d).

e. Active Efforts to Apply for Tribal Membership

Comment: Two commenters suggested including efforts to apply for Tribal membership for the child as an example of active efforts because the child may obtain Tribal benefits and enrollment may be more difficult if family reunification ultimately fails.

Response: The rule does not include a requirement to conduct active efforts to apply for Tribal citizenship for the child. The Act requires active efforts to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family. This does not clearly encompass active efforts to obtain Tribal citizenship for the child. In any particular case, however, it may be appropriate to seek Tribal citizenship for the child, as this may make more services and programs available to the child. Securing Tribal citizenship may also have long-term benefits for an Indian child, including access to programs, services, benefits, cultural connections, and political rights in the Tribe. It may be appropriate, for example, to seek Tribal citizenship where it is apparent that the child or its biological parent would become enrolled in the Tribe during the course of the proceedings, thereby aiding in ICWA's efficient administration.

f. Active Efforts to Identify Preferred Placements

Comment: A few commenters suggested requiring active efforts to identify families that meet the placement preferences. One noted that California law requires this.

Response: The rule does not require active efforts to identify preferred placements because the statute uses the term "active efforts" only with regard to providing remedial services

and rehabilitative programs to prevent the breakup of the Indian family. *See* 25 U.S.C. 1912(d). It is, however, a recommended practice and the Department encourages other States to follow California's leadership in this regard. As discussed further below at Section IV.M.5, the final rule permits a finding of "good cause" to depart from the placement preferences based on the unavailability of a suitable placement only where the court finds that a "diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located." FR § 23.132(c)(5).

2. Timing of Active Efforts

a. Active Efforts Begin Immediately and During Investigation

Comment: Several commenters expressed their support of the proposed provision at PR § 23.106(a) stating that the requirement for active efforts begins the moment the possibility arises that a child may need to be removed, and as soon as an investigation is opened. A commenter stated that this requirement will help prevent removals and promptly reunify children if placements are needed. Another commenter stated that early, concentrated efforts on the part of professionals to achieve family preservation and permanency are part of what has led to declining foster care populations. A commenter suggested further defining when active efforts are required, because some counties defer the requirement until after detention and jurisdictional hearings, rather than when removal first occurs. Another commenter suggested clarifying that active efforts must be initiated at the "crucial moment of considered intent to remove the child from the family." Another suggested that active efforts are required at the moment of the agency's first contact with the family.

A few commenters stated that BIA exceeds its authority in requiring an agency to conduct active efforts while investigating Indian status, because it is not yet clear whether the

Act applies. Another commenter suggested narrowing the trigger point for active efforts to be when at least two of the four types of placements described in the Act are planned. One of these commenters stated that the requirement to engage in active efforts immediately will unduly increase the burden on State agencies by requiring active efforts in the vast majority of referrals, and that this requirement is inconsistent with ICWA and case law.

Response: The final rule deletes the proposed provision, PR § 23.106, directed at agencies providing active efforts because 25 U.S.C. 1912(d) is directed at what State courts must find prior to making certain determinations in Indian child-custody proceedings. Nevertheless, the statute and final rule provide that the State court must conclude that active efforts were provided and were unsuccessful prior to ordering an involuntary foster-care placement or termination of parental rights. *See* 25 U.S.C. 1912(d); FR § 23.120. Thus, if a detention, jurisdiction, or disposition hearing in an involuntary child-custody proceeding includes a judicial determination that the Indian child must be placed in or remain in foster care, the court must first be satisfied that the active-efforts requirement has been met. In order to satisfy this requirement, active efforts should be provided at the earliest point possible.

Comment: A commenter suggested clarifying that active efforts should continue even after the return of a child to parental custody, if necessary to prevent the future breakup of the Indian family.

Response: If a child is returned to parental custody and there is no pending child-custody proceeding, then ICWA no longer applies. If a child-custody proceeding is ongoing, even after return of the child, then active efforts would be required before there may be a subsequent foster-care placement or termination of parental rights.

Comment: A few commenters suggested adding that active efforts are required in voluntary service agreements and differential/alternative response programs to prevent removal.

Response: Voluntary service agreements and differential/alternative response programs may help prevent removal of an Indian child; however, these are not "child-custody proceedings" within the scope of the Act.

b. Time Limits for Active Efforts

Comment: Several commenters recommended stating that there are no time limits on active efforts. A few commenters requested adding a timeline for active efforts; one of these suggested the timeline should establish that active efforts terminate at termination of parental rights and adoption.

Response: The final rule does not provide any time limits on active efforts. A State court must make a finding that active efforts were provided in order to make a foster-care placement or order termination of parental rights to an Indian child, so the active-efforts requirement must be satisfied as of each of those determinations. The requirement to conduct active efforts necessarily ends at termination of parental rights because, at that point, there is no service or program that would prevent the breakup of the Indian family.

3. Documentation of Active Efforts

Comment: Several commenters supported the proposed requirement that State courts document that the agency used active efforts. Several also requested clarifying that documentation of active efforts must be made part of the court record.

Response: The final rule continues to provide that documentation of active efforts must be part of the court record. *See* FR § 23.120(b). The active-efforts requirement is a key protection provided by ICWA, and it is important that compliance with the requirement is

documented in the court record. 25 U.S.C. 1914 permits an Indian child, parent, Indian custodian, or Tribe to petition a court of competent jurisdiction to invalidate a foster-care placement or termination of parental rights upon a showing that the action violated section 1912 of the statute. The parties to the proceeding also have appeal rights under State law. In order to effectively exercise these rights, there must be a record of the basis for the court's decision with regard to active efforts and other ICWA requirements.

Comment: Some commenters suggested adding a requirement that agencies' documentation of the active efforts be provided to the Tribe and all parties involved as well.

Response: The final rule requires that active efforts be documented in detail in the record, which the parties to the case should have access to. *See* FR §§ 23.120(b), 23.134.

Comment: Commenters also suggested requiring the court to address active efforts at each hearing.

Response: The final rule reflects that the court must conclude that active efforts were made prior to ordering foster-care placement or termination of parental rights, but does not require such a finding at each hearing. *See* FR § 23.120. It is recommended practice for a court to inquire about active efforts at every court hearing and actively monitor the agency's progress towards complying with the active efforts requirement. This will help avoid unnecessary delays in achieving reunification with the parent, or other permanency for the child.

4. Other Suggested Edits for Active Efforts

Comment: A few commenters suggested adding a requirement that State courts consult with Tribes about appropriate active efforts and actual performance of active efforts.

Response: The definition of "active efforts" includes working in partnership with the Indian child's Tribe to the maximum extent possible. *See* FR § 23.2.

Comment: A commenter recommended establishing that the standard of proof to make a finding of "active efforts" is the same standard of proof for the underlying proceeding (e.g., clear and convincing evidence for foster-care proceedings and beyond a reasonable doubt for termination-of-parental-rights proceedings).

Response: The Department declines to establish a uniform standard of proof on this issue in the final rule, but will continue to evaluate this issue for consideration in any future rulemakings.

H. Emergency Proceedings

The provisions concerning jurisdiction over Indian child-custody proceedings are "[a]t the heart of the ICWA," with the statute providing that Tribes have exclusive jurisdiction over some child-custody proceedings and presumptive jurisdiction over others. *Holyfield,* 490 U.S. at 36. Recognizing, however, that a Tribe may not always be able to take swift action to exercise its jurisdiction, Congress authorized States to take temporary emergency action. Specifically, section 1922 of ICWA was designed to "permit, under applicable State law, the emergency removal of an Indian child from his parent or Indian custodian or emergency placement of such child in order to prevent imminent physical harm to the child notwithstanding the provisions of" ICWA. H.R. Rep. No. 95-1386, at 25; 25 U.S.C. 1922.

Congress, however, imposed strict limitations on this emergency authority, requiring that the emergency proceeding terminates as soon as it is no longer required. ICWA requires that State officials "insure" that Indian children are returned home (or transferred to their Tribe's jurisdiction) as soon as the threat of imminent physical damage or harm has ended, or that State officials "expeditiously" initiate a child-custody proceeding subject to all ICWA protections. 25

U.S.C. 1922. Thus the rule emphasizes that an emergency proceeding pursuant to section 1922 needs to be as short as possible and includes provisions that are designed to achieve that result.

In addition to requiring that any emergency proceeding be as short as possible, the rule places a presumptive outer bound on the length of such emergency proceeding. The final rule provides that an emergency proceeding for an Indian child should not be continued for more than 30 days unless the court makes specific findings. These provisions are included because, unless there is some kind of time limit on the length of an emergency proceeding, the safeguards of the Act could be evaded by use of long-term emergency proceedings. An unbounded use of section 1922's emergency proceeding authority would thwart Congress's intent—reflected in section 1922's immediate termination provisions—to strictly constrain State emergency authority to the minimum time necessary to prevent imminent physical damage or harm to the Indian child.

The Department believes, based on its review of comments and its own understanding of emergency proceedings, that a presumptive 30-day limit on the use of the emergency proceeding authority in section 1922 is appropriate. Even if a safe return of the child to her parent or custodian is not possible in that time frame, it is unlikely that a court should need longer than 30 days to either transfer jurisdiction of the child's case to her Tribe or to require the initiation of a child-custody proceeding, with the attendant ICWA protections. A court should be able to accomplish one of those tasks within 30 days.

Should the court need the emergency proceeding of an Indian child to last longer than 30 days, however, it may extend the emergency proceeding if it makes specific findings. *See* FR § 23.113(e). The final rule tailors those findings more closely to the statutory requirements of section 1922 than did the draft rule. A court may extend an emergency proceeding only if it makes the following determinations: 1) the child still faces imminent physical damage or harm if

returned to the parent or Indian custodian, 2) the court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian Tribe, and 3) it has not been possible to initiate an ICWA child-custody proceeding. *Id.* Allowing a court to extend an emergency proceeding if it makes those findings provides appropriate flexibility for a court that finds itself facing what the Department expects should be unusual circumstances.

A number of commenters expressed concerns regarding the requirement that the emergency removal or placement must terminate when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child. These comments assume that the statutory mandate requiring the termination of the emergency proceeding means that the actual placement of the child must change. That is not necessarily the case. If an Indian child can be safely returned to a parent, the statute requires this (as do many State laws). In this circumstance, the State agency may still initiate a child-custody proceeding, if circumstances warrant. But, if the child cannot be safely returned to the parents or custodian, the child must either be transferred to the jurisdiction of the appropriate Indian Tribe, or the State must initiate a child-custody proceeding. Under this scenario, the child may end up staying in the same placement, but such placement will not be under the emergency proceeding provisions authorized by section 1922. Instead, that placement would need to be pursuant to Tribal law (if the child is transferred to the jurisdiction of the Tribe) or comply with the relevant ICWA statutory and rule provisions for a child-custody proceeding (if the State retains jurisdiction).

1. Standard of Evidence for Emergency Proceedings

See also comments and responses above regarding the definition of "imminent physical damage or harm."

Comment: Several commenters opposed the proposed regulation's standard that emergency removal is necessary to prevent "imminent physical damage or harm" and a few commenters suggested alternative standards for when emergency removal is appropriate (e.g., the best interests of the child or "substantial and immediate danger or threat of such danger.")

Response: The Act addresses emergency proceedings at section 1922, establishing that requirements of the Act may not be construed to interfere with any emergency proceeding under State law to prevent "imminent physical damage or harm" to the Indian child. The regulations incorporate this statutory standard for emergency proceedings at FR § 23.113. There is no statutory authority for establishing a different standard.

Comment: One commenter suggested defining the term "emergency" or better specifying what "imminent physical damage and harm" is, to better clarify whether, for example, a child may be removed, under an emergency removal, from a parent who fails to get the child to school.

Response: The final rule relies on the statutory phrase "imminent physical damage or harm" and does not provide a further definition, as discussed above. The statutory phrase, however, is clear and the commenter's example of failure to get the child to school, standing alone, would not qualify as "imminent physical damage or harm" justifying an emergency proceeding (and attendant delay of compliance with ICWA section 1912).

Comment: A few commenters noted that each State may have a different or broader basis for emergency removal.

Response: As discussed above, the Department believes that section 1922's use of "imminent physical damage or harm" is in accord with the emergency-removal provisions of most States' laws. The Department recognizes, however, that a State may have a different or broader basis for immediate removals and placements. Regardless of how the State defines

emergency removals and the triggers for emergency removals, ICWA requires that an emergency proceeding terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

States must comply with ICWA's limitations on such removals and placements. Upon removing an Indian child, the State must either determine that there is a risk of "imminent physical damage or harm" to the child and follow the requirements for an emergency proceeding, or it must immediately terminate the emergency proceeding and initiate a child-custody proceeding and, if appropriate, return the child to her parent(s) or Tribe.

Comment: Several commenters also asserted that, to the extent ICWA's basis for emergency removal is narrower for Indian children, the rule places them at a greater risk of injury or death than non-Indian children.

Response: ICWA's standard of "imminent physical damage or harm" is focused on the health, safety, and welfare of the child, such that Indian children will not be placed at a greater risk than non-Indian children. As discussed above, the ICWA standard is similar to that of many States.

Comment: A few commented on the provision allowing continuation of emergency custody beyond 30 days in "extraordinary circumstances." One commenter stated that the circumstances need to be better defined to prevent the exception from swallowing the rule.

Response: The final rule implements the statutory mandate that an emergency proceeding involve only the temporary suspensions of full ICWA compliance, and that the agency must initiate a child-custody proceeding that complies with all the notice, timing, hearing, and other requirements of ICWA as soon as possible, if the child is not returned to his Tribe. The final rule deletes the provision in the proposal allowing for "extraordinary circumstances" to justify

continued emergency proceedings because the Act is clear that the emergency proceeding must terminate immediately when no longer necessary to prevent imminent physical damage or harm to the child. There is a continuing obligation to determine whether the imminent physical damage or harm is no longer present. As discussed above, the final rule includes a presumptive 30-day limit on an emergency proceeding, but allows a court in very limited circumstances to extend that period by making certain findings. *See* FR § 23.113(d).

Comment: Several commenters pointed out that some State agencies, as a practice, continue emergency placements for indeterminate times without ICWA compliance, and that the emergency placements ultimately became long-term placements.

Response: The final rule addresses this issue by implementing the statutory intention for emergency proceedings to be of limited duration. *See* FR § 23.113.

Comment: One commenter suggested changing the language "removal or placement" with "emergency removal or emergency placement" to clarify that this section applies only in the emergency removal context.

Response: The final rule adds this clarification. *See* FR § 23.113.

2. Placement Preferences in Emergency Proceedings

Comment: A few commenters suggested the rule should explicitly state that placement preferences apply to emergency placements as a type of foster-care placement "whenever practical and appropriate" or "whenever possible." One commenter stated that they have often seen situations where an agency removes an Indian child as an emergency removal when there was no emergency or the emergency subsided, places the child in a non-Indian home, and then takes months to even notify the family of the custody. This commenter stated that placing the

child directly into the home of a preferred placement allows for an unbroken connection to the Tribe and family.

Response: The Act does not explicitly require that emergency placements comply with the placement preferences, so the rule does not include this suggestion. As a recommended practice, however, States should make emergency placements of Indian children in accordance with the placement preferences whenever possible and as soon as possible. This will help prevent subsequent disruptions if the child needs to be moved to a preferred placement once a child-custody proceeding is initiated.

3. 30-Day Limit on Temporary Custody

Comment: Several commenters supported the provision at FR § 23.113(f) prohibiting continuation of emergency removal or placement beyond 30 days without the initiation of a full ICWA-compliant child-custody proceeding, to clarify that emergency proceedings must terminate as soon as they are no longer necessary to prevent imminent physical damage or harm to the child. The National Council of Juvenile and Family Court Judges stated that this provision, and shortening the time period for temporary custody without a hearing from 90 to 30 days, align with key principles of avoiding unnecessary separation of children and families and are best practices.

A few commenters opposed making the 30-day provision a mandate. One commenter stated that agencies may avoid emergency removals or remove children earlier than appropriate to avoid the detailed steps to necessary satisfy this section, resulting in Indian children being less protected from harm.

A few commenters stated that a shorter time should be included in the rule. One commenter noted that, often, returning a child to a parent within 72 hours will not result in

imminent physical damage or harm. Another commenter suggested that State law should govern the timing of the initial evidentiary hearing, provided it is no longer than 72 hours after removal (and then that the removal may not last beyond 30 days without a section 1912(e)-compliant foster care hearing). Commenters noted that allowing for longer periods of removal will make return to parental custody increasingly more difficult due to a combination of agency practice and consequential trauma to the parents from separation. One commenter also suggested adding a 45-day presumptive deadline by which an adjudicatory hearing must be held, to ensure the parent receives a hearing within a meaningful time.

Response: The basis for the presumptive 30-day outer limit for an emergency proceeding is discussed above. The rule's emergency proceedings provisions are designed to ensure that such removals/placements be as short as possible and that the Indian children be returned home (or transferred to their Tribe's jurisdiction) as soon as the threat of imminent physical damage or harm has ended, or that State officials "expeditiously" initiate a child-custody proceeding subject to all ICWA protections.

The concerns that the 30-day limit is too short are addressed through adjusting the rule's language regarding the circumstances under which the time period may be extended, as discussed above. *See* FR § 23.113(d). Notably, in light of the comments received, these changes include deleting the requirement for obtaining a qualified expert witness by that time.

The rule does not specify that a hearing should be held within 72 hours of removal. While providing a hearing within 1-3 days of removal may be required to comply with State law or to provide the parents or custodian with constitutionally required due process, the provision of such a hearing is not an ICWA-specific requirement, so it is not required by the rule.

Comment: Two commenters stated there are difficulties in obtaining qualified expert witness testimony in a timely fashion and that the timeframe would be increasingly difficult if the Tribe were out of State, the Tribe were unable or unwilling to provide an expert, or the exact Tribe is unknown. Another commenter noted that Tribes have up to 30 days to respond to notice, making it nearly impossible to secure expert witness testimony in that time. A commenter also stated that New Mexico allows for adjudication of an abuse/neglect petition to occur within 60 days but the proposed rule's requirements for clear and convincing evidence at an earlier stage (emergency stage) would cause more than one full evidentiary hearing on whether the parent's custody is likely to result in imminent physical damage or harm.

Response: The final rule deletes from the emergency proceeding requirements certain requirements that apply to child-custody proceedings (e.g., requirement for a qualified expert witness and clear and convincing evidence) because section 1922 of ICWA does not impose such requirements on emergency proceedings and, as the commenters noted, compliance with these requirements may not be practically possible.

4. Emergency Proceedings – Timing of Notice and Requirements for Evidence

Comment: Several commenters opposed the proposed rule's requirements for notice and time limits to apply to emergency hearings (known in various States as 72-hour hearings, detention hearings, shelter care hearings, and other terms). These commenters stated that it is not possible to comply with the time limits (e.g., waiting until 10 days after each parent, the Indian custodian, and Tribe have received notice before beginning the proceeding) and comply with State law requiring a hearing shortly following emergency removal. A State commenter stated that once a child is removed on an emergency basis, a petition must be filed within 48 hours, and the petition is the commencement of the proceeding, then a hearing must be held the next judicial

day to determine if it is a dependency action, then a jurisdiction hearing is held within 21 days, at which time the petition is confirmed. The proposed rule's statement that a proceeding may not begin means the petition may not be filed (again, resulting in either a delayed return to parents or no initial removal to the detriment of the child). Commenters suggested adding to the end of PR § 23.111(h) and at the beginning of PR § 23.112 exceptions for emergency removals and emergency placements.

Response: The final rule does not require that the section 1912(a) notice provisions and waiting periods for notices apply to emergency proceedings. These requirements are not imposed by section 1922. The final rule does, however, indicate that agencies should report to the court on their efforts to contact the parents, custodian, and Tribe for emergency proceedings. FR § 23.113(c).

Comment: Several commenters stated that, where it is impossible to notify the Tribe and give adequate time to intervene or transfer, the decision should not be binding on the party that did not receive notice.

Response: To the extent the commenters are concerned that emergency placements may become permanent placements, the final rule confirms that emergency proceedings must terminate as soon as the emergency ends and, at that point, either the child must be returned to the parent, custodian, or Tribe or the State must initiate a child-custody proceeding following ICWA's requirements, including notice requirements. *See* FR §§ 23.110, 23.113.

Comment: A State commenter stated that it is unclear what is meant by "substantive proceedings, rulings or decisions on the merits" and how it relates to emergency removals (shelter care hearings). Another State commenter requested clarification that "on the merits" means this section does not apply to emergency removals.

Response: The final rule deletes the phrase "substantive proceedings, rulings, or decisions on the merits" from what was PR § 23.111(h) and clarifies that the section 1912(a) notice provisions and waiting periods for notices do not apply to emergency proceedings.

5. Mandatory Dismissal of Emergency Proceedings

Comment: A few commenters stated that PR § 23.110 and PR § 23.113 conflict in that PR § 23.110 says that a State court must dismiss the proceeding if it determines it lacks jurisdiction, and PR § 23.113 says States must transfer the proceeding. A commenter stated that the wording of PR § 23.110(a) creates a safety issue because it implies that transferring to Tribal court is not an option and would result in cases being dismissed where children were at imminent risk of harm.

Response: The mandatory dismissal provisions in § 23.110 apply "subject to" § 23.113 (emergency proceedings). Section 1922 of the Act allows removal and placement under State law to prevent imminent physical damage or harm to the child. *See* FR § 23.110.

6. Emergency Proceedings Subsection-by-Subsection

Comment: With regard to PR § 23.113(a)(1), a commenter stated that because the terms "proper" and "continues to be necessary" are subjective and open to culturally biased interpretation, the investigation should include input from a qualified expert witness, Tribal representatives, and members of the child's extended family not connected with the emergency who have a relationship with the child.

Response: The final rule uses the term "necessary" because that is the term the statute uses. *See* 25 U.S.C. 1922. *See* FR § 23.113(b)(1).

Comment: With regard to PR § 23.113(a)(2), a few commenters suggested "promptly hold a hearing" needs a more definitive timeframe. One of these commenters suggested replacing "promptly hold a hearing" with "promptly, but in no case beyond 72 hours, hold a hearing."

Response: The final rule continues to use the term "promptly," recognizing that different States may have different timeframes for being able to hold such a hearing. *See* FR § 23.113(b)(2).

Comment: A commenter suggested clarifying in PR § 23.113(a)(2) and (a)(3) that if the agency determines the emergency has ended, it should promptly return the child without the need for a hearing. A hearing should be required only when a court order entered in connection with the emergency removal must be vacated or dismissed.

Response: State procedures determine whether a hearing is required.

Comment: A commenter asked whether the notice requirements in PR § 23.113(b)(5), to "take all practical steps to notify" are intended to be so radically different from the notice requirements for foster care, which requires 10 days advance notice. A few commenters suggested more definition of "practical steps" is needed. One of these commenters suggested adding notice via personal service, email, telephone, registered mail, and fax. A few commenters suggested that notice by registered mail should be required in addition to taking all practical steps to notify the parents or Indian custodian and Tribe.

Response: Notice by registered or certified mail is not required by ICWA for emergency proceedings because section 1922 does not require such notice and because of the short timeframe in which emergency proceedings are conducted to secure the safety of the child (although there may be relevant State or due process requirements). In order to protect the parents', Indian custodians', and Tribes' rights in these situations, however, it is a recommended

practice for the agency to take all practical steps to contact them. This likely includes contact by telephone or in person and may include email or other written forms of contact.

Comment: A commenter suggested specifying that notice of an emergency removal and emergency placement must fully inform the parents and the Tribe promptly of the timing of the emergency hearing and basis for the removal, including copies of the petition, affidavit and any evidence in support of the emergency removal, the parents and Indian custodian be advised of the full scope of their rights at the hearing, including the right to be present, to contest the allegations, to testify, and to call witnesses and introduce evidence, cross-examine adverse witnesses, and to have counsel appointed.

Response: These requirements are not specified by section 1922 and so are not included in the rule (although there may be relevant State and due process requirements). Any emergency proceeding pursuant to section 1922, however, is required to be as short as possible, after which the child is to be returned to the parent, custodian, or Tribe or a child-custody proceeding with all the attendant ICWA protections is to be initiated.

Comment: A few commenters pointed out that PR § 23.113(c) is missing.

Response: The final rule addresses this omission.

Comment: One commenter noted that the requirements in PR § 23.113(d)(7) and (d)(9) (requiring the affidavit to include the circumstances leading to the emergency removal and active efforts taken) and PR § 23.113(f) (requiring custody to continue beyond 30 days only if certain circumstances exist) mirror requirements of the Oklahoma ICWA and are the "gold standard" resulting in faster identification of Indian children, streamlined Tribal involvement, faster placements in preferred homes, and less time out of home.

A commenter stated concern that a failure to include any of the required elements in the affidavit may result in denial of the petition, even if the child is in imminent danger.

One commenter stated that the information required by PR § 23.113(d) to be included in the affidavit is already included in the State's dependency petitions, and requested adding that such information is required only if the petition does not already include the information.

Response: The final rule states that either the petition or accompanying documents (which may include an affidavit) should include a statement of the imminent physical damage or harm expected and any evidence that the removal or emergency custody continues to be necessary to prevent such imminent physical damage or harm to the child (which was listed in proposed 23.113(d)(10)). *See* FR § 23.113(d). This information is appropriate under ICWA section 1922. The final rule separately lists additional information (which was listed in PR §§ 23.113(c)(1)-(10)), that should be included in the petition or accompanying documents. Inclusion of these items is a recommended practice and, as a commenter noted, the "gold standard" for ICWA implementation.

Comment: A commenter suggested incorporating some of the requirements of the Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA) section 209 regarding determination of a child's residence or domicile, where the child has been living for the past 5 years, and prior court proceedings.

Response: This rule addresses implementation of ICWA and does not address implementation of UCCJEA, so it does not include such requirements.

Comment: A commenter suggested adding a requirement in PR § 23.113(d)(3) that the petition include efforts to locate extended family members.

Response: The final rule does not add the requested requirement because it is not required by the statute; however, it is a recommended practice to make efforts to locate extended family members as soon as possible.

Comment: A commenter suggested amending PR § 23.113(d)(3) to require the petition to include a statement that if the domicile or residence of the parents or Indian custodian is unknown, that a detailed description of the efforts to identify them, including notice to the Tribal social services agency, submission of an affidavit of service by publication, and other avenues such as the Tribal enrollment office or posting on the Tribal bulletin board or newsletter, for parents who are hard to locate.

Response: The final rule states that the petition or accompanying documents should include a description of the steps taken to locate and contact the child's parents, custodians and Tribe about any emergency proceeding, but does not specify the detail suggested by the commenter.

Comment: A commenter expressed concern that requiring a factual determination on the need for continued removal at every hearing may result in fewer protections for parents because a full evidentiary hearing for the emergency hearings would give States cause to extend the deadline for the first hearing. For this reason, the commenter suggested deleting PR § 23.113(e).

Response: Because of the statutory requirement to "insure" that emergency proceedings terminate "immediately" when the emergency has ended, the State court (and agency) have a continuing obligation under section 1922 to evaluate whether the emergency situation has ended. The court therefore needs to revisit that issue at each opportunity. The Department does not agree that this will result in fewer protections for parents because an assessment of the need for

continued removal will occur at each hearing, meaning the parent has the opportunity for return of the child at each hearing.

Comment: A few commenters suggested rewording PR § 23.113(g) to provide that the placement must terminate as soon as the Tribal court issues an order for the placement to terminate, instead of when the Tribe exercises jurisdiction. The commenters stated that this would better allow the Tribe the opportunity to decide whether the placement should continue.

Response: A State court may terminate an emergency proceeding by transferring the child to the jurisdiction of the appropriate Indian Tribe. *See* 25 U.S.C. 1922; FR § 23.113(b)(4)(ii). The child may stay in a particular placement if the Tribe chooses to keep that placement upon exercising jurisdiction.

Comment: A commenter suggested the placement terminate as soon as the emergency no longer exists or a solid safety plan is in place, in which case dismissal may be appropriate at an early stage.

Response: A safety plan may be a solution to mitigate the situation that gave rise to the need for emergency removal and placement and allow the State to terminate the emergency proceeding. If the State court finds that the implementation of a safety plan means that emergency removal or placement is no longer necessary to prevent imminent physical damage or harm, the child should be returned to the parent or custodian. The State may still choose to initiate a child-custody proceeding, or may transfer the case to the jurisdiction of the Tribe.

Comment: A commenter stated that requiring termination of the emergency removal as soon as the imminent physical damage or harm no longer exists is unworkable in Montana because Montana requires parents to work on treatment plan tasks and make progress before the

State will return the children. The commenter stated that the proposed rule provision subverts that Montana process and allows for unlimited challenge to the State's out-of-home placement.

Response: Under the statute, the emergency removal and placement must end when no longer necessary to prevent imminent physical damage or harm to the child. If the court finds that the parent must make progress on specified case plan items in order to prevent imminent physical damage or harm to the child, that is permissible under ICWA. The State agency may also promptly initiate a child-custody proceeding with all the attendant ICWA protections.

Comment: A few State commenters stated that requiring an agency to expeditiously "initiate a child-custody proceeding subject to the provisions of ICWA" as one of the options following termination of emergency removal is confusing because the emergency removal petition is considered an initiation of a child-custody proceeding. Other commenters stated that the ICWA proceeding should be initiated at the same time as the emergency proceeding, because emergency proceedings are generally only subject to State law.

Response: The statute treats emergency proceedings, at section 1922, differently from other child-custody proceedings. The final rule clarifies "emergency proceedings" to be emergency removals and emergency placements, which are proceedings distinct from child-custody proceedings" under the statute. While States use different terminology (e.g., preliminary protective hearing, shelter hearing) for emergency hearings, the regulatory definition of emergency proceedings is intended to cover such proceedings as may be necessary to prevent imminent physical damage or harm to the child. The emergency proceedings should be as short as possible and may end with the initiation of a child-custody proceeding subject to the provisions of ICWA (e.g., the notice required by § 23.111, time limits required by § 23.112).

Comment: One commenter stated that the provision at PR § 23.113(h) requiring a child to be returned to a parent within one business day may not be possible in parts of Alaska in which villages can be weathered out for days.

Response: The statute provides that emergency removal and placement must end when no longer necessary to prevent imminent physical damage and harm. We understand that it may not be possible to return a child within one business day.

7. Emergency Proceedings – Miscellaneous

Comment: A few commenters suggested replacing the term "emergency physical custody" with "emergency placement" for consistency.

Response: The final rule incorporates this suggestion.

I. Improper Removal

FR § 23.114 implements section 1920 of the statute. It requires that, where a court determines that a child has been improperly removed from custody of the parent or Indian custodian or has been improperly retained in the custody of a petitioner in a child-custody proceeding, the court should return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger. 25 U.S.C. 1920.

Comment: A commenter stated that PR § 23.114(b) should refer to the standard in ICWA section 1920 ("substantial and immediate danger or threat of danger") specific to improper removals rather than the standard in 25 U.S.C. 1922 ("imminent physical damage or harm") specific to emergency removals. A commenter requested adding "Indian" before "custodian."

Response: The final rule incorporates these suggested changes to more closely reflect the statutory language. *See* FR § 23.114(b).

Comment: A few State commenters stated that the proposed rule's provisions on improper removal exceed ICWA and are beyond BIA's authority. One stated there is no standard for when a person can request a stay and demand an additional hearing to determine if removal was improper, and the other stated that requiring an immediate stay creates a substantive requirement that may unreasonably preclude the State protective services from securing an order of protection from the court.

Response: The final rule replaces the requirement for the State court to stay the proceedings with a requirement that the State court expeditiously make the determination as to whether the removal was improper. *See* FR § 23.114(a).

Comment: A commenter suggested rewording this section to require the court to terminate the proceeding and return the child if any party asserts improper removal or the court has reason to believe the removal was improper due to expert testimony not having been presented at the time of removal.

Response: The final rule does not incorporate this suggestion because the statute does not require expert testimony at the time of removal.

J. Transfer to Tribal Court

25 U.S.C. 1911(b) provides for the transfer of any State court proceeding for the foster-care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's Tribe. This provision recognizes that Indian Tribes maintain concurrent jurisdiction over child-welfare matters involving Tribal children, even off of the reservation. In enacting ICWA, Congress recognized that child-custody matters involving Tribal children are "essential tribal relation[s]," *see Williams v. Lee*, 358 U.S. 217 (1959), that fall squarely within a Tribe's right to govern itself. H.R. Rep. No. 95-1386, at 14-15. Congress

also recognized that State courts were often not well-informed about Indian culture, and may not correctly assess the standards of child abuse and neglect in this context. *Id.* at 11. Tribal-court jurisdiction remedies this problem.

Tribal courts are also well-equipped to handle child-welfare proceedings, including those involving non-member parents. Congress has repeatedly sought to strengthen Tribal courts, and has recognized that Tribal justice systems are an essential part of Tribal governments. 25 U.S.C. 3601(5), 3651(5); *see also* S. Rep. No. 103-88, at 8 (1993) (noting that 25 U.S.C. 3601(6) "emphasize[s] that tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals"); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450, 450a (providing funding and assistance for Tribal government institutions, including courts); Indian Tribal Justice Act of 1993, 25 U.S.C. 3601 *et seq.* (establishing the Office of Tribal Justice Support within the Bureau of Indian Affairs and authorizing up to $50 million annually to assist Tribal courts).

The final rule reflects 25 U.S.C. 1911(b)'s requirement that a child-custody proceeding be transferred to Tribal court upon petition of either parent or the Indian custodian or the Indian child's Tribe, except in three circumstances: (1) where either parent objects; (2) where the Tribal court declines the transfer; or (3) where there is good cause to the contrary. The first two exceptions are fairly straightforward. The third exception is not defined in the statute, and in the Department's experience, has in the past been used to deny transfer for reasons that frustrate the purposes of ICWA. The legislative history indicates that this provision is intended to permit a State court to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the Tribe are fully protected. *See* H.R. Rep. No. 95-1386, at 21. The Department finds that this indicates that

Congress intended for the transfer requirement and its exceptions to permit State courts to exercise case-by-case discretion regarding the "good cause" finding, but that this discretion should be limited and animated by the Federal policy to protect the rights of the Indian child, parents, and Tribe, which can often best be accomplished in Tribal court. Exceptions cannot be construed in a manner that would swallow the rule.

Accordingly, the final rule does not mandate or instruct State courts as to how they must conduct the good-cause analysis. Rather, the final rule provides certain procedural protections, and also identifies a limited number of considerations that should not be part of the good-cause analysis because there is evidence Congress did not wish them to be considered, or they have been shown to frustrate the application of 25 U.S.C. 1911(b) and the purposes of ICWA, or would otherwise work a fundamental unfairness. FR § 23.118. Specifically:

- The final rule prohibits a finding of good cause based on the advanced stage of the proceeding, if the parent, Indian custodian, or Indian child's Tribe did not receive notice of the proceeding until an advanced stage. This protects the rights of the parents and Tribe to seek transfer where ICWA's notice provisions were not complied with, and thus will help to promote compliance with these provisions. It also ensures that parties are not unfairly advantaged or disadvantaged by noncompliance with the statute.

- The final rule prohibits a finding of good cause based on whether there have been prior proceedings involving the child for which no petition to transfer was filed. ICWA clearly distinguishes between foster-care and termination-of-parental-rights proceedings, and these proceedings have significantly different implications for the Indian child's parents and Tribe. There may be compelling reasons to not seek transfer for a foster-care proceeding, but those reasons may not be present for a termination-of-parental-rights proceeding.

- The final rule prohibits a finding of good cause based on predictions of whether the transfer could result in a change in the placement of the child; this has been altered slightly from the proposed rule, which could be read to assume that a State court could know or predict which placement a Tribal court might consider or ultimately order. As an initial matter, these predictions are often incorrect. Like State courts, Tribal courts and agencies seek to protect the welfare of the Indian child, and would consider whether the current placement best meets that goal. Further, the transfer inquiry should not focus on predictions or speculation regarding how the other tribunal might rule regarding placement or any other matter. ICWA recognizes that Tribal courts are presumptively well-positioned to adjudicate child-custody matters involving Tribal children. Tribal courts will evaluate each case on an individualized basis to determine whether a change in placement is in the interests of the child, and if so, how to effect the change in placement with the minimum disruption to the child.
- The final rule prohibits a finding of good cause based on the Indian child's perceived cultural connections with the Tribe or reservation. Congress enacted ICWA in express recognition of the fact that State courts and agencies were generally ill-equipped to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. 25 U.S.C. 1901(5). It would be inconsistent with congressional intent to permit State courts to evaluate the sufficiency of an Indian child's cultural connections with a Tribe or reservation in evaluating a motion to transfer.
- The final rule prohibits consideration of any perceived inadequacy of judicial systems. This is consistent with ICWA's strong recognition of the competency of Tribal fora to address child-custody matters involving Tribal children. It is also consistent with section 1911(d)'s

requirement that States afford full faith and credit to public acts, records, and judicial proceedings of Tribes to the same extent as any other entity.

- The final rule prohibits consideration of the perceived socioeconomic conditions within a Tribe or reservation. In enacting ICWA, Congress found that misplaced concerns about low incomes, substandard housing, and similar factors on reservations resulted in the unwarranted removal of Indian children from their families and Tribes. *E.g.*, H.R. Rep. at 12. Congress also found that States "have often failed to recognize the essential Tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." *See* 25 U.S.C. 1901(5). These factors can introduce bias into decision-making and should not come into play in considering whether transfer is appropriate.

State courts retain the ability to determine "good cause" based on the specific facts of a particular case, so long as they do not base their good cause finding on one or more of these prohibited considerations.

1. Petitions for Transfer of Proceeding

Comment: Several commenters stated that the proposed rule's provisions on transfer exceed statutory authority by allowing a transfer to Tribal court in any child-custody proceeding, whereas ICWA section 1911(b) explicitly addresses transfer only for foster-care placement and termination-of-parental-rights proceedings. Another commenter claimed there is authority to extend the transfer provisions to preadoptive and adoptive proceedings because such proceedings may occur as part of termination-of-parental-rights proceedings, transfer may be appropriate to provide a higher standard of protection of the rights of the parent or Indian custodian under ICWA section 1921, and ICWA section 1919 allows States and Tribes to enter into agreements to transfer jurisdiction of any child-custody proceeding on a case-by-case basis. Another

commenter asserted that ICWA section 1911 applies to both involuntary and voluntary proceedings, and that, in any case, the biological parent can veto a transfer so that he or she is not forced into a forum foreign to him or her.

Response: Like the statute, the final rule addresses transfer of foster-care-placement and termination-of-parental-rights proceedings. *See* FR § 23.115; 25 U.S.C. 1911(b). And, like the statute, the final rule's provisions addressing transfer apply to both involuntary and voluntary foster-care and termination-of-parental-rights proceedings. This includes termination-of-parental-rights proceedings that may be handled concurrently with adoption proceedings. Parties may request transfer of preadoptive and adoptive placement proceedings, but the standards for addressing such motions are not dictated by ICWA or these regulations. Tribes possess inherent jurisdiction over domestic relations, including the welfare of child citizens of the Tribe, even beyond that authority confirmed in ICWA. *See, e.g.*, *Holyfield*, 490 U.S. at 42 (1989) ("Tribal jurisdiction over Indian child-custody proceedings is not a novelty of the ICWA."); *Fisher v. Dist. Court*, 424 U.S. 382, 389 (1976) (pre-ICWA case recognizing that a Tribal court had exclusive jurisdiction over an adoption proceeding involving Tribal members residing on the reservation). Thus, it may be appropriate to transfer preadoptive and adoptive proceedings involving children residing outside of a reservation to Tribal jurisdiction in particular circumstances.

Comment: Several commenters supported the provision at PR § 23.115 allowing for motions to transfer to be made orally, stating that oral motions are already allowed by court rules and that by explicitly allowing for oral motions in the rule removes a hurdle to making a motion, particularly for parties not represented by counsel.

Response: The final rule retains the provision allowing for the petition to transfer to be made orally because nothing in the Act indicates that a written document would be required. FR § 23.115(a). For the purposes of this rule, an oral petition would be considered "filed" when made on the record.

Comment: One commenter requested specific language to clarify that parents may request transfer to a Tribal court even if the parents live off reservation.

Response: Nothing in the statute or rule limits the right to request transfer to parents who live on reservation. As confirmed by ICWA, Tribes retain authority over the welfare of Tribal children, even when they reside outside of a reservation.

Comment: A few commenters stated their support of the provision providing that transfer can be requested at any stage. A few commenters opposed this provision, stating that a time limit should be imposed. Commenters had various suggestions for time limits to impose on requests for transfer, ranging from, for example, within 30 days of notification to the parents, Indian custodians, and Tribe, to within 6 months of such notification. One commenter suggested a time limit that would allow transfer until the order for foster-care placement or termination of parent rights has been entered. Commenters in support of imposing time limits on transfer stated that:

- Congress implied there is a time limit because, while ICWA section 1911 addresses both transfer and intervention, it allows only for intervention "at any point in a proceeding;"
- ICWA does not allow for transfer after termination of parental rights, so time limits should prevent transfer of an appeal of a foster-care order or termination-of-parental-rights order;

- When jurisdiction is transferred to a Tribe, the Tribe often changes the child's placement. If a child was in the previous placement for a long time and has developed attachments to that placement, this can disrupt those attachments;
- The Supreme Court warned in *Adoptive Couple v. Baby Girl* that parties should not be able to play the "ICWA trump card at the eleventh hour;"
- Allowing transfer at any time rewards "deadbeat" parents who request transfer after a child has been in a placement for an extended period of time, causing extreme trauma for the child for no reason.

Response: The final rule does not establish a deadline or time limit for requesting transfer. It provides that the right to request a transfer is available at any stage in each proceeding. This adheres most closely to the statute, which does not establish any time limits for seeking transfer. Further, the statute indicates Congress's understanding that Tribes would have presumptive jurisdiction over Indian children domiciled outside of a reservation. *See* 25 U.S.C. 1911(b) (the State court shall transfer such proceeding to the jurisdiction of the Tribe unless certain conditions are present); *Holyfield*, 490 U.S. at 49. Establishing time limits for seeking transfer would be contrary to this intent.

The Department's conclusion is also consistent with the general approach that courts take to deciding transfer motions. For example, motions to change venue pursuant to 28 U.S.C. 1404 (the modern version of forum non conveniens where the alternative forum is within the territory of the United States) may be granted at any time during the pendency of the case. *See, e.g.*, *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir. 1991); *see also* H.R. Rep. No. 95-1386, at 21 (describing ICWA's transfer provision as a "modified doctrine of

forum non conveniens"). The mere passage of time is not alone a sufficient reason to deny a motion to transfer pursuant to 28 U.S.C. 1404; nor is it for 25 U.S.C. 1911(b).

The Department is cognizant that child-custody matters involve children, for whom there may be special considerations related to the passage of time and the need to minimize disruptions of placements. As discussed elsewhere, the Department disagrees that transfer to Tribal jurisdiction will necessarily entail unwarranted disruption of an Indian child's placement in any particular case. Tribes seek to protect the welfare of the children in their jurisdiction, which may mean in any particular case that a current placement will be temporarily or permanently maintained. Under any circumstances, the Department finds that the strong Federal policy in support of Tribal jurisdiction over Tribal children weighs strongly in favor of no time limits for motions to transfer.

There are also compelling practical reasons for the Department's decision. Although a commenter expressed concern about parents strategically waiting to seek transfer to Tribal court, evidence suggests that opponents of transfer can also behave strategically to thwart transfer. *See, e.g. In the Interest of Tavian B.*, 874 N.W.2d 456, 460 (Neb. 2016) (noting that State dismissed its motion to terminate parental rights to avoid transfer, leaving an Indian child suspended in uncertainty).

And, the Department is aware of child-custody proceedings in which the Tribe intervenes, but does not immediately move to transfer the case because maintaining State-court jurisdiction appears to hold out the most promise for reunification of the family. This may be for any number of reasons, including geographic considerations, or because the State is able to provide specialized services to the parents or child that the Tribe cannot. *See, e.g.*, *In re Interest of Zylena R.*, 825 N.W.2d 173, 183 (Neb. 2013) (discussing that "a Tribe may have no reason to

seek transfer of a foster placement proceeding" but "once the goal becomes termination of parental rights, a Tribe has a strong cultural interest in seeking transfer of that proceeding to tribal court."). A parent may defer moving to transfer a case for similar reasons. The Tribe or parent rationally decides that seeking transfer of a foster-care proceeding would not support the goal of reunification of the Indian child with her parent(s). But once the State abandons this goal, and seeks to terminate parental rights, the Tribe's or parent's calculus might reasonably change. If time limits were imposed for moving to transfer, Tribes might be forced to seek transfer early in a foster-care proceeding, even if that outcome does not facilitate reunification. The Department believes that this would undermine the goals and intent of ICWA, and not produce the best outcomes for Indian children.

For these reasons, the final rule provides that a request for transfer may be made at any stage within each proceeding. *See* FR § 23.115(b). A request for transfer may be denied for "good cause," however, which is discussed elsewhere.

Comment: Several commenters stated that the provision at PR § 23.115(b) providing the right to transfer with "each proceeding" is unclear as to whether it means each child-custody proceeding or each hearing. One commenter supported just stating "any stage of the proceeding" as in PR § 23.115(c) instead.

Response: The final rule clarifies in the definitions that, as relevant here, a "proceeding" is a foster-care-placement or termination-of-parental-rights proceeding, and that each proceeding may include several "hearings," which are judicial sessions to determine issues of fact or of law. *See* FR § 23.2. The final rule permits a party to request transfer at any stage in each proceeding. *See, e.g.*, *In re Interest of Zylena R.*, 825 N.W.2d at 182-84.

Comment: One commenter suggested deleting PR § 23.115(b) and (c) as superfluous.

Response: The final rule deletes proposed paragraph (b) because paragraph (a) already captures that the right to transfer arises with each proceeding, and moves proposed paragraph (c) to final paragraph (b). The final paragraph (b) is necessary to emphasize that the request to transfer may be made at any stage. *See* FR § 23.115.

Comment: A commenter suggested revising PR § 23.115(a) to refer to "jurisdiction of the Tribe" rather than "Tribal court" because in some cases the Tribe may not have a Tribal court.

Response: The final rule incorporates this suggested revision because it more closely matches the statute. *See* FR § 23.115.

Comment: A commenter requested adding the guardian ad litem and child (at a minimum age) to those who may request transfer to Tribal court.

Response: The statute allows petition for transfer by the Indian child's parent, Indian custodian or Tribe only. The statute does not expressly provide for the child to request transfer. *See* 25 U.S.C. 1911(b). State courts, however, may permit motions to transfer from a guardian ad litem and child.

2. Criteria for Ruling on Transfer

Comment: One commenter noted the provision at PR § 23.116 appeared in the 1979 guidelines and is necessary where courts may otherwise deny transfer based on the judge's belief that transfer is not in the child's best interests. A few commenters suggested adding that Tribal jurisdiction is presumed in all ICWA cases because Tribes have concurrent and presumptive jurisdiction when an Indian child is domiciled outside of a reservation. A few commenters suggested stating that the best interests of the Indian child presumptively favor granting the petition for transfer to improve ICWA compliance.

Response: The final rule, like the proposed rule, states that State courts must grant a petition to transfer unless one or more of three criteria are met. This comports with the statute, which states that a State court "shall transfer" unless these specified conditions are present. The final rule does not add the suggested additions because they are not necessary to implement ICWA's transfer provision, which already requires transfer except in specified circumstances.

Comment: A few commenters suggested clarifying that a parent's objection to transfer must be in writing and the consequences of the objection must be explained to the parent, to ensure an informed decision.

Response: The final rule does not impose the suggested limitations on parental objections; however, State courts must document the objection. *See* FR § 23.117(a).

Comment: A few commenters suggested clarifying that a parent whose parental rights have been terminated may not object.

Response: If a parent's parental rights have been terminated and this determination is final, they would no longer be considered a "parent" with a right under these rules to object.

Comment: One Tribal commenter stated that the regulations fail to respond to the ambiguity in section 1911(b), which requires transfer "absent objection by either parent" but has been incorrectly interpreted to require transfer "provided that a parent does not object." This commenter provided several reasons for why ICWA's language does not require a court to deny transfer if a parent objects and stated that the rule should clarify that the court still has the discretion to transfer even if a parent objects.

Response: The final rule mirrors the statute in requiring transfer in the absence of a parent's objection. The House Report states "Either parent is given the right to veto such transfer." H.R. Rep. No. 95-1386, at 21.

Comment: A commenter suggested that the guardian ad litem (where both parents are unfit or unable to consider the welfare of the child) or child himself should have the ability to object to transfer. Another commenter stated that if the child is permitted to object, there should be a minimum age requirement.

Response: The statute specifically addresses objection by "either parent" only; however, nothing prohibits the State court from considering the objection of the guardian ad litem or child himself in determining whether there is good cause to deny transfer, pursuant to the criteria identified in FR § 23.118.

3. Good Cause to Deny Transfer

Comment: Several commenters opposed the proposed rule's approach of defining what factors courts may not consider in determining good cause to deny transfer (*see* PR § 23.117), saying it substitutes BIA's judgment for the courts' judgment, and denies courts the ability to consider every relevant aspect of an individual child's case. One commenter stated that it limits the "good cause" analysis to nothing more than a convenient forum analysis, and that it is beyond BIA's authority to limit the analysis in this way. Another commenter noted that the proposed rule could be interpreted to require a court to transfer to Tribal court every case involving young Indian children where parental rights were terminated.

Several commenters stated that limiting the discretion of State courts to deny transfer of a case to the Tribe was particularly helpful, and clarifies that Tribes have "presumptive jurisdiction" in child-welfare cases. Many commenters recounted their experiences with State courts inappropriately finding "good cause" to deny transfer based on the State court believing the Tribe will make a decision different from the one it would make, because of reliance on bonding with the foster parents, bias against Tribes and Tribal courts, or other reasons, and asked

that the rule help prevent denials on this basis in the future. One commenter noted that State courts sometimes employ a "best interests of the child" analysis in determining whether to transfer jurisdiction, but stated that the question of whether to transfer is a jurisdictional one that should not implicate the best interests of the child, because ICWA recognizes that Tribal courts are fully competent to determine a child's best interests. A few commenters stated their support of the proposed rule's statement that the socioeconomic status of any placement relative to another should not be considered as a basis for good cause to deny transfer because such reasoning has been used in the past.

Response: The limits imposed by the final rule are consistent with the statutory language and congressional intent in enacting ICWA. Congress directed that State courts "shall transfer" proceedings to the jurisdiction of the Tribe unless specified conditions were met. This indicates that Congress intended transfer to be the general rule, not the exception. Congress also intended ICWA, and the transfer provision in particular, to protect the "rights of the child as an Indian" as well as the rights of the Indian parents or custodian and the Tribe. H.R. Rep. No. 95-1386, at 21. If the "good cause" provision is interpreted broadly, or in ways that could permit decision-making that assumes the inferiority of the Tribal forum, congressional intent would be undermined. In keeping with congressional intent, the Department has imposed certain limits on what the court may consider in determining "good cause" to promote consistency in application of the Act and effectuate the Act's purposes. These limits focus on those factors that there is evidence Congress did not wish to be considered, or that have been shown to frustrate the application of 25 U.S.C. 1911(b). State courts retain discretion to determine "good cause," so long as they do not base their good cause finding on one or more of these prohibited considerations.

Comment: A few commenters noted that the 1979 Guidelines identified what State courts could consider in determining whether good cause exists, whereas the regulations now identified what a State court may not consider, leaving open the question of what would qualify as good cause. Several commenters stated that the rule could be strengthened by providing a list of examples of what good cause to deny transfer may resemble. Commenters disagreed on whether the list of examples should be non-exhaustive (to allow for situations not contemplated in the examples) or exhaustive. A few commenters suggested that not stating what may constitute good cause may expand courts' ability to create good cause.

Response: The regulations take the approach of listing what courts must not consider, for the reasons listed above. *See* FR § 23.118. ICWA's legislative history indicates the good cause provision was intended to permit a State court to apply a modified (i.e., limited, narrow) version of the *forum non conveniens* analysis. H.R. Rep. No. 95-1386, at 21. The Department believes that it is most consistent with congressional intent, and will best serve the purposes of ICWA, if State courts retain limited discretion to determine what constitutes good cause to deny transfer. Reliance on the factors identified in the rule, however, would be inconsistent with the purposes of ICWA, and thus is not permitted.

Comment: Several commenters opposed removing "advanced stage" as a "good cause" basis to deny transfer. Among the reasons commenters stated for this opposition were the following:

- The rule radically departs from the prior guidelines, which explicitly allowed consideration of whether the proceeding was at an advanced stage;
- State courts should be able to consider whether the proceeding is at an advanced stage for good policy reasons—to prevent forum shopping (i.e., waiting until the ruling becomes

clear and then, if it is unfavorable, seeking transfer) and to prevent harm to the child (from disruption in placement and delay in permanency);

- Timeliness is a proven weapon against disruption caused by negligence or obstructionist tactics;
- Not allowing consideration of whether the case is at an advanced stage violates the Indian child's right to permanency;
- The rule is inconsistent with ASFA-mandated permanency deadlines, which have been the basis of policy established by appellate courts in dozens of states to interpret "good cause" under advanced stage principles;
- State courts have overwhelmingly agreed good cause may exist if the proceeding is at an advanced stage, but merely disagreed regarding what is "advanced stage," so the rule will increase litigation and delays in case resolution;
- It was not Congress's intent to authorize late transfers and congressional intent has not changed;
- Congress could have expressly allowed transfer at any point in the proceeding in section 1911(b), as it did for intervention in section 1911(c), but it did not;
- Late transfers are more disruptive than late interventions, because a transfer may require retrying the entire case whereas problems resulting from a late intervention are primarily those of the intervener;
- If courts are precluded from considering the "advanced stage" they should at least be able to consider as good cause any "unjustifiable delay" in requesting transfer; otherwise, the rule incentivizes delay until the outcome in the original proceeding becomes clear.

Several commenters supported restricting State courts from considering whether a case is at an "advanced stage" as a "good cause" basis to deny transfer. Among the reasons stated for this support were the following:

- ICWA does not specify any time limits on transferring to Tribal court;
- The 1979 Guidelines' provision allowing consideration of the "advanced stage of the proceedings" as good cause to deny transfer caused confusion among courts and resulted in disparate interpretations because there is no consistent understanding of "advanced stage" across the States (e.g., one court held just over 2 months into a proceeding was "advanced stage");
- Each of the four ICWA-defined proceedings should be reviewed anew, so that a petition to transfer filed late in a foster-care proceeding would be considered early for an adoptive placement and State proceedings do not perfectly map to the ICWA-defined proceedings;
- There are a myriad of reasons a Tribe may wait to transfer a case to their own jurisdiction, including allowing sufficient time to do the work necessary to determine whether to transfer, or waiting until the termination of parental rights stage because the Tribe works with the State or monitors the case before that time to promote family reunification.

One commenter shared a story of a State court denying transfer on the basis that the case was at an advanced stage, even though the Tribe did not learn about the case until that stage.

Response: While the 1979 guidelines explicitly allowed consideration of whether the case was at an advanced stage as good cause to deny transfer, the final rule prohibits reliance on the advanced stage of the proceeding in circumstances where the Indian parent, custodian, or Tribe did not receive notice until the proceeding was at an advanced stage. The Department is

including this requirement to address circumstances in which denying transfer is unfair, and undermines ICWA's goals. Specifically, as pointed out by a commenter, there have been situations where a parent, Indian custodian, or the child's Tribe did not receive timely notice, and then seeks to transfer the proceeding shortly after receiving notice, but the State court denies the petition to transfer based on the case being at an "advanced stage." The final rule ensures that parents, custodians, and Tribes who were disadvantaged by noncompliance with ICWA's notice provisions may still have a meaningful opportunity to seek transfer. This provision should also serve as an incentive for States to provide the required notice promptly. *See* FR § 23.117(c).

While ICWA does not establish a time limit on the opportunity to transfer or expressly allow for transfer at any point in the proceeding, it does expressly allow for intervention at any point in the proceeding. One of the rights of an intervenor is to seek transfer of the proceeding. To effectuate rights to notice in section 1912(a) and rights to intervene in section 1911(c), State courts should allow a request for transfer within a reasonable time after intervention.

The final rule also clarifies that "advanced stage" refers to the proceeding, rather than the case as a whole. Each individual proceeding will culminate in an order, so "advanced stage" is a measurement of the stage within each proceeding. This allows Tribes to wait until the termination-of-parental-rights proceeding to request a transfer to Tribal court, because the parents, Indian custodian, and Tribe must receive notice of each proceeding. The Department recognizes that it is often at the termination-of-parental-rights stage that factors that may have dissuaded a Tribe from taking an active role in the case (such as the State's efforts to reunite a child with her nearby parent) change in ways that may warrant reconsidering transfer of the case. *See, e.g.*, *Zylena R.*, 825 N.W.2d at 183 (Neb. 2013).

Comment: A State commenter stated that litigation over whether a State court may consider, in its good cause determination, whether the proceeding is at an "advanced stage" is causing delays, which are, in turn, delaying permanency for children and putting the State in a position of not being able to meet required permanency timelines.

Response: The final rule aims to reduce litigation over determinations as to whether a proceeding is at an "advanced stage" by establishing clearer standards for when this factor may not be considered. Expeditious transfer does not delay permanency for a child.

Comment: A few commenters opposed not including the child's contacts with the reservation as a basis for good cause to deny transfer, noting that the 1979 Guidelines included this factor and that transferring a child's case to a court with which the child has no connection does not serve the child well. Another commenter supported removing this provision noting that young children would not have evidence of involvement with a Tribe at that age anyway.

Response: As noted above, the final rule establishes that the court must not consider a child's cultural connections with the Tribe or reservation in determining whether there is good cause to deny transfer. State courts are ill-equipped to make this assessment, and young children are unlikely to have had the opportunity to develop such connections.

Comment: Several commenters opposed restricting State courts from considering whether there will be a change in placement, for the following reasons:

- Restricting courts from considering whether there will be a change in placement effectively restricts the court from considering the impact on the child of the transfer;
- Legally, it is impossible to separate jurisdiction and custody, because once jurisdiction is transferred to a Tribe, only the Tribe has jurisdiction over the child's custody;

- Transferring jurisdiction to a Tribe but retaining the child's placement raises legal and practical questions about whether the court has jurisdiction over caregivers, to monitor the care provided to the child, and to determine if the child is subject to new abuse or neglect;
- Many courts have held that the child's best interests may be considered in determining whether good cause to deny transfer exists;
- Not allowing the court to consider whether a transfer would result in a placement change violates the child's equal protection rights and is detrimental to the child;
- Best practices in child-welfare proceedings direct that children should have minimal changes in placement.

Response: The final rule provides that the State court must not consider, in its decision as to whether there is good cause to deny transfer to the Tribal court, whether the Tribal court could change the child's placement. This is an inappropriate consideration because it would presume a decision that the Tribal court has not yet made. *See* FR § 23.118(c)(3). A transfer to Tribal court does not automatically mean a change in placement; the Tribal court will consider each case on and individualized basis and determine what is best for that child. Some commenters erroneously assume that Tribal courts and social services agencies do not follow "best practices in child-welfare proceedings" regarding changes in a child's placement.

The Department also declines to accept the comments recommending that State courts be permitted to consider whether transfer could result in change of placement because the Department has concluded it is not appropriate to grant or deny transfer based on predictions of how a particular Tribal court might rule in the case. *See e.g., Piper Aircraft Co. v. Reyno*, 454

U.S. 235, 261 (1981) (holding that the "Court of Appeals erred in holding that the possibility of an unfavorable change in law bars dismissal on the ground of *forum non conveniens*").

For similar reasons, the Department does not find the equal protection concerns raised by commenters compelling. The transfer decision should focus on which jurisdiction is best-positioned to make decisions in the child's custody proceeding. ICWA—and the Department's experience—establishes that Tribal courts are presumptively well-positioned to address the welfare of Tribal children. State courts retain limited discretion under the statute but the choice between two court systems does not raise equal protection concerns. *See, e.g. United States v. Antelope*, 430 U.S. 641 (1977).

Finally, the Department does not find these concerns compelling because even if a child-custody proceeding remains in State court, the State court must still follow ICWA's placement preferences (or find good cause to deviate from them). If there is an extended family or Tribal placement that the parties believe that the Tribal court is likely to consider and perhaps choose, the State court must consider that placement as well.

Comment: One commenter suggested prohibiting consideration of whether transfer "could" result in a change in placement, rather than "would" result because it can be the mere "fear" by a State-court judge of the potential change that leads to denial of transfer.

Response: The final rule incorporates this suggestion because the State court will not know whether, once the proceeding is transferred, the Tribal court would decide to change the placement.

Comment: A commenter noted that the issue in deciding whether there is good cause to deny transfer is not what is best for the child, but who should be making decisions about what is

best for the child. This commenter notes that a presumption by State courts that the Tribe cannot or will not act in a child's best interest was one of the reasons ICWA was initially passed.

Response: The Department agrees that ruling on a transfer motion should not involve predicting how Tribal courts may rule in a particular case.

Comment: Several commenters stated their concern that the proposed rule removes from State-court judges the ability to consider the child's best interests in determining whether a case should be transferred. One commenter stated that this is an unwarranted expansion of Tribal authority over children not domiciled in reservations and has the potential to cause grave harm to children.

In contrast, several other commenters suggested the rule should explicitly prohibit State courts from applying the traditional "best interests of the child" analysis in determining whether there is good cause to deny transfer to the Tribe because: (1) this prohibition was included in the Guidelines; (2) ICWA establishes the placement preferences as being in the child's best interest; and (3) leaving best interests to be argued undermines ICWA's goal to overcome bias and determinations based on lack of knowledge of Tribes and Indian children. A few commenters stated that a best interests inquiry is inconsistent with the presumption of Tribal jurisdiction and recognition of Tribal courts as fully competent to protect an Indian child's welfare. Others stated that the regulations establish that transfer is presumptively in the child's best interests.

A commenter suggested inserting a "best interests" analysis that includes consideration of the child's strong interest in having a connection to the child's Tribe, learning the child's culture, being part of the Tribal community, and developing a positive Indian identity. This commenter also requested adding language from the 1979 Guidelines stating that certain facts may indicate

transfer is not in the best interests of the child (e.g., if the child is part of a sibling group with non-Indian children).

Response: The final rule does not include a "best interests" consideration, but does provide other guidance. *See Zylena R.*, 825 N.W.2d at 183 (Neb. 2013) (best interests of child should not be a factor in determining whether there is good cause to deny a transfer motion); *In re A.B.*, 663 N.W.2d 625, 634 (N.D. 2003) (same, collecting cases). In general, the transfer determination should focus on what jurisdiction is best positioned to hear the case. The BIA guidelines also provide additional guidance regarding what factors are appropriate to consider in analyzing whether there is good cause to deny transfer.

Comment: A few commenters suggested the rule should establish a "clear and convincing" standard of evidence for a showing of good cause to deny transfer. The commenters stated that this standard would be appropriate to protect the Tribe's presumptive jurisdiction and promote consistency by preventing State courts from adopting a lesser standard. A few commenters stated that there should be no burden of proof specified for good cause to deny transfer.

Response: The statute does not establish the standard of evidence for the determination of whether there is good cause to transfer a proceeding to Tribal court. There is, however, a strong trend in State courts to apply a clear and convincing standard of evidence. *See, e.g.*, *In re M.E.M.*, 635 P.2d 1313, 1317 (Mont. 1981); *In re Armell*, 550 N.E.2d 1060, 1064 (Ill. App. Ct. 1990); *In re S.W.*, 41 P.3d 1003, 1013 (Okla. Civ. App. 2002); *In re T.I.*, 707 N.W.2d 826, 833-34 (S.D. 2005); *Thompson v. Dep't. of Family Servs*, 747 S.E.2d 838 (2013); *People in Interest of J.L.P.*, 870 P.2d 1252 (Colo1994); *Matter of Adoption of T.R.M.*, 525 N.E.2d 298 (Ind. 1988); *In re A.P.*, 961 P.2d 706 (1998). The Department declines to establish a Federal standard of

proof at this time, but notes the strong State court approach to this issue is compelling. States are already applying this standard and the Department will consider this issue for future action.

Comment: A few commenters suggested that the rule should allow only States, and not foster or putative adoptive parents, to advance a claim that there is good cause to deny transfer.

Response: Neither the statute nor the rule limit who may advance a claim that there is good cause to deny transfer. State laws or rules of practice may limit the rights of certain individuals to raise such an objection.

Comment: A few commenters suggested additional factors that a State court should not be permitted to consider, including the distance between the State court and any Tribal or BIA social service or judicial systems.

Response: The final rule does not add the suggested factor to the list of items a State court may not consider in determining good cause to deny transfer. If a State court considers distance to the Tribal court, it must also weigh any available accommodations that may address the potential hardships caused by the distance.

Comment: A commenter noted that some of PR § 23.117 reflects what is in current California law, particularly that a court may not consider the socioeconomic conditions and perceived inadequacy of Tribal systems, but asserts that PR § 23.117(c) and (d) would unduly restrict the State judge's discretion by not allowing the judge to consider exceptional circumstances relating to the Indian child's welfare.

Response: The regulation's limitations on what may be considered in the "good cause" determination do not limit State judges from considering some exceptional circumstance as the basis of good cause. However, the "good cause" determination whether to deny transfer to Tribal

court should address which court will adjudicate the child-custody proceeding, not the anticipated outcome of that proceeding.

4. What Happens When Petition for Transfer Is Made

Comment: A few commenters noted that ICWA does not require the Tribe to affirmatively accept jurisdiction before transfer. One of these commenters suggested revising PR § 23.118(a) to mirror the statutory provision at section 1911(b) stating that the State court "shall transfer… subject to declination by the tribal court."

Response: The rule requires prompt notification to the Tribal court of the transfer petition, and permits a court to request a response regarding whether the Tribal court wishes to decline the transfer. FR § 23.116. As a practical matter, the State and Tribal courts must communicate regarding whether the Tribal court will accept jurisdiction in order to facilitate a smooth transfer and protect the Indian child and minimize disruption of services to the family. *See* FR § 23.119

Comment: A few commenters opposed the proposed provision allowing the Tribe 20 days to decide to accept transfer, noting that ICWA does not mandate a timeframe for Tribal response and that Tribal court scheduling may occur less frequently.

Response: The final rule deletes the proposed provision allowing the Tribe 20 days to decide to accept transfer, and instead specifies that the State court may request a timely response form the Tribe. The Tribe has a statutory right to decline (or accept) jurisdiction, without a statutorily mandated timeline. The Department, however, believes that Tribal courts will respond in a timely manner, recognizing the need for expediently addressing child-welfare issues.

Comment: A few commenters stated that the rule should require the State child-welfare agency to provide a copy of the agency file and additional listed information to the Tribe at no

charge because such documentation is essential to appropriate care decisions and are often not provided to Tribes upon transfer. Another commenter stated that the rule should require the records to be sent to the Tribe at the time the Tribe is requested to make a decision to accept or decline a transfer, so it can make an informed decision.

Response: The final rule combines the provisions in the proposed rule regarding transmission of information from the State court to the Tribal court upon transfer, and provides that the State court should expeditiously provide to the Tribal court all records regarding the proceeding. *See* FR § 23.119. In addition, State agencies should share records with Tribal agencies as they would other governmental jurisdictions, presumably at no charge, under the ICWA provision requiring mutual full faith and credit be given to each jurisdiction's records. *See* 25 U.S.C. 1911(d).

Comment: A commenter stated that the rule should instruct the State court to follow procedures for transfer as dictated by the Tribe.

Response: Once the State court determines that it must transfer to Tribal court, the State court and Tribal court should communicate to agree to procedures for the transfer to ensure that the transfer of the proceeding minimizes disruptions to the child and to services provided to the family.

Comment: One Tribal commenter stated that the rule should require the State court to send notice of request to transfer to the designated ICWA office rather than the Tribal court because there may be multiple Tribal courts.

Response: As discussed above, if the State court does not have contact information for the Tribal court, it should contact the Tribe's ICWA officer.

K. Adjudication

1. Access to Reports and Records

ICWA and these rules require that access to certain records be provided to certain parties. For example, ICWA provides that each party to an ICWA foster-care-placement or termination-of-parental-rights proceeding has the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based. 25 U.S.C. 1912(c); FR § 23.134. In order to comport with due process requirements, the final rule also extends this right to parties to emergency proceedings. FR § 23.134. Tribes that are parties to such proceedings are entitled to receipt of the documents upon which a decision may be based. In addition, the notice provisions of FR § 23.111(d) require that Tribes be provided the document by which the child-custody proceeding was initiated (as well as other information), and FR § 23.141 requires that States make available to an Indian child's Tribe the placement records for that child's child-welfare proceedings.

Comment: A few commenters suggested clarifying that the child's Tribe has the right to timely receipt of documents filed with the court or upon which a decision may be based. One stated that such access is necessary for the Tribe to determine whether to intervene. Two Tribes stated that States refuse them access to information on the basis of confidentiality.

Response: States cannot refuse to provide an Indian child's Tribe with access to information about that child's proceedings. ICWA expressly provides for Tribal access to certain records, and makes no exception for confidentiality concerns (which presumably are present in all child-custody proceedings). Tribes are sovereign entities that have concurrent jurisdiction over child-custody proceedings, and they should have the ability to review documents relevant to those proceedings. Further, the Indian Child Protection and Family Violence Protection Act addresses this concern, providing that State agencies that investigate and treat incidents of child

abuse should provide information and records to Tribal agencies that need to know the information in performance of their duties to the same extent they would provide the information and records to Federal agencies. 25 U.S.C. 3205. Therefore, confidentiality generally is not a valid basis to withhold information and records to the Indian child's Tribe. The rule does not incorporate this provision because it is not unique to ICWA implementation.

Comment: One commenter stated the rule should clarify that Tribes have a right to both discovery and disclosure of every document, and should not be required to pay for photocopying of documents that other parties receive.

Response: State agencies must share records with Tribal agencies that are parties to child-custody cases as they would other parties and governmental entities. The rule does not, however, address payment of such charges, as the issue is not addressed in the statute.

Comment: One commenter requested the rule require States to allow Tribes at least three business days to review records.

Response: The statute does not require States to provide Tribes with a certain time period for reviewing records, but all parties should be provided sufficient time to review the records to allow for meaningful participation in the proceeding.

Comment: One commenter opposed PR § 23.119(b) (the court's decisions must be based only upon documents in the record), because it suggests that agreed orders entered into between the parties could not be off the record or ex parte, despite local practice and State statutory authority, and could overload State courts by requiring all cases to be heard on the record.

Response: ICWA requires clear and convincing evidence for foster-care placements and evidence beyond a reasonable doubt for termination of parental rights, each of which would

necessarily require documentation in the record. This does not foreclose agreed orders, but the court must still make the statutorily required findings.

2. Standard of Evidence for Foster-care placement and Termination

a. Standard of Evidence for Foster-care placement

Comment: Several commenters supported PR § 23.121(a), establishing the standard of evidence applicable to foster-care placement. A few commenters suggested strengthening PR § 23.121(a) and (b) by changing "may not" to "must not" or "shall not" to make it more clearly mandatory. One commenter stated that while "may not" is the phrase used by the statute, it does not depart from the intent of ICWA to use "shall not."

Response: The final rule changes "may not" to "must not" as requested to clarify that the standard of evidence is mandatory.

Comment: Several commenters pointed out that PR § 23.121(a), establishing that the court may not order foster-care placement unless continued custody is likely to result in serious physical damage or harm to the child uses the phrase "serious physical damage or harm to the child" while the statute, at section 1912(e), uses "serious emotional or physical damage to the child." Commenters opposed the omission of "emotional" as beyond the authority granted by the statute. Some assumed this was an inadvertent omission, while others interpreted this as meaning that foster care may not be ordered even where parents are inflicting serious emotional harm on the Indian child.

Response: The proposed rule mistakenly omitted the term "emotional" in PR § 23.121(a) and instead used the term "harm." The final rule more closely tracks the statutory language, using the phrase "serious emotional or physical damage to the child." *See* FR § 23.121(a).

b. Standard of Evidence for Termination

One commenter suggested changing "continued custody of the child by the parent or Indian custodian" in PR § 23.121(b) to "custody of the child by either parent or Indian custodian."

Response: The final rule retains the proposed language stating "continued custody of the child by the parent or Indian custodian" because this is the statutory language. *See* 25 U.S.C. 1912(f), FR § 23.121(b).

c. Causal Relationship

Comment: One commenter noted that PR § 23.121(c) requires a showing of a relationship between particular conditions but it does not say in the second item how these conditions relate. The commenter suggested clarifying in both (c) and (d), that the actions are directly putting the children in danger. A commenter noted that the word "between" is confusing in PR § 23.121(c).

Response: The final rule addresses the commenters' concerns by revising the language to clarify that there must be a causal relationship between the particular conditions in the home and the risk of serious emotional or physical damage to the child. *See* FR § 23.121(c).

Comment: A commenter stated that the requirement for a causal relationship should apply to both clear and convincing evidence for foster-care placement and beyond a reasonable doubt for termination of parental rights because the statute establishes these evidentiary standards in mirroring provisions.

Response: The final rule requires the causal relationship for both clear and convincing evidence for foster-care placement and beyond a reasonable doubt for termination of parental rights. *See* FR § 23.121(c).

Comment: A few commenters suggested that "particular conditions in the home" should be "particular conditions in the home listed in the petition" because the petition should include all the allegations.

Response: The final rule does not add that the conditions must be listed in the petition because evidentiary requirements that are not unique to ICWA govern what allegations must be included in the petition. *See* FR § 23.121(c).

Comment: A commenter suggested replacing "conditions in the home" with "facts" to prevent exclusion of facts such as a parent's propensity to abuse the child, as opposed to the living conditions.

Response: The final rule retains the phrase "conditions in the home" because this phrase generally indicates all conditions of the child's home life rather than just the physical location. This phrase was also used in the 1979 Guidelines. *See* FR § 23.121(c).

d. Single Factor

Comment: Several commenters expressed concern regarding PR § 23.121(d), which states that one of the listed factors may not, of itself, meet the burden of evidence. A few stated that the proposed rule presumes States routinely remove children solely on the basis of poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior, when in fact they do not. One commenter expressed concern that PR § 23.121(d) is dangerous, because one could argue that where both parents are abusing and producing drugs, the evidence shows only the existence of inadequate housing and substance abuse, which cannot meet the burden of evidence. Another commenter noted that substance abuse is a significant contributing factor to child abuse and neglect, and asserted that excluding substance abuse from evidence fails to protect the child. Another commenter stated that Congress

never suggested alcohol or substance abuse that harms Indian children was not a sufficient reason for removing Indian children. A commenter stated that not allowing a judge to consider substance abuse or nonconforming social behavior takes away the court's power to protect Indian children.

Response: The final rule does not prohibit State courts from considering the factors. Instead, the final rule prohibits relying on any one of these factors, absent the causal connection identified in FR § 23.121(c), as the sole basis for determining that clear and convincing evidence or evidence beyond a reasonable doubt support a conclusion that continued custody is likely to result in serious emotional or physical damage to the child. *See* FR § 23.121(d). The intention behind this provision is to address the types of situations identified in the statute's legislative history where States remove Indian children at higher rates than they remove non-Indian children based on subjective assessments of these factors. To address the commenters' concerns that this provision may prevent State courts from protecting Indian children, the final rule addresses this comment by stating that a court may not consider any one of these factors unless there is a causal relationship between the factor and the damage to the child. In other words, if one of these factors is causing the likelihood of serious emotional or physical harm to the Indian child, the court may rely on the factor.

Comment: One commenter suggested defining or giving examples of "nonconforming social behavior" in the provision stating that evidence of nonconforming behavior by itself is not evidence that continued custody is likely to result in serious emotional or physical damage to the child.

Response: The final rule does not define the term, but the Department notes that "nonconforming social behavior" includes behaviors that do not comply with society's norms,

such as dressing in a manner that others perceive as strange, an unusual or disruptive manner of speech, or discomfort in or avoidance of social situations. *See* FR § 23.121(d).

Comment: A commenter stated that the list of factors in PR § 23.121(d) should not be sufficient for evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child, in addition to not being sufficient for clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child.

Response: The final rule adds "beyond a reasonable doubt" as requested. *See* FR § 23.121(d).

3. Qualified Expert Witness

The Act requires the testimony of qualified expert witnesses for foster-care placement and for adoptive placements. 25 U.S.C. 1912(e), (f). The final rule provides the Department's interpretation of this requirement. *See* FR § 23.122.

The legislative history of the qualified expert witness provisions emphasizes that the qualified expert witness should have particular expertise. Congress noted that "[t]he phrase 'qualified expert witnesses' is meant to apply to expertise beyond the normal social worker qualifications." H.R Rep. No. 95-1386, at 22. In addition, a prior version of the legislation called for testimony by "qualified professional witnesses" or a "qualified physician." *See* S. Rep. No. 95-597, at 21.

The final rule requires that the qualified expert witness must be qualified to testify regarding whether the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. FR § 23.122(a). This requirement flows from the language of the statute requiring a determination, supported by evidence …,

including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. 1912(e), (f).

In addition, the qualified expert witness should have specific knowledge of the prevailing social and cultural standards of the Indian child's Tribe. FR § 23.122(a). In passing ICWA, Congress wanted to make sure that Indian child-welfare determinations are not based on "a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family." *Holyfield*, 490 U.S. at 36 (citing H.R. Rep. No. 95-1386, at 24). Congress recognized that States have failed to recognize the essential Tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. *See* 25 U.S.C. 1901(5). Accordingly, expert testimony presented to State courts should reflect and be informed by those cultural and social standards. This ensures that relevant cultural information is provided to the court and that the expert testimony is contextualized within the Tribe's social and cultural standards. Thus, the Department believes that the question of whether the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child is one that should be examined in the context of the prevailing cultural and social standards of the Indian child's Tribe.

The final rule does not, however, strictly limit who may serve as a qualified expert witness to only those individuals who have particular Tribal social and cultural knowledge. FR § 23.122(a). The Department recognizes that there may be certain circumstances where a qualified expert witness need not have specific knowledge of the prevailing social and cultural standards of the Indian child's Tribe in order to meet the statutory standard. For example, a leading expert on issues regarding sexual abuse of children may not need to know about specific Tribal social

and cultural standards in order to testify as a qualified expert witness regarding whether return of a child to a parent who has a history of sexually abusing the child is likely to result in serious emotional or physical damage to the child. Thus, while a qualified expert witness should normally be required to have knowledge of Tribal social and cultural standards, that may not be necessary if such knowledge is plainly irrelevant to the particular circumstances at issue in the proceeding. A more stringent standard may, of course, be set by State law.

Comment: Several commenters supported the proposed rule's requirement in PR § 23.122 for the qualified expert witness to have knowledge of the prevailing social and cultural standards and childrearing practices within the child's Tribe and prioritizing use of experts who are members of the child's Tribe and recognized by the Tribal community as knowledgeable in Tribal customs. A few commenters stated that this ensures cultural information is provided to the court and avoids increasing use of non-Indian professionals without experience or knowledge in Indian families. A few commenters noted that expert witness testimony has been provided by those without any knowledge of Indian family customs or based on information gleaned from the Tribe's website; these commenters supported the proposed rule for addressing this issue. A commenter supported the definition of qualified expert witness in PR § 23.122 as consistent with the way the term has been defined in various State statutes implementing ICWA, in various Tribal-State agreements, and in accordance with ICWA's intent.

Several other commenters stated that the proposed provisions addressing who may serve as a qualified expert witness are beyond the Department's authority. Other commenters stated that the Department is within its purview to define who may be considered as a qualified expert witness in ICWA cases because the statute requires qualified expert witnesses but does not define the term.

Several commenters objected to PR § 23.122, stating that it commandeers State courts by telling them who may serve as expert witnesses and that, instead, State-court judges should determine what expert testimony is credible and reliable based on rules of evidence. A few other commenters stated that the rule conflicts with established rules of evidence because questions of bias and prejudice go to the weight, not the admissibility, of evidence. These commenters note that concerns as to bias and prejudice can be addressed through impeachment in cross-examination.

Response: The Act is ambiguous regarding who is a "qualified expert witnesses." Thus, as discussed above, the final rule provides the Department's interpretation of this requirement. *See* FR § 23.122. Providing State courts with this regulatory language will promote uniformity of the application of ICWA.

As discussed above, the Department emphasizes that qualified expert witnesses must have particular relevant expertise and should have knowledge of the prevailing social and cultural standards of the Indian child's Tribe. These are not issues of bias or prejudice; rather, they are issues of the knowledge that the expert should have in order to offer her testimony. The final rule still provides State courts with discretion to determine what qualifications are necessary in any particular case.

Comment: A few commenters noted that ICWA does not require the qualified expert witness have specific knowledge of the Tribe's culture or customs. A commenter stated that Congress said the phrase was meant to apply to expertise beyond "normal social worker qualifications" but did not impose additional requirements for knowledge of the Tribe's culture and customs. This commenter also noted that numerous courts have ruled that, if cultural bias is not implicated in the testimony or proceeding, then the expert witness is not required to have

experience with or knowledge of the Indian culture. A few commenters pointed to case law holding that specialized knowledge of Indian culture is not necessary for a person to be qualified as an expert in an ICWA case, and State law controls who is recognized as an expert.

A few commenters pointed out the purpose of the requirement for qualified expert witness testimony and stated that Congress intended to prevent removal of Indian children due to cultural misunderstandings, poverty, or different standards of living. Another stated that Congress was trying to address social workers improperly basing findings of neglect and abandonment on factors such as the care of Indian children by extended family members, Indian parents' permissive discipline, and unequal considerations of alcohol abuse.

Response: As discussed above, the final rule states that a qualified expert witness should have an understanding of the child's Tribe's cultural and social standards. However, the final rule still provides State courts with discretion to determine what qualifications are necessary in any particular case. State law may also provide standards for qualified expert witnesses that are more protective of the rights of the Indian child and parents.

Comment: One commenter noted that the requirement for specific knowledge of the Tribe applies even if the child has never been involved in the Tribe's customs or culture. A commenter asserted it would be unfair to a child that has no connection to the Tribe's customs or culture to require a Tribal expert witness. One commenter stated that it does not take an expert with specific knowledge of Indian culture to provide helpful information to the court, so long as the expert has substantial education and experience and testifies on matters not implicating cultural bias. This commenter stated that the requirement for an expert with special knowledge of Indian life is unreasonable when an agency seeks action on any ground not pertaining to the child's

heritage. A few commenters pointed to case law holding that when cultural bias is not clearly implicated, the qualified expert witness need not have specialized knowledge of Indian culture.

Response: As discussed above, the final rule states that a qualified expert witness should have an understanding of the child's Tribe's cultural and social standards. The child's involvement with Tribal customs and culture is not relevant to an inquiry that focuses on the ability of the parent to maintain custody of their child.

There may be limited circumstances where this knowledge is plainly irrelevant to the question whether the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, and the final rule allows for this. The Department disagrees, however, with the commenters' suggestion that State courts or agencies are well-positioned to assess when cultural biases or lack of knowledge is, or is not, implicated. ICWA was enacted in recognition of the fact that the opposite is generally true. Indeed, as other commenters have pointed out, some theories, such as certain bonding and attachment theories, presented by experts in foster-care, termination-of-parental-rights, and adoption proceedings are based on Western or Euro-American cultural norms and may have little application outside that context. *See, e.g.*, Comments of Casey Family Programs, at pp 13-17.

Comment: Several commenters opposed restricting expert testimony since it could prevent courts from receiving relevant information. Commenters also stated that limitations on expert evidence would cause harm and prevent positive outcomes for many children. A commenter noted that the proposed rule's requirements improperly allow the Tribe to dictate who the State can call as an expert witness in their own case-in-chief. This commenter stated that the Tribe as a party may call their own witnesses and cross-examine the State's expert and should have the responsibility to present evidence. A few commenters noted that the regulations

do not limit the number of expert witnesses at a hearing but ensures the court has all the information it needs to make culturally informed decisions. These commenters state that the proposed rule requires the State to find someone who agrees with the foster-care placement or termination of parental rights after reviewing the case from the perspective of the child's culture and community, to ensure that the cultural norms of the child's Tribe are considered. Other commenters stated that the proposed rule restricts testimony from psychological experts in trauma, attachment, developmental psychology, etc., unless they also have knowledge of the specific Tribe's customs. Several commenters requested clarification that these requirements do not preclude State courts from hearing testimony from other expert witnesses in addition to the expert on the Tribe's culture and customs as they pertain to childrearing. A few commenters noted that a primary policy underlying ICWA was to protect the best interest of Indian children, but the proposed rule provides no qualification for experts who can speak to the best interests of the child. These commenters state that any such expert should be given priority regardless of whether the expert is from a Tribe.

Response: The rule does not restrict expert testimony. The court may accept expert testimony from any number of witnesses, including from multiple qualified expert witnesses. The statute requires, however, that the proposed foster-care placement or termination of parental rights be supported by the testimony of qualified expert witnesses.

Comment: Several commenters noted the difficulty in obtaining expert witnesses with specific knowledge of the Tribe's culture and customs who are willing to testify. One noted that, in California, due to the historical relocation policies, finding an expert can be a challenge. These commenters were concerned that the difficulties in securing qualified expert witnesses could delay permanency decisions. Suggested solutions to this issue included:

- Allowing regional experts (particularly in Alaska, where it may not be possible to find experts in each unique village or Tribe that can be available at hundreds of hearings held each year);
- Providing guidance for finding witnesses from out-of-State Tribes;
- Applying expert witness requirements only when the child is domiciled on or residing on the reservation because otherwise it is difficult to locate an impartial qualified expert witness with specific knowledge of the Tribe's culture and customs;
- Requiring Tribes to respond to requests to provide an expert, or to relieve the agency of the obligation to identify a Tribal expert if the Tribe fails to respond;
- Requiring BIA provide a list of qualified expert witnesses.

Response: The Department encourages States to work with Tribes to obtain a qualified expert witness. In some instances, it may be appropriate to accept an expert with knowledge of the customs and standards of closely related Tribes. Parties may also contact the BIA for assistance. *See* 25 CFR 23.81.

Comment: A commenter noted that the evidentiary issue before the court is whether the child is at risk of serious emotional or physical damage, and that the new definition does not require the expert witness to have any knowledge, education, or qualification on that issue. This commenter noted that knowledge of the Tribe's culture and customs can inform an expert's opinion but that is secondary to the expert's ability to address the main issue.

Response: The final rule states that the testimony of at least one qualified expert witness must address the issue of whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Comment: A few commenters supported the preference list of qualified expert witnesses. A few commenters suggested redrafting PR § 23.122(b) to clarify that the presumption is in descending order, to read "The [qualified expert witness] shall be determined in the following order of preference." One commenter stated that the preference order is important because in some counties, the State worker is accepted as an expert witness to circumvent the Tribe's opinion, if it is known that the Tribe has an opposing opinion.

A few commenters opposed listing a member of the child's Tribe recognized as knowledgeable in Tribal customs or childrearing as the first preference because choosing a layperson over a professional would be choosing that Tribe's cultural opinion over an educated person who can provide evidence-based testimony.

A few commenters opposed the priority given to professionals with substantial experience and education in his or her specialty being below the priority of Tribal members of the child's or another Tribe, and laypersons with knowledge of the Tribe's cultural and childrearing practices. These commenters stated that the priorities essentially eliminate the input of licensed child-welfare experts, and could jeopardize the safety and wellbeing of the children.

One commenter stated that the fourth preference should be removed because a non-Native anthropologist will likely not understand the culture and traditions of Tribes. This commenter recommends instead adding language similar to three, saying that a layperson who is recognized by the child's Tribe in having substantial experience.

A commenter opposed ranking at all because the trier of fact should determine what weight to give to testimony, and by ranking, it implies the higher ranked expert would be more reliable or credible.

Response: The final rule does not include a preference list of qualified expert witnesses. Instead it requires that the qualified expert witnesses be able to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and that the qualified expert witnesses should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. The final rule also allows a Tribe to designate a person as being qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe.

Comment: A few commenters expressed concern that a witness in the proposed order of preference would be biased, because a member of the Tribe would not oppose the Tribe's position.

Response: The final rule does not require that the qualified expert witness be a citizen of the Tribe. The witness should be able to demonstrate knowledge of the prevailing social and cultural standards of the Indian child's Tribe or be designated by a Tribe as having such knowledge. *See* FR § 23.122(a), (b).

Comment: One commenter suggested considering Native elders knowledgeable about ICWA and the family's heritage, etc., as qualified expert witnesses.

Response: Any potential qualified expert witness, including Native elders, would need to meet the requirements of FR § 23.122 to testify on whether continued custody is likely to result in serious emotional or physical damage to the child. The court may allow experts to testify for other purposes as well.

Comment: Several commenters suggested further improving the regulation by providing that the Tribe will designate and authorize the expert witness. Several other commenters requested clarification that, while the Tribe may assist in locating an expert, it is under no

obligation to do and that the Tribe's failure to do so does not absolve the State of its obligation. A few other commenters requested requiring the State to seek assistance from the Tribe or the BIA agency if the Tribe is unable to be contacted. Another commenter noted that the Tribe is often the State's opposing party, so it shouldn't be required to seek assistance from the Tribe.

Response: The final rule provides that the court or any party may request the assistance of the Indian child's Tribe or the BIA agency serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses. This is not required.

Comment: Several commenters requested a new provision prohibiting the qualified expert witness from being employed by the State agency due to a concern about the potential that the State worker may have a bias, and noting that the original intent of the requirement for a qualified expert witness was to combat such bias. Others requested the prohibition be extended to private agencies and Federal agencies. These commenters stated that it is a conflict of interest, or at least the appearance of impropriety, for the agency seeking placement to claim to be an expert in whether the child should be placed.

Response: The final rule adds a provision prohibiting the social worker that is regularly assigned to the child from serving as the qualified expert witness, to help to address concerns regarding bias or conflicts. In addition, this provision reflects the congressional direction that "[t]he phrase 'qualified expert witnesses' is meant to apply to expertise beyond the normal social worker qualifications." H.R. Rep. No. 95-1386, at 22.

Comment: One commenter noted that because the standard of evidence for foster-care placement and termination of parental rights hinges on harm to the child, the qualified expert should be someone familiar with the child, not just the Tribe. A commenter suggested requiring the qualified expert witness to make contact with the parents and make an effort to view

interactions between the parents and child, and attempt to meet with extended family members involved in the child's life. Otherwise, the expert will rely on one-sided State reports.

Response: The commenter's suggestions are recommended practices.

L. Voluntary Proceedings

Certain ICWA requirements apply to voluntary proceedings. The statute defines "child-custody proceeding" broadly to include foster-care, preadoptive, and adoptive placements, without regard to whether those placements are made with or without the consent of the parent(s). 25 U.S.C. 1903(1). Similarly, termination-of-parental-rights proceedings fall within the statutory definition whether or not the termination is voluntary or involuntary. *Id.*

The statute does not condition Tribal court jurisdiction over Indian child-custody proceedings on whether that proceeding is voluntary or involuntary. Rather, exclusive Tribal jurisdiction is recognized over any child-custody proceeding involving an Indian child who resides or is domiciled within the reservation of the Tribe under 25 U.S.C. 1911(a). *See also generally Holyfield*. Transfer and intervention rights apply in any State court proceeding for the foster-care placement of, or termination of parental rights to, an Indian child. 25 U.S.C. 1911(b), (c). Similarly, section 1915 of the statute provides placement preferences that apply in any adoptive placement of an Indian child under State law, without specifying whether that adoption is the result of a voluntary or involuntary termination of parental rights. And, section 1913 of the statute specifically addresses voluntary proceedings, and provides a number of significant protections to parents.

The Department is cognizant that voluntary proceedings require consideration of the interests of the Indian child's biological parents to direct the care, custody, and control of their child. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65 (2000). The rights of the child, including the

rights of the child as an Indian, must also be considered. State and Tribal governments also have a sovereign interest in protecting the welfare of the child. And Congress has articulated a clear Federal interest in protecting Indian children and the survival of Tribes. State law varies in how these various interests are considered and protected.

ICWA balances these important and sometimes competing considerations. It recognizes that Tribes have exclusive jurisdiction over child-custody proceedings involving children domiciled on the reservation, and the right to seek transfer or intervene in foster-care or termination-of-parental rights proceedings involving off-reservation children. The final rule retains this balance, and makes clear that ICWA's placement preferences apply to voluntary placements, but also permits departure from those preferences based on various factors, including the request of one or both parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference. FR § 23.132(c). This balances the importance of the placement preferences with the rights of the parent.

For clarity, the final rule indicates in FR § 23.104 which provisions apply to voluntary proceedings. The final rule also provides specific standards for voluntary proceedings. In particular:

- Section 23.124(a) and (b) provide the minimum requirements for State courts to determine whether the child is an "Indian child" as defined by statute. If there is reason to believe that the child is an "Indian child," but this cannot be confirmed based on the evidence before the State court, it must ensure that the party seeking placement sought verification of the Indian child's status with the Tribes of which the child might be a citizen. The determination of whether the child is an "Indian child" is a threshold inquiry; it affects the jurisdiction of the State court and what law applies to the matter before it. *See, e.g., In re A.G.*, 109 P.3d 756, 758 (Mont.

2005) (whether child is an "Indian child" is a "threshold inquiry" and must be definitively resolved before termination of parental rights). Section (a) mirrors the provision in the proposed rule; section (b) was added to clarify the obligation to confirm a child's status as an "Indian child."

- FR § 23.124(c) clarifies that the regulatory provisions addressing the application of the placement preferences apply with equal force to voluntary proceedings.

- The final rule does not include a provision requiring agencies and State courts to provide notice to the Indian Tribe of voluntary proceedings. As a practical matter, notice to the Tribe may be required in order to comply with other provisions of the statute or regulation (*see, e.g.*, FR § 23.124(b)). In the Department's view, it is a best practice to provide such notice.

- FR § 23.125 details how consent must be obtained in a voluntary proceeding, and is designed to ensure that the procedural protections provided by ICWA are implemented in each case. The final rule makes some wording changes from the proposed rule, but is substantively similar.

- FR § 23.126 describes what information a consent document should contain. The final rule makes some wording changes from the proposed rule, but is substantively similar.

- FR § 23.127 describes how withdrawal of consent to a foster-care placement is achieved. It clarifies that the parent or Indian custodian may withdraw consent to foster-care placement at any time; requires the filing of an instrument under oath, and if consent is properly withdrawn, requires the immediate return of the child to the parent or custodian.

- FR § 23.128 addresses withdrawal of consent to termination of parental rights or adoption. The final rule includes termination of parental rights, to better match the statutory provision. *See* 25 U.S.C. 1913(c). The final rule, like the proposed rule, requires that a

withdrawal of consent be filed in court or made by testifying in court, and that after withdrawal of consent is filed, the child must be returned to the parent or Indian custodian.

1. Applicability of ICWA to Voluntary Proceedings – In General

Comment: Several commenters noted and supported the applicability of ICWA to voluntary placements. A commenter stated that the proceedings identified in PR § 23.103(f) (voluntary proceedings in which the parent or Indian custodian may regain custody upon demand) are those that operate outside of the court and child-welfare systems, and that these are distinct from those described in PR § 23.103(g) (in which a parent consents to foster care or termination of parental rights).

Response: Certain provisions of the final rule are applicable to voluntary placements. To clarify which placements are outside of ICWA, the final rule defines "upon demand" to mean verbal demand without any required formalities or contingencies. Section 1913 of the statute (implemented by FR § 23.103(g)) requires formalities for consent and withdrawal of consent of a foster-care placement.

Comment: Several commenters supported PR § 23.103(g) stating that private adoption placements made voluntarily by parents are covered by ICWA. Among the reasons stated in support of this provision were:

- Private adoption placements contribute to the wholesale separation of Indian children from their families, culture and Tribes;
- Indian children are routinely adopted into non-Indian homes through private adoptions because adoption agencies control which homes the birth parents choose from;
- There are hundreds or thousands of Indian homes that would like to adopt Indian children;

- ICWA as a whole does not only pertain to involuntary proceedings.

One Tribe recounted a situation where the Tribe intervened in a voluntary adoption and the Tribal member changed her mind and placed the child with a placement that preserved the child's ties to family, culture, and community.

Response: The final rule clarifies which provisions are applicable to voluntary proceedings. *See e.g.*, FR § 23.104. It balances the interests of biological parents with the Federal policy promoting retention of Indian children within their extended family and Tribal community whenever possible.

Comment: A few commenters stated that the proposed rule treats the child as property of the Tribe, inviting Tribal interference with the parent's right to make decisions.

Response: The rule in no way treats the child as property of the Tribe. Tribes, like other governments, have a sovereign interest in the welfare of their citizens, and in particular, their children. The final rule balances this interest with a parent's interest in directing the care, custody, and control of their child.

2. Applicability of Notice Requirements to Voluntary Proceedings

Comment: Many commenters stated support for the provision of the proposed rule related to notice to Tribes in voluntary proceedings. These commenters noted that Tribes are *parens patriae* for their member children and that, when Tribes do not receive notice in voluntary proceedings they are effectively denied rights and protections granted by ICWA. Specifically, a Tribe must receive prior notice of a voluntary proceeding in order to avail itself of the following statutory rights and protections:

- The opportunity to verify a child is a member, and therefore subject to ICWA;

- The exercise of exclusive Tribal jurisdiction over Indian children who reside or are domiciled within the reservation or who are wards of Tribal court (25 U.S.C. 1911(a));
- The exercise of concurrent jurisdiction over Indian children by transferring the proceeding to Tribal court (25 U.S.C. 1911(b));
- Intervention in voluntary foster-care placement and termination-of-parental-rights proceedings (25 U.S.C. 1911(c));
- The opportunity to provide an interpreter to a parent or Indian custodian (25 U.S.C. 1913(a));
- Monitoring and compliance (filing a petition to invalidate proceedings) (25 U.S.C. 1914);
- Assistance in identifying placements and providing information on "prevailing social and cultural standards" in the Indian community (25 U.S.C. 1915(d));
- Facilitation of documentation of efforts to comply with the order of preference (25 U.S.C. 1915(e)).

A few commenters asserted that the proposed requirement for notice in voluntary proceedings addresses an ambiguity in the statute: the provision at section 1913 addressing consent for voluntary termination does not address how the provision interacts with other provisions of the Act. A few commenters stated that the proposal addresses Congress's concern about both State and private agency adoptions. These commenters assert that birth parents' rights are balanced against the government's interest in the child's safety.

One commenter noted that while the statute explicitly requires notice in involuntary proceedings, it does not preclude notice in voluntary proceedings. Other stated reasons for support of requiring notice in voluntary proceedings were:

- Voluntary adoptions are often used to skirt around ICWA;

- Including the Tribe in voluntary placements will help find suitable placements and lead to placement stability;
- Requiring notice in voluntary proceedings is consistent with several State laws, including California SB 678 and the Oklahoma Indian Child Welfare Act, and Tribal-State agreements, and that nationalization of the requirement ensures equal treatment on the issue across jurisdictions;
- Requiring notice allows the Tribe the opportunity to assist the mother with any situations leading her to feel that she cannot raise her child.

A few commenters suggested adding that the notice to Tribes of voluntary proceedings is to permit the Tribe to determine whether the child involved is an Indian child.

Several other commenters opposed the proposed requirement for notice in voluntary proceedings, stating that it is contrary to the plain language of the statute because the notice provisions at section 1912 apply only to involuntary proceedings and the provisions specific to voluntary proceedings at section 1913 make no mention of notice. These commenters also pointed to case law concluding there is no Tribal right to notice in voluntary proceedings and past congressional attempts to amend ICWA to require this notice as proof that the Act currently does not require such notice.

Several commenters stated that requiring notice in voluntary proceedings violates an individual's rights to privacy and due process, and will result in children not being adopted because the birth parents will be forced into a choice of doing what they believe is best for the child or preserving their constitutionally protected privacy and anonymity. One commenter stated her belief that the birth parent's desire should be paramount. One commenter pointed to

the Supreme Court's decision in *Whalen v. Roe,* 429 U.S. 589 (1977), as protecting parents' right to privacy.

A few commenters stated that the regulations should suggest, rather than mandate, notice in voluntary proceedings because the Act does not require notice but such notice may be advisable to protect the Tribe's right to intervene.

Response: The final rule has been changed from the proposed rule, and does not require in all cases that notice be provided to Tribes of voluntary proceedings. The final rule does require that the court make a determination of whether the child is an "Indian child," because this is essential in order to assess the State court's jurisdiction and what law applies. An inquiry with one or more Tribes may be necessary in some cases to confirm a child's status as an "Indian child." The final rule does not preclude State requirements for notice in voluntary proceedings in other circumstances. The Department recommends that Tribes be provided notice in voluntary proceedings.

Comment: Many commenters opposed the provisions at PR § 23.107(d) stating that a request for anonymity in voluntary proceedings does not relieve the obligation to obtain verification from the Tribe and provide notice. These commenters stated that requiring notice to Tribes in voluntary cases is contrary to the plain language of the statute, because the statute states the court or agency "shall give weight" to the parent's desire for anonymity and nothing in the statute requires notice to Tribes in voluntary proceedings. These commenters also stated that requiring verification and notice in voluntary proceedings even where the parent has expressed a desire for anonymity violates constitutional privacy rights and the non-discrimination provisions of the Multi-Ethnic Placement Act. A few commenters argued that it is good public policy to allow for anonymity without notice to the Tribe and others because removing the option for a

"quiet adoption" will make other options, such as abortion or taking advantage of "safe haven" laws to anonymously abandon a child more desirable.

A few commenters supported this provision and requested adding that a request for anonymity does not relieve the obligation to comply with any other provision of ICWA as well. These commenters stated that Tribes can work within their Tribal systems to keep the information confidential and that these regulations are consistent with the approach taken in some States. One commenter stated that, without this provision, adoption attorneys and agencies that seek to place Indian children with non-Indian families need only tell the parents to request anonymity to enable placement without complying with ICWA. One commenter stated that the link between notice to the Tribe and harm to the parents is attenuated and that the alleged constitutional right to privacy would be an expansion of Supreme Court jurisprudence.

A few commenters specifically addressed PR § 23.107(d)'s requirement that the agency or court keep documents confidential and under seal. A State commenter requested explanation for how it could be possible to keep the documents confidential and under seal while still seeking verification and notice. A few other commenters requested a revision to state that the requirement to keep documents confidential and under seal may not allow the court to deny access to the documents by a Tribe or any party that needs them to fully present their position in the child-custody proceeding. One commenter noted that, just as no parent in a child-custody proceeding has an anonymity interest that supersedes a State's sovereign interest in protecting children, neither does a parent have an anonymity interest that supersedes a Tribe's sovereign interest in protecting children.

Response: As discussed above, the final rule requires notice to Tribes when necessary to determine a child's status as an "Indian child." Tribes, like other governments, are equipped to

keep such inquiries confidential, and the final rule requires this of Tribes. While this inquiry to the Tribe may require the State to share confidential information, this sharing is a government-to-government exchange of information necessary for the government agencies' performance of duties. Tribes are often treated like Federal agencies for the purposes of exchange of confidential information in performance of governmental duties. *See, e.g.*, Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. 3205; Family Rights and Education Protection Act, 20 U.S.C. 1232(g). The final rule balances the rights of the parents to confidentiality with the need to determine the Indian status of the child.

Comment: Several commenters noted that State "safe haven" laws, such as the law in Wisconsin and Minnesota, that allow parents to anonymously relinquish children, undermine ICWA and suggested addressing this issue in the regulations. Some commenters asserted that the Federal ICWA preempts State "safe haven" laws. Others suggested adding a requirement for representatives of safe haven facilities to ask the parents to provide information regarding Tribal affiliation and then inform any agency or court involved.

Response: The operation of State "safe haven" laws is beyond the scope of this rulemaking. Child-custody proceedings involving children relinquished under these laws must still comply with applicable requirements under ICWA and these regulations.

Comment: A few commenters requested clarification that Health Insurance Portability and Accountability Act of 1996 (HIPAA) only applies to medical information and does not apply to information on Tribal affiliation.

Response: These comments are beyond the scope of this rulemaking.

Comment: A few commenters stated that notice is necessary to address situations where the mother places a child voluntarily for adoption, but the proceeding is involuntary to the father.

Response: In situations where a mother voluntarily places an Indian child for adoption, but the proceeding is involuntary to the father, then the involuntary proceedings requirements under section 1912 of the Act apply (e.g., notice, active efforts, evidence beyond a reasonable doubt including the testimony of qualified expert witnesses).

Comment: A few commenters stated that the proposed language applying ICWA to voluntary placements may create barriers when parents agree to out-of-home placements to allow them to engage in informal supervision services that provide intensive support to families to prevent court intervention.

Response: If a parent agrees to out-of-home placement but may not regain custody of the child upon verbal request, the out-of-home placement is a child-custody proceeding, FR § 23.2, and ICWA requirements (for voluntary or involuntary proceedings, as the case may be) are applicable. ICWA establishes minimum Federal standards that require court involvement at certain points.

3. Applicability of Placement Preferences to Voluntary Proceedings

Comment: A few commenters stated their support of the proposed provision clarifying that placement preferences apply to voluntary proceedings. A commenter suggested revisions to clarify that the placement preferences apply to both involuntary and voluntary proceedings because otherwise, parents who proceed through attorneys rather than an "agency" may interpret the provision to apply only to involuntary proceedings.

Many commenters opposed this provision. Commenters in opposition to this provision state that the Tribe's rights should not "trump" the rights of the birth parents to choose what they believe to be the best adoptive placements for their children and what placement they as the parents believe is in the best interests of the child. Commenters stated that the proposed rule

takes away parents' ability to make placement plans for their children. Several commenters asserted that birth parents may choose to perjure themselves to withhold information on Tribal membership, terminate a pregnancy, or may feel forced to parent the child themselves in an undesirable environment because they will not be able to choose the adoptive family, or may ultimately have the child taken away involuntarily. Some stated that this rule will prevent adoptive families from being open to adopting Indian children due to the fear that the Tribe could override the birth parents' choice and take the child away.

Response: The plain language of section 1915(a) of the Act requires that the placement preferences be applied "in any adoptive placement," which includes both voluntary and involuntary adoptive placements, in the absence of good cause to the contrary. The regulation likewise requires that the preferences be applied in both voluntary and involuntary placements, but notes that a basis for good cause to deviate from the placement preferences may be the request of one or both of the parents, if they attest that they have reviewed the placement options that comply with the order of preference. The regulation therefore permits parents to choose a placement for their child that does not comply with the preferences. *See* FR § 23.132(c).

Comment: A few commenters stated that they intentionally chose to disassociate from the Tribe and therefore find it "offensive" that a Tribe could claim their child as a member. One commenter stated that Tribal members who choose not to live on a reservation should not be subject to their Tribal governments making choices for their children, such as where to place their infants for adoption.

Response: Parents who choose to dissociate from the Tribe by not enrolling or by disenrolling (and by not enrolling their child in the Tribe) are not subject to ICWA because the child will not qualify as an "Indian child." If, however, the child is an "Indian child," the Tribe

has a legitimate and federally recognized interest in the welfare of that child and the maintenance of ties to the Tribe. The final rule balances this interest with the interests of parents in directing the care, custody, and control of their child.

Comment: A few commenters stated that looking at what is in the best interest of the child should come before everything else and nobody other than the parents should be able to determine what best interest means to them. These commenters stated that culture should be a consideration but the Tribe should not be able to interfere if the family chooses a non-preferred adoptive placement. Commenters also stated that birth mothers of Indian children should have the same rights as all other birth mothers under the Constitution to choose who will raise the child. A few commenters cited Supreme Court cases addressing constitutional rights with respect to family autonomy. *See, e.g., Troxel*, 530 U.S. at 66; *Santosky, supra*. A commenter cited to an Iowa Supreme Court decision stating that ICWA does not curtail a parent's right to choose the family she feels is best suited to raise her child. *In re the interest of N.N. E.*, 752 N.W.2d 1, 9 (Iowa 2008).

Response: While the placement preferences apply to voluntary placements, the final rule allows birth parents to choose families outside the preferences if they attest that they have reviewed the placement options that comply with the order of preference. *See* FR § 23.132(c)(1). This balances the interest of the parent with the other interests protected by ICWA.

Comment: One commenter raised that, in step-parent adoptions, an Indian family should not come before an Indian mother who wants her husband to adopt her Indian child.

Response: Adoptive placement with a step-parent would meet the placement preferences of the Act, because the first placement preference is a member of the child's extended family and

step-parents are included in the definition of "extended family member." *See* 25 U.S.C. 1903(2); 1915(a); FR §§ 23.2, 23.130(a)(1).

Comment: A few commenters opposed requiring a diligent search for placements in a voluntary adoption context because it conflicts with the parent's freedom to choose who will raise their children. One commenter stated that, by the time a parent goes to an adoption agency, the parent has already explored potentially placing within the family or community and has ruled it out.

Response: The final rule does not include the provision that the commenters identified.

Comment: One commenter stated that applying the placement preferences to voluntary adoptions will result in Indian children having a more difficult time being adopted if there are no available families within the placement preferences.

Response: The placement preferences for adoptions cover a wide range of individuals, including extended family, other citizens of the Indian child's Tribe, and other Tribal citizen families. Nevertheless, good cause may be found to deviate from the placement preferences based on the parent's request for placement with another family or lack of available placements that meet the preferences, among other reasons. *See* FR § 23.131.

4. Applicability of Other ICWA Provisions to Voluntary Proceedings

Comment: Several commenters stated there is no Tribal right to intervene in voluntary proceedings because section 1911(c) provides the right only in State court proceeding for the foster-care placement of, or termination of parental rights to, Indian child. Other commenters stated that there is a compelling governmental interest of Tribes that supports intervention of right, to protect its sovereign interest in Tribal children, and the welfare of Indian children is the same whether the proceeding is voluntary or involuntary.

Response: The commenters are correct that section 1911(c) refers to termination of parental rights" but not "adoptive placement; however, nothing in the Act restricts the phrase "termination of parental rights" to involuntary proceedings. By its plain language, the statute permits Tribal intervention in a voluntary termination-of-parental-rights proceeding.

Comment: One commenter stated that active efforts are required in voluntary proceedings, and another stated they are not.

Response: The statutory provision requiring active efforts appears in the section of the Act that primarily addresses involuntary proceedings. *See* 25 U.S.C. 1912(d). The regulation therefore does not require a showing of active efforts to prevent the breakup of the Indian family in voluntary proceedings.

Comment: One commenter requested clarification as to whether the rule is saying the right in section 1912(b) to appointment of counsel in involuntary proceedings is also available in voluntary proceedings (because PR § 23.111(c)(4)(iv) and (v) and PR § 23.111(f) require the notice to include statements regarding the right to counsel).

Response: The statutory provision requiring the right to court-appointed counsel appears in the section of the Act that primarily addresses involuntary proceedings. *See* 25 U.S.C. 1912(b).

5. Applicability to Placements Where Return is "Upon Demand"

A few commenters requested deletion or clarification of PR § 23.103(f) because of the risk that it will improperly exclude certain adoptive placements from ICWA. One commenter suggested as an alternative "voluntary placements made without involvement of an agency or State court where the parent can regain custody of the child upon demand are not covered by ICWA." One commenter stated that if the State is involved, there is always the threat of

involuntary removal if the parent does not "agree" to the placement, and that these placements should be subject to ICWA. This commenter suggested adding that every placement in which the State has a say should be treated as an ICWA placement.

Response: As mentioned above, the final rule defines "upon demand" to mean verbal demand without any required formalities or contingencies and adds to the definition of "voluntary placement" that the placement be without a threat of removal by a State agency. *See* FR § 23.2.

6. Consent in Voluntary Proceedings

Comment: A commenter suggested beginning PR § 23.124(a) with "any voluntary consent to" rather than "a voluntary termination."

Response: The final rule makes this editorial change for consistency. *See* FR § 23.125(a).

Comment: A commenter noted that PR § 23.124 is important because agencies and attorneys have used voluntary consent to essentially "trick" parents and extended family into permanently surrendering their custodial rights. The commenter notes that safeguards, including that the consent be recorded before a judge, are essential to protecting rights and eliminating the possibility of dispute over intent, preventing litigation, and avoiding emotional trauma. Another commenter stated that the rule should instead allow for consent to be entered before a notary public to save time and money.

Response: The regulation's requirement that consent be recorded before a judge repeats the statutory requirement. *See* 25 U.S.C. 1913(a), FR § 23.125.

Comment: One commenter suggested clarifying that the court of competent jurisdiction may not be the same court where the child-custody proceeding takes place.

Response: Neither the statute nor the regulations limit the location of the court of competent jurisdiction.

Comment: A commenter suggested the "timing limitations" and "point at which such consent is irrevocable" include cross-references to distinguish consent to foster-care placements (to which no time limitations apply) in PR § 23.126 and adoptions (to which there are time limitations—may be withdrawn at any time prior to the entry of the final decree of termination or adoption) in PR § 23.127.

Response: The final rule clarifies the applicable timeframes in FR §§ 23.127, 23.128.

Comment: A few commenters suggested adding a requirement that the court explain on the record the consequences of consent, right to withdraw consent, and procedure for withdrawing consent, and at what point the right to withdraw ends.

Response: FR § 23.125(b) & (c) requires this explanation on the record.

Comment: A commenter requested clarification that the right to withdraw consent cannot be waived.

Response: The right to withdraw consent is a statutory right. Congress did not include a procedure for waiving the right.

Comment: Several commenters stated it would be unclear what consent procedures to follow in a voluntary proceeding if a child is treated as an Indian child, and then the Tribe later determines the child is not eligible for membership. Under those circumstances, the court would have told the parent they have the right to withdraw consent at any time prior to termination of parental rights; whereas, the right to revoke consent under State law may be more limited.

Response: In the situation described by the commenter, if the State court determines that the child is not an Indian child, the State court would need to determine whether to allow the withdrawal under State law.

Comment: A commenter suggested adding that the written consent must be by both the mother and father. Another commenter suggested adding that a known biological parent must have the opportunity to consent or object where the other parent has voluntarily consented.

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

Comment: A commenter recommended revising "need not be made in open court" to clarify that the consent still must be recorded before a judge, but need not be recorded in a session open to the public.

Response: FR § 23.125(d) clarifies that the consent must be recorded before a judge, though it need not be recorded in a session open to the public.

Comment: A commenter stated that the provision that "a consent given prior to or within 10 days after the birth is not valid" infringes on a parent's right to arrange for adoption.

Response: The final rule retains this provision because it is statutory. *See* 25 U.S.C. 1913(a).

Comment: A commenter suggested allowing incarcerated parents that cannot leave prison to attend court for this purpose to consent without attending court to avoid undue delays in permanency for children.

Response: The final rule encourages the use of alternative methods of participation such as participation by telephone, videoconferencing or other methods. *See* FR § 23.133.

7. Consent Document Contents

Comment: Commenters suggested requiring additional information in the consent document (PR § 23.125), such as the name and address of the non-custodial parent, parents' Tribal enrollment numbers, the name and address of prospective adoptive or preadoptive parents, and details regarding the right and timeframes for withdrawing consent.

Other commenters stated that the extent of information proposed is inappropriate, and suggested deleting:

- The address of the consenting parent because the information would already be in other files and could cause confidentiality concerns; and
- Identification and addresses of foster parents because of confidentiality.

Response: The final rule establishes that the written consent must include the name and birthdate of the Indian child, the name of the Indian child's Tribe, identifying Tribal enrollment number, if known, and the name of the consenting parent. It must also clearly set out any conditions to the consent. *See* FR § 23.126. A State may choose to include additional information.

Comment: A few commenters suggested adding a provision stating that any consent not executed as described is not binding.

Response: The final rule requires that any conditions be set out in the written consent, because section 1913(a) requires the consent to be in writing in order to be valid. *See* FR § 23.126(a).

8. Withdrawal of Consent

Comment: A few commenters suggested adding when consent to a termination of parental rights or adoption or consent to a foster-care placement may be withdrawn.

Response: The final rule addresses the deadline for withdrawing consent to the termination of parental rights and adoption, and adds that consent to a foster-care placement may be withdrawn "at any time." *See* FR § 23.127, § 23.128.

Comment: A commenter requested clarification that the parent withdrawing the consent does not need to be the person who files the withdrawal in court because many parents may not have legal representation and may lack the sophistication to file papers with the court and the parent may not be informed as to which court the consent was filed in. This commenter stated that the parent should be allowed to file the withdrawal with current custodians, their attorney, or the agency that took the consent, or as a last resort with BIA.

Response: The final rule sets as a default standard that the parent or Indian custodian must file a written withdrawal of consent with the court, or testify before the court, but that State law may provide additional methods for withdrawing consent. *See* FR § 23.127, § 23.128. This is not intended to be an overly formalistic requirement. Parents involved in pending foster-care placement or termination-of-parental-rights proceedings can be reasonably expected to know that there are court proceedings concerning their child, and the final rule balances the need for a clear indication that the parent wants to withdraw consent with the parent's interest in easily withdrawing consent.

Comment: A few commenters opposed the requirements for withdrawal of consent to be filed. A commenter stated that ICWA's intent was to make it as easy as possible to withdraw consent in furtherance of having Indian children raised by their families, so they should be able to do so in any way where the intent to withdraw is clear. Another commenter stated that State law may permit revocation without filing an instrument in court, and that the requirement for filing may delay return of the child.

Response: The final rule continues to require a filing of the withdrawal with the court, but adds testimony before the court as an option to fulfill this requirement, because the formality roughly equal to that required for the original consent is appropriate and it is important that the court and other parties know when the parent seeks to withdraw consent. The final rule sets this standard as a default, but States may have additional methods for withdrawing consent that are more protective of a parent's rights that would then apply.

Comment: One commenter stated that the return of the child in PR § 23.126(b) should not be immediate but should be "as soon as practicable" as stated in PR § 23.127(b), because there are circumstances where immediate return is not practical. Another commenter noted that section 1913 of the Act does not specify when the child must be returned.

Response: The final rule accepts the suggested edit for return of a child "as soon as practicable" if a parent withdraws consent to foster-care placement, but the Department notes that in most cases the return should be nearly immediate because foster-care placement is necessarily intended to be temporary. The final rule retains the requirement for return of the child "as soon as practicable" when the parent withdraws consent to a termination or adoption. *See* FR §§ 23.127, 23.128.

Comment: A few commenters opposed the provision stating that consent to termination of parental rights or adoption may be withdrawn any time prior to the entry of the final decree of termination or final decree of adoption, "whichever is later;" rather than the statutory language, "as the case may be." These commenters state that courts have uniformly interpreted section 1913(c) to cut off the right to withdraw consent upon entry of the final order terminating parental rights, even if an adoption decree has not been entered.

Other commenters supported the language "whichever is later." One noted that a child has no legal parents after termination but before the final decree of adoption, so if the purpose of adoption is to provide the child with parents, then the biological parents or Indian custodian should be allowed to resume parental responsibilities up to the point of a finalized adoption. Another stated that this phrase addresses confusion caused by the statutory phrase "as the case may be" to construe the original intent of the provision that would establish a nationwide standard that does not limit a parent's right to end a possible adoption and secure return of the child.

Response: As a commenter noted, the statute uses the phrase "as the case may be" rather than specifying whichever is later. *See* 25 U.S.C. 1913(c). To better address the meaning of "as the case may be," the final rule treats each proceeding separately, so that a parent may withdraw consent to a termination of parental rights any time before the final decree for that termination of parental rights is entered, and a parent may withdraw consent to an adoption any time before the final decree of adoption is entered.

Comment: A commenter stated that PR § 23.127(b) places the burden on the court to notify the placement of the withdrawal of consent, but in some cases the court may not know the contact information for the placement (e.g., where consent was filed in a different court than the one with current jurisdiction and placement was arranged by private parties).

Response: The final rule (like the proposed rule) requires the court to contact the party by or through whom any preadoptive or adoptive placement has been arranged. In most cases this will be the agency, whether public or private. The agency is expected to have the contact information for the placement.

Comment: A commenter suggested using the word "court" instead of "clerk of the court" which may be too specific.

Response: The final rule uses "court" instead of "clerk of the court." *See* FR § 23.128(d).

Comment: A commenter suggested adding a requirement that the court notify the consenting parent or Indian custodian of the entry of a final decree of adoption within 15 days so that they know there is no longer a right to withdraw the consent. This commenter also suggested requiring the court to notify the consenting parent every 120 days following the consent, to keep them informed as to the progress of adoptive placement in case an adoption never occurs.

Response: The final rule does not incorporate these requirements, as the statute does not require such notice.

9. Confidentiality and Anonymity in Voluntary Proceedings

Comment: Many commenters opposed the proposed rule on the basis that it would violate the parents' right to privacy, confidentiality, and anonymity in choosing a placement. Among the problematic provisions these commenters pointed to were:

- PR § 23.123(a) requiring an inquiry be made into whether the child is an Indian child in voluntary proceedings, because this will result in the parents losing their privacy and confidentiality, particularly in small Tribal communities; and
- The requirement to inform members of the Indian child's extended family, in order to identify a placement.

These commenters noted that the 1979 guidelines stated that the Act gives confidentiality a "much higher priority" in voluntary proceedings, and that the Act directs State courts to respect parental requests for confidentiality in voluntary proceedings.

Response: The final rule requires, for the reasons already stated, that the State court determine whether the child is an "Indian child" which may, in some instances, require contacting the Tribe. The final rule does not mandate contacting extended family members to identify potential placements. The final rule also includes several protections to ensure confidentiality. Among these are the following:

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

M. Dispositions

In ICWA, Congress expressed a strong Federal policy in favor of keeping Indian children with their families and Tribes whenever possible. Section 1915, which lays out the placement preferences, constitutes the "most important substantive requirement [that ICWA] imposed on state courts." *Holyfield*, 490 U.S. at 36. It establishes a series of preferred placements for foster care, preadoptive, and adoptive placements. It also allows the Indian child's Tribe to establish a different order of preference. The party urging that the ICWA preferences not be followed bears the burden of proving by clear and convincing evidence the existence of "good cause" to deviate from such a placement. 25 U.S.C. 1915(a), (b); FR § 23.132(b).

Congress established preferred placements in ICWA that it believed would help protect the needs and long-term welfare of Indian children and families, while providing the flexibility to ensure that the particular circumstances faced by individual Indian children can be addressed by courts. In §§ 23.129-23.132, the final rules provide guidance to States to ensure nationwide uniformity of the application of these placement preferences as well as the standards for finding good cause to deviate from them.

The preferences in ICWA and the final rule codify the best practice in child welfare of favoring extended family placements, including placement within a child's broader kinship community. If a child is removed from her parents, the first choice in child-welfare practice for an alternative placement—for all children, not just Indian children—is the child's extended family. *See* National Council of Juvenile and Family Court Judges, Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases 10-11 (2000) ("An appropriate relative who is willing to provide care is almost always a preferable caretaker to a non-relative."); Child Welfare League of America, Standard of Excellence for Adoption Services 1.10 (2000) (2000) ("Adoption Standards") ("The first option considered for children whose parents cannot care for them should be placement with extended family members..."); Child Welfare League of America, Standard of Excellence for Kinship Care Services 1.4 (2000) ("Kinship Care Standards") ("Kinship care … should be the first option considered…"); Elaine Farmer & Sue Moyers, Kinship Care: Fostering Effective Family and Friends Placements (2008).

Placing children with their extended family benefits children. *See* Adoption Standards 8.24, 4.23 (kinship care "maximizes a child's connection to his or her family"); Tiffany Conway & Rutledge Hutson, *Is Kinship Care Good for Kids?*, Center for Law and Social Policy 2 (Mar. 3, 2007) ("[T]he research tells us that many children who cannot live with their parents benefit

from living with grandparents and other family members.") (emphasis omitted). This is true for children who are placed in foster care as well as those who are adopted. *See* Kinship Care Standards, at 5 (noting beneficial outcomes of kinship care for foster care including children being less likely to experience multiple placements and more likely to be successfully reunified with their parents); Adoption Standards § 4.23; Marc A. Winokur, et al., *Matched Comparison of Children in Kinship Care and Foster Care on Child Welfare Outcomes*, 89 FAMILIES IN SOC'Y: J. CONTEMP. SOC. SCIENCES 338, 344-45 (2008) (reporting better outcomes for children in kinship care on several metrics). Congress recognized that this general child-welfare preference for placement with family is even more important for Indian families, as one of the driving concerns leading to the passage of ICWA "was the failure of non-Indian child welfare workers to understand the role of the extended family in Indian society." *Holyfield*, 490 U.S. at 35 n.4.

Even if biological relatives are not available for placements, there are benefits to children from placements within their community, which Congress recognized by establishing placement preferences for Tribal members. 25 U.S.C. 1915(a), (b). Again, this is not just a principle of child-welfare practice for Indian children, but for all children. *See* Kinship Care Standards §§ 1.1, 2.8. But it has special force and effect for Indian children, since, as Congress recognized, there are harms to individual children and parents caused by disconnection with their Tribal communities and culture, and also harms to Tribes caused by the loss of their children.

Recognizing the benefits of placements with family and within communities, Congress has repeated its emphasis on such placements in subsequent statutes in the years since it passed ICWA. For example, in order to obtain Federal matching funds, a State must consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards, and

must exercise "due diligence" to identify, locate, and notify relatives when children enter the foster care system. 42 U.S.C. 671(a)(19), (29); see also *Miller v. Youakim*, 440 U.S. 125, 142 n.21 (1979) (noting "Congress' determination that homes of parents and relatives provide the most suitable environment for children"). Congress has also required states receiving Federal funds to prioritize placement in close proximity to the parents' home, recognizing the importance of placement within the community. 42 U.S.C. 675(5)(A).

Congress, through ICWA's placement preferences, and the Department, through this regulation, continue to treat the physical, mental, and emotional needs of the Indian child as paramount. *See, e.g.,* FR § 23.132(c), (d). These physical, mental, and emotional needs include retaining contact, where possible, with the Indian child's extended family, community, and Tribe. If there are circumstances in which an individual child's extraordinary physical, mental, and emotional needs could not be met through a preferred placement, then good cause may exist to deviate from those preferences. *See* FR § 23.132(c)(4).

The Department received many comments regarding what may constitute "good cause" to deviate from the placement preferences and whether the final rule should set out such factors. By providing clear guidance on what constitutes "good cause" to deviate from the placement preferences, the final rule gives effect to the fact that Congress intended good cause to be a limited exception, rather than a broad category that could swallow the rule. The Department also recognizes that the question of what constitutes good cause is a frequently litigated area of ICWA, and this litigation can result in harmful delays in achieving permanency for children. For these reasons, the Department has determined that it is important to provide some parameters on what may be considered "good cause" in order to give effect to ICWA's placement preferences.

The final rule, therefore, lays out five factors upon which courts may base a determination of good cause to deviate from the placement preferences. These factors are discussed in more detail below in the response to comments, but include the request of the parents, the request of the child, sibling attachment, the extraordinary physical, mental, or emotional needs of the child, and the unavailability of a suitable preferred placement. FR § 23.132(c). It also makes clear that a court may not depart from the preferences based on the socioeconomic status of any placement relative to another placement or based on the ordinary bonding or attachment that results from time spent in a non-preferred placement that was made in violation of ICWA. FR § 23.132(d), (e).

The final rule also recognizes that there may be extraordinary circumstances where there is good cause to deviate from the placement preferences based on some reason outside of the five specifically-listed factors. Thus, the final rule says that good cause "should" be based on one of the five factors, but leaves open the possibility that a court may determine, given the particular facts of an individual case, that there is good cause to deviate from the placement preferences because of some other reason. While the rule provides this flexibility, courts should only avail themselves of it in extraordinary circumstances, as Congress intended the good cause exception to be narrow and limited in scope.

As requested by commenters, the rules governing placement preferences recognize the importance of maintaining biological sibling connections. The placement preferences allow biological siblings to remain together, even if only one is an "Indian child" under the Act, because FR § 23.131(a) provides that the child must be placed in the least restrictive setting that most approximates a family, allows his or her special needs to be met, and is in reasonable proximity to his or her home, extended family, and/or siblings. The sibling placement preference

does not mean ICWA applies to a sibling who is not an "Indian child" but rather makes clear that good cause can appropriately be found to depart from ICWA's placement preferences where doing so allows the "Indian child" to remain with his or her sibling. Because keeping biological siblings together contributes toward a setting that approximates a family, the final rule explicitly adds "sibling attachment" as a consideration in choosing a setting that most approximates a family. *See* FR § 23.131(a)(1). If for some reason it is not possible to place the siblings together, then FR § 23.131(a)(3) mandates that the Indian child should be placed, if possible, in a setting that is within a reasonable proximity to the sibling. In addition, if the sibling is age 18 or older, that sibling would qualify as a preferred placement, as extended family.

A number of commenters praised or questioned the provisions at PR § 23.128(b) requiring, in certain circumstances, a search to identify placement options that would satisfy the placement preferences. The final rule has been modified to include a requirement that, in order to determine that there is good cause to deviate from the placement preferences based on unavailability of a suitable placement, the court must determine that a diligent search was conducted to find placements meeting the preference criteria. *See* FR § 23.132(c)(5). This provision is required because the Department understands ICWA to require proactive efforts to comply with the placement preferences and requires more than a simple back-end ranking of potential placements. It is also consistent with the Federal policy for all children—not just Indian children—that States are to exercise "due diligence" to identify, locate, and notify relatives when children enter the foster care system. 42 U.S.C. 671(a)(19), (29).

ICWA requires that there be efforts to identify and assist preferred placements. Section 1915(a) directs that, in any adoptive placement of an Indian child under State law, a preference "shall" be given to the Indian child's family and Tribe. 25 U.S.C. 1915(a) (1)-(2). This language

creates an obligation on State agencies and courts to implement the policy outlined in the statute. "Giv[ing]" a "preference" means more than mere prioritization—it connotes the active bestowal of advantages on some over others. *See* BLACK'S LAW DICTIONARY 1369 (10th ed. 2014) (defining "preference" as the "quality, state, or condition of treating some persons or things more advantageously than others" and the "favoring of one person or thing over another"). Thus, section 1915(a) requires affirmative steps to give preferred placements certain advantages and a full opportunity to participate in the child-custody determination.

This conclusion is supported by other provisions of section 1915, which work in concert with section 1915(a) to require that State agencies and courts make efforts to identify and assist extended family and Tribal members with preferred placements. Section 1915(e) requires that, for each placement, the State must maintain records evidencing the *efforts to comply* with the order of preference specified in section 1915. 25 U.S.C. 1915(e). To allow oversight of such efforts, Congress further required that those records be made available at any time upon the request of the Secretary or the Indian child's tribe. *Id.* Thus, reading Sections 1915(a) and 1915(e) together, it is clear that Congress demanded documentable "efforts to comply" with the ICWA placement preferences.

Courts have recognized that State efforts to identify and assist preferred placements are critical to the success of the statutory placement preferences. *See Native Village of Tununak v. State, Dep't of Health and Soc. Servs. (Tununak II)*, 334 P.3d 165, 177-78 (Alaska 2014) (noting that before a court in which an adoption proceeding is pending can even "entertain[] argument that there is good cause to deviate from section 1915(a)'s preferred placements, it must searchingly inquire about the existence of, and [the State's] efforts to comply with achieving, suitable section 1915(a) preferred placements"); *In re T.S.W.*, 276 P.3d 133, 142-44 (Kan. 2012)

(rejecting a lower court's determination that there was good cause to deviate from the placement preferences based, in part, on the adoption agency's failure to make adequate efforts to identify potential preferred placements); *In re D.W.*, 795 N.W.2d 39, 44-45 (S.D. 2011) (carefully examining the sufficiency of the steps that the State took to find a suitable preferred placement); *In re Jullian B.*, 82 Cal. App. 4th 1337, 1347 (Cal. Ct. App. 2000) (emphasizing that ICWA requires the State to "search diligently for a placement which falls within the preferences of the act"); *Pit River Tribe v. Superior Court*, No. C067900, 2011 WL 4062512, at *10, *12 (Cal. Ct. App. Sept. 14, 2011).

Finally, the final rule provides that a court may not consider, as the sole basis for departing from the preferences, ordinary bonding or attachment that flows from time spent in a non-preferred placement that was made in violation of ICWA. In response to commenters' concerns, the final rule adjusts the proposed provision stating that "ordinary bonding" is not within the scope of extraordinary physical, mental, or emotional needs. PR § 23.131(c)(3). The proposed provision may have inappropriately limited court discretion in certain limited circumstances.

1. When Placement Preferences Apply

Comment: Several commenters supported proposed PR § 23.128, emphasizing the need to follow the Act's placement preferences, and noted that it addresses one of the biggest problems in the Act's implementation—the failure to place Indian children in the homes of extended family and Tribal members. One commenter pointed to the repeated failure in one State to investigate preferred placements and the practice of relying on bonding with non-preferred placements as good cause to depart from the placement preferences. Another commenter asserted that States are not pursuing placement preferences even when the Tribe identifies a family that

meets the requirements. Several commenters provided reasons for why the placement preferences are so important, including to minimize trauma by placing the child somewhere within their realm of comfort and to promote the best interests of the child by keeping the child with her family or within her Tribal community and culture.

Several opposed PR § 23.128, saying it gives higher priority to the Tribe than to the family, and prevents the court from weighing relative interests. These commenters stated that placement preferences should be secondary to the individual child's needs and welfare.

Response: The Act requires that States apply a preference for the listed placement categories. 25 U.S.C. 1915. As discussed above, Congress established preferred placements in ICWA that it believed would help protect Indian children's needs and welfare, while providing the flexibility to ensure that particular circumstances faced by individual Indian children can be addressed by courts. In enacting ICWA, Congress also recognized that State and private agencies and State courts sometimes apply their own biases in assessing what placement best meets the individual Indian child's needs and long-term welfare. The final rule reflects the statutory mandate.

Comment: A few Tribal commenters suggested the rule allow for such different orders as established by Tribal law or Tribal-State agreements.

Response: FR § 23.129(a), FR § 23.130(b), and FR § 23.131(c) reflect the statutory requirement that a Tribe may establish a different order of preference by resolution. *See* 25 U.S.C. 1915(c). The Department recognizes that an order of preference established as part of a Tribal-State agreement would constitute an order of preference established by "resolution," 25 U.S.C. 1915(c), particularly as the statute specifically authorizes Tribal-State agreements respecting care and custody of Indian children. 25 U.S.C. 1919.

Comment: A commenter stated that PR § 23.128(a) omits language from section 1915(c) of the Act that the Tribe's order of preference should be followed only "so long as the placement is the least restrictive setting appropriate to the particular needs of the child." According to this commenter, that omitted language is what makes clear that the best interest of the child must be considered and provides a basis for not following the placement preference order.

Response: FR § 23.131 adds the statutory language providing that the placement must be the least restrictive setting that most approximates a family, taking into consideration sibling attachment, allows the Indian child's special needs, if any, to be met, and is in reasonable proximity to his or her home, extended family, and/or siblings. The Department disagrees, however, that this language provides a basis for not following the preference order in the ordinary case.

Comment: A commenter opposed the language in PR § 23.128(a) stating that the placement preferences always apply without a cross-reference to the good cause provision. Likewise, a few commenters stated that PR § 23.129 and § 23.130 should both use the phrase "in the absence of good cause to the contrary" as qualifying language because Congress intended State courts to consider the unique circumstances affecting individual children and the statute includes the language "in the absence of good cause to the contrary" in each paragraph (section 1915(a) and (b)).

Response: The provision establishing that good cause must exist to depart from the placement preferences is located at FR § 23.129(c). Specific provisions regarding good cause are set out in FR § 23.132; it is not necessary to repeat "in the absence of good cause to the contrary" in FR §§ 23.130 or 23.131.

Comment: Several commenters supported requiring a diligent search for placements within ICWA's placement preferences (extended family, Tribal families, and other Indian families) and noted this is a best practice that is in the child's best interest. A commenter stated that the requirement for a diligent search is critically important because ICWA's requirements have been ignored and almost half the children continue to be placed in non-preferred placements. A few commenters suggested further emphasizing the need for States to identify preferred placements by working with Tribes to proactively recruit preferred placement homes.

A few commenters opposed requiring a diligent search, saying it is not required by ICWA and that Congress intended to rely on State family law to establish requirements for placement option searches.

Response: As discussed above, a diligent search is necessarily implied by the Act to comply with the placement preferences. The regulations make this requirement explicit in situations where a party seeks good cause to deviate from the placement preferences based on unavailability. *See* FR § 23.132(c)(5). Furthermore, State agencies generally search for a child's extended family as a matter of practice.

Comment: A commenter stated that the diligent search for foster placements including homes licensed, approved, or specified by the child's Tribe conflicts with the Act's requirement that the child be placed within a reasonable proximity to his or her home (as well as other requirements associated with Federal funding).

Response: While the specific portion of PR § 23.128(b) that the commenter is addressing is not included in the final rule, FR § 23.131(a) reflects the Act's requirements for the child to be placed in the least restrictive setting that most approximates a family and in which the child's

special needs, if any, may be met, and within reasonable proximity to the child's home. *See* 25 U.S.C. 1915(b), (c).

Comment: A commenter asked whether the showing as to the diligent search for placements has to be made at every hearing, or whether the rule is creating a requirement that a specific placement proceeding happen in each ICWA case that does not comply with the first placement preference. This State commenter also expressed concern regarding State resources this would require.

Response: The rule does not require a showing at every hearing that a diligent search for placements has been made or that a specific hearing be held to show why the first placement preference was not attainable. The rule requires that, if the agency relies on unavailability of placement preferences as good cause for deviating from the placement preferences, it must be able to demonstrate to the court on the record that it conducted a diligent search. *See* FR § 23.132(c)(5). This showing would occur at the hearing in which the court determines whether a placement or change in placement is appropriate.

Comment: Several commenters requested that the rule address the Alaska Supreme Court's limitation in *Native Village of Tununak v. Alaska* to define what a preferred placement family needs to do to demonstrate a willingness to adopt a particular child (e.g., the individual, agency, or Tribe informs the court orally during a proceeding or in writing of willingness to adopt). Several other commenters stated that the rule ignores the Supreme Court's ruling that the preferences are inapplicable where no eligible placement has formally sought to adopt the child.

Response: As discussed above, ICWA requires that there be efforts to identify and assist preferred placements. As a recommended practice, the State agency should provide the preferred placements with at least enough information about the proceeding so they can avail themselves

of the preference. Alaska itself has taken corrective action to address the ruling in *Tununak* by modifying its standards to facilitate more means by which to demonstrate willingness to adopt a particular child. We encourage other States to follow Alaska's lead in this regard.

Comment: A few commenters stated that it is impractical to notify each of the homes listed in PR § 23.128(b)(4) (institutions for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs). A commenter also pointed out that, practically, there are no accessible lists of every Indian foster home in the State or whether they would want such notification which could amount to hundreds of letters each year.

Response: The specific portion of the provision of proposed rule § 23.128(b) that commenters are addressing is not included in the final rule. As discussed above, however, the rule does include a requirement that, in order to determine that there is good cause to deviate from the placement preferences based on unavailability of a suitable placement, the court must determine on the record that a diligent search was conducted to find suitable placements meeting the preference criteria. *See* FR § 23.132(c)(5). A diligent search will almost always require some contact with those preferred placements that also meet the requirements for a least restrictive setting within a reasonable proximity, taking into account the child's special needs. It may also involve contacting particular institutions for children approved or operated by Indian Tribes if other preferred placements are not available.

Comment: A few commenters had suggested edits to PR § 23.128(b). For example, a State commenter requested clarifications in PR § 23.128(b) as to "placement proceeding" and "explanation of the actions that must be taken to propose an alternative placement and to whom those are provided in the proceedings."

Response: The final rule deletes this provision.

Comment: A commenter suggested changing the last preference to include Indian foster homes "authorized" by the Tribe rather than "licensed" by the Tribe.

Response: The rule includes "licensed" because that is the term the Act uses. *See* 25 U.S.C. 1915(b).

Comment: A commenter requested clarification of whether the agency must show why the higher preferences cannot be complied with instead of a lower preference.

Response: The final rule clarifies what the court will examine in determining whether the placement preferences were met or good cause exists to deviate from the placement preferences. *See* FR § 23.132. The agency must document its search for placement preferences and an explanation as to why each higher priority placement preference could not be met. *See* section 1915(e) (requiring that the State maintain documentation "evidencing the efforts to comply with the order of preference specified in this section"); FR § 23.141.

Comment: One commenter stated that the mandate that placement must always follow the placement preferences is not practical because there are 17 States with no federally recognized Tribes, meaning the child would face a move to a location that would make reunification more difficult.

Response: The fact that a no federally recognized Tribe is located within a State does not mean that there are no family members or members of Tribes residing or domiciled in that State.

Comment: Some commenters requested that the placement preferences allow siblings to remain together even if only one child is an "Indian child" as defined by ICWA. One commenter noted that one State regularly finds that a placement with a minor sibling qualifies as a placement with extended family for purposes of the placement preferences.

Response: As discussed above, the rules governing placement preferences recognize and address the importance of maintaining biological sibling connections.

Comment: One commenter stated that the provision at PR § 23.128(c) stating that the request for anonymity does not relieve the obligation to comply with placement preferences is extremely important because many attorneys in voluntary proceedings advise their clients to request anonymity to avoid the placement preferences.

Response: The final rule includes a provision, discussed above, requiring the court to give weight to the request for anonymity in applying the preferences. *See* FR § 23.129(b).

Comment: A few commenters suggested the rule clarify the ability of State-court judges to issue placement orders under ICWA. These commenters stated that such a provision is necessary because some State codes prohibit a State judge from ordering placement, instead leaving the responsibility to the State social workers.

Response: While it may be the practice in some jurisdictions for judges to defer to State agencies, the statute contemplates court review of placements of Indian children. It requires, for example, court review of whether active efforts were made (section 1912(d)) and an "order" for foster-care placement (section 1912(e)) and termination of parental rights (section 1912(f)). Further, the statute establishes a standard of evidence for foster-care-placement orders and termination-of-parental-rights orders (section 1912(e)-(f)), necessarily requiring court involvement.

Comment: A few commenters suggested adding a cross-reference in PR § 23.128(d) to the section delineating the good-cause criteria.

Response: The final rule adds the requested clarification. *See* FR § 23.129(c).

Comment: One commenter requested additional clarification on the requirements in PR § 23.128(e) for maintenance of records.

Response: The final rule moves the requirement regarding maintenance of records from PR § 23.128(e) to FR § 23.141. *See* comments on PR § 23.137, below.

2. What Placement Preferences Apply, Generally

Comment: Several commenters expressed their strong support of the placement preferences as assuring that the child's best interests are met by giving the child the opportunity to be placed with relatives. One commenter noted that traditional Indian spirituality, culture, and history cannot be fully taught by a non-Indian family. Commenters stated that studies reflect that placement of children within the ICWA preferences are more stable by half than placements that do not fall within ICWA's preferences.

A few commenters opposed the placement preferences. One stated that Federal law already seeks to place children within the same family and community. Another stated that the preferences are not a mandate, and that there are not enough Indian foster homes so in some cases children have to be placed in non-Indian homes.

One commenter stated that the rule should make the placement preferences discretionary because it may not always be possible to adhere to the placement preferences, and the rule must allow for flexibility to place a child where his or her physical and emotional needs are best met.

Response: As discussed above, Congress established preferred placements in ICWA that it believed would help protect Indian children's needs and welfare. The statute provides the flexibility to ensure that special circumstances faced by individual Indian children can be addressed by courts. The final rule reflects the child's best interests and the order of the preferred

placements. The criteria applicable to foster-care placements allow for placements in which the child's special needs, if any, may be met.

Comment: A few commenters stated that the guidelines contradict the Multiethnic Placement Act (MEPA) to prevent discrimination based on race, color and/or national origin when making placements, and that some Indian children do not have an apparent existing connection to their traditional culture and are thus "mainstream."

Response: These comments are based on the misunderstanding that ICWA is a race-based statute. Congress established certain placement preferences based on, and in furtherance of, the political affiliation of Indian children and their parents with Tribes, and the government-to-government relationship between the United States and Tribes. Recognizing that the applicability of ICWA is based on political affiliation rather than race, Congress made clear that MEPA should not be construed to impact the application of ICWA. 42 U.S.C. 674(d)(4), 1996b(3) (each stating this subsection shall not be construed to affect the application of the Indian Child Welfare Act of 1978).

Comment: One commenter suggested adding language to clarify that the preferences are in descending order of preference. A commenter stated that States should not be allowed to skip steps in the preferences.

Response: FR §§ 23.130(a) and 23.131(b) state that the preferences are in descending order, reflecting that each placement should be considered (without being skipped) in that order; the preferences are in the order of most preferred to least preferred.

Comment: Several commenters suggested adding a provision to allow the court to consider the Tribe's recommended placement for an Indian child, to take into consideration

Tribal custom, law, and practice when determining the welfare of Indian children, as authorized by section 1915(c), which states that the Tribe may establish a different order of preference.

Response: Congress established a method for the Tribe to express its preferences in section 1915(c). FR §§ 23.129(a), 23.130(b), and 23.131(c) are included in the final rule in recognition of that statutory requirement. State courts may also wish to consider a Tribe's recommended placement for a particular child.

Comment: A few commenters stated that the placement preferences should better protect the rights of biological fathers. One suggested including biological fathers in the list of placement preferences.

Response: The final rule's placement preferences reflect the statute. If the biological father meets the criteria for the placement preferences (for example, as a member of the Indian child's Tribe), he may avail himself of the placement preferences. In addition, the Act establishes that unwed fathers who have not acknowledged or established paternity are not considered "parents" under the Act; however, by acknowledging or establishing paternity, the father may become a "parent" under the Act, and avail himself of ICWA's protections.

Comment: A few commenters stated that the placement preferences should extend beyond the nuclear family to include extended family (aunts, uncles, grandparents) because ICWA was designed to keep Indians rooted to their Tribes and culture if the nuclear family breaks down.

Response: Members of the child's extended family are the first-listed preferred placement. *See* 25 U.S.C. 1915(a), (b); FR § 23.130(a)(1); § 23.131(b)(1).

3. Placement Preferences in Adoptive Settings

Comment: One commenter suggested adding licensed adoptive homes to the list of placement preferences in PR § 23.129 and PR § 23.130.

Response: The rule does not specify licensed adoptive homes in the list of placement preferences because the statute does not specify these homes, and this change would not comport with the intent of Congress to place Indian children, where possible, with extended family or Tribal members.

Comment: A State commenter requested clarification in PR § 23.129(b) of the phrase "where appropriate" and whether the child or parent's preference supersedes the placement preferences. A few commenters stated that the rule should use the word "shall" or "must" to require the court to consider the preference of the Indian child or parent, in accordance with section 1915. A few other commenters supported use of "should" in this provision, stating that otherwise the Indian child's or parent's preference would trump the placement preferences.

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

4. Placement Preferences in Foster or Preadoptive Proceedings

Comment: Several commenters expressed concern that unavailability of preferred placements will result in longer periods of instability for the child or delays in permanency for the child. A few commenters requested that timelines be imposed on finding preferred placements. For example, one commenter stated that once a Tribe is notified, it should have a certain timeframe to provide a permanent home for the child or an exception to ICWA should be made for the well-being of the child, otherwise the rule denies permanency for the child in the name of cultural preservation.

Response: The Department has not identified any authority in the statute for imposing timelines to find a placement; therefore, the rule does not do so. The unavailability of a suitable preferred placement is one of the bases for good cause to depart from the placement preferences, so long as a diligent search for a preferred placement was conducted. FR § 23.132(c)(5). Thus, so long as a prompt and diligent search is made for a preferred placement, these rules should not delay permanency.

Comment: A commenter suggested that a needs assessment by a qualified expert witness should be required in PR § 23.130(a)(2) where it references a child's needs.

Response: The statute explicitly refers to "special needs" but does not qualify it as requiring the input of a qualified expert witness, as the statute does in other places. Therefore, the rule does not impose this requirement.

5. Good Cause to Depart from Placement Preferences

Comment: A few commenters said the proposed rule requires a hearing on whether good cause exists and opposed the requirement for an agency to wait for a court to act in order to depart from the placement preferences. One commenter stated that this requirement is contrary to ICWA because while ICWA states that the court must determine there is good cause to deny transfer, it does not require the court to determine whether good cause to depart from placement preferences exists. A State commenter asserted that there will be significant workload increases for agencies if there must be an evidentiary hearing even when there is no objection from the Tribe or parents. This commenter also stated that requiring the judge to determine good cause in the absence of the parties' disagreement puts the court in the role of case administrator rather than arbiter.

Response: Where the requirements of 25 U.S.C. 1912(d)-(e) have been met, a court evidentiary hearing may not be required to effect a placement that departs for good cause from the placement preferences, if such a hearing is not required under State law. *See* section 1915(c). Regardless of the level of court involvement in the placement, however, FR § 23.132(a) requires that the basis for an assertion of good cause must be stated in the record or in writing and the statute requires a record of the placement be maintained. Section 1915(e), FR § 23.141.

Where a Tribe or other party objects, however, the final rule establishes the parameters for a court's review of whether there is good cause to deviate from the placement preferences and requires the basis for that determination to be on the record. *See* FR § 23.129(c). While the agency may place a child prior to or without any determination by the court, the agency does so knowing that the court reviews the placement to ensure compliance with the statute.

Comment: A few commenters supported the requirement in PR § 23.128(b) for "clear and convincing evidence" that the placement preferences were met, and in PR § 23.131(b) for "clear and convincing evidence" of good cause to depart from the placement preferences. Some of these commenters point out that the court in *Tununak II* overturned the initial application of only a "preponderance of the evidence" standard. One commenter stated that elevating the standard of proof to "clear and convincing evidence" is an important means of strengthening the statutory preferences, but recommended making it permissive because ICWA intended State courts to retain flexibility. *See* S. Rep. No. 95-597. A few other commenters opposed specifying "clear and convincing evidence" as exceeding the Department's authority.

Response: The final rule states that the party seeking departure from the placement preferences should prove there is good cause to deviate from the preferences by "clear and convincing evidence." FR § 23.132(b). While this burden of proof standard is not articulated in

section 1915 of the statute, courts that have grappled with the issue have almost universally concluded that application of the clear and convincing evidence standard is required as it is most consistent with Congress's intent in ICWA to maintain Indian families and Tribes intact. *See In re MKT*, 4368 P.3d 771 ¶ 47 (Okla. 2016); *Gila River Indian Cmty. v. Dep't. of Child Safety*, 363 P.3d 148, 152-53 (Ariz. Ct. App. 2015); *In re Alexandria P.* 176 Cal.Rptr.3d 468, 490 (Cal. Ct. App. 2014); *Native Vill. of Tununak v. Alaska*, 303 P.3d 431, 448, 453 (Alaska 2013) *vacated in part on other grounds by* 334 P.3d 165 (Alaska 2014); *People ex rel. S. Dakota Dep't of Soc. Servs.*, 795 N.W.2d 39, 44, ¶ 24 (S.D. 2011); *In re Adoption of Baby Girl B.*, 67 P.3d 359, 374, ¶ 78 (Okla. Civ. App. 2003); *In re Custody of S.E.G.*, 507 N.W.2d 872, 878 (Minn. Ct. App. 1993); *but see Dep't of Human Servs. v. Three Affiliated Tribes of Fort Berthold Reservation*, 238 P.3d 40, 50 n. 17 (Or. Ct. App. 2010) (addressing the issue in a footnote in response to a "passing" argument).

While the final rule advises that the application of the clear and convincing standard "should" be followed, it does not categorically require that outcome. However, the Department finds that the logic and understanding of ICWA reflected in those court decisions is convincing and should be followed. Widespread application of this standard will promote uniformity of the application of ICWA. It will also prevent delays in permanency that would otherwise result from protracted litigation over what the correct burden of proof should be. So, while the Department declines to establish a uniform standard of proof on this issue in the final rule, it will continue to evaluate this issue for consideration in any future rulemakings.

a. Support and Opposition for Limitations on Good Cause

Comment: Many commenters supported emphasizing the need to follow the placement preferences and limiting agencies' and courts' ability to deviate from the placement preferences based on subjective and sometimes biased factors. Commenters reasoned:

- One of ICWA's primary purposes is to keep Indian children connected to their families, Tribal communities and culture, and yet, currently more than 50% of Native American children adopted are placed into non-Native homes;
- Defining "good cause" is within DOI's authority under ICWA;
- Defining "good cause" will provide clarity to on-the-ground social workers and others because the phrase "good cause" has been interpreted differently among States;
- The provision explaining that the length of time a child is in a non-compliant placement is irrelevant is consistent with best practices in child welfare;
- Restrictions on good cause are necessary to ensure courts do not disregard ICWA's placement preferences based on a non-Indian assessment of what is "best" for the child, such as through a generalized "best interest" analysis;
- Use of "good cause" to deviate from placement preferences has become so liberal that it has essentially swallowed ICWA's mandate; and
- Without the rule, "good cause" leaves so much discretion to State courts that the Tribe rarely prevails in moving a child to a preferred placement after initial placement elsewhere.

Many other commenters opposed the rule's definition of "good cause." Among the reasons stated for this opposition were:

- The rule's basis for "good cause" is so narrow that it leaves courts with no flexibility, contrary to congressional intent;

- The rule is not a reasonable interpretation and will not receive deference because it predetermines good cause even though the legislative history explicitly states that the term "good cause" was intended to give State courts flexibility;
- The rule excludes "best interest" factors as a basis for good cause even though placements directly implicate a child's best interests;
- The rule could require placement in a home that every party to the proceeding, including the Tribe, believes is contrary to the best interests of the child; and
- The rule violates Indian children's rights to due process by limiting the factors and probative evidence a State court can consider as compared to non-Indian children.

One commenter expressed concern that courts may interpret the word "must" as requiring them to automatically find good cause when any of the listed circumstances exist.

Response: As discussed above, Congress established preferred placements in ICWA that it believed would help protect the long-term health and welfare of Indian children, parents, families, and Tribes. ICWA must be interpreted as providing meaningful limits on the discretion of agencies and courts to remove Indian children from their families and Tribes, since this is the very problem that ICWA was intended to address. Accordingly, the final rule identifies specific factors that should provide the basis for a finding of good cause to deviate from the placement preferences. These factors accommodate many of the concerns raised by commenters, and include the request of a parent, the child, sibling attachments, the extraordinary physical, mental, or emotional needs of a child, and the unavailability of suitable preferred placements. The final rule retains discretion for courts and agencies to consider any unique needs of a particular Indian child in making this determination.

b. Request of Parents as Good Cause

Comment: A commenter stated their support of PR § 23.131(c)(1), requiring both parents to request the deviation in order for it to qualify as good cause, because it will lessen instances where the rights of the child's mother are deemed more important than those of the father. A few commenters opposed requiring both parents to request because there are instances in which one parent is unavailable, cannot be found, is mentally disabled, or has been proven unfit. One stated that there may be instances where both parents do not agree, but the court should still be encouraged to consider each parent's request. A commenter also pointed to case law holding that a single parent's request can constitute good cause. According to this commenter, if a noncustodial parent may not invoke section 1912 to thwart an adoption, under *Adoptive Couple*, then a noncustodial parent has no right to be heard on placement preferences. A commenter stated that the ordinary meaning of section 1915(c) is that the preference of the parent—meaning one or both parents—be considered in applying or departing from the placement preferences, where appropriate.

Response: The final rule changes the requirement for both parents to make the request to "one or both parents," in recognition that in some situations, both parents may not be available to make the request. This is also consistent with the statutory mandate that, where appropriate, the preference of the Indian child or parent [(singular)] shall be considered. 25 U.S.C. 1915(c). If the parents both take positions on the placement, but those positions are different, the court should consider both parents' positions.

Comment: A few commenters suggested the court should also consider the preference of the child's guardian ad litem in making the placement.

Response: The rule does not add that a guardian ad litem's request should be considered as good cause because Congress expressly allowed for consideration of the preference of the Indian child or parent, and did not include the guardian ad litem. *See* 25 U.S.C. 1915(c).

Comment: A few commenters opposed the provision allowing consideration of the request of parents in determining good cause because, they stated, parents are often pressured to accept placement and this provision encourages coercion. Another commenter stated that there is no rationale for acceding to a parental request for placement in the context of an involuntary removal of a child. Likewise, a few commenters stated that the parent's preference does not automatically show good cause to deviate and should only be a consideration. One commenter stated that parents who decided not to raise their child should not have unilateral authority to determine the child's placements and whether the child will have continued contact with relatives and the Tribe. One commenter supported including the parent's request as good cause, and asserted that a birthparent's preference should be considered unless otherwise proven not to be in the child's best interest.

Response: The statute explicitly provides that, where appropriate, preference of the parent must be considered. *See* 25 U.S.C. 1915(c). The regulation therefore provides that the request of the parent or parents should be a consideration in determining whether good cause exists. *See* FR § 23.132(c)(1). The request of the parent is not determinative, however. The final rule includes a provision requiring that the parent or parents attest that they have reviewed the placement options that comply with the order of preference are intended to help address concerns about coercion. *See* FR § 23.132(c)(1).

Comment: One commenter requested clarifying that the parent must attest that they have reviewed the actual families that meet the placement preferences, not just the categories. The

commenter stated that if the parents still object after reviewing the preferences, the agency or court should first be required to explore other available preferred families before concluding there is good cause.

Response: The rule uses the term "placement options" to refer to the actual placements, rather than just the categories. *See* FR § 23.132(c)(1). A court or agency may consider in determining whether good cause exists whether a diligent search was conducted for placements meeting the placement preferences.

Comment: One commenter stated that the non-Indian foster parent should not be considered the de facto parent for the purposes of this provision.

Response: The definition of "parent" does not include foster-care providers. *See* FR § 23.2.

c. Request of the Child as Good Cause

Comment: One commenter opposed allowing consideration of the request of the child in determining "good cause" at PR § 23.131(c)(2) because children can be groomed to request a certain placement and it is subjective when a child is able to understand the issue.

Response: The statute explicitly provides that, where appropriate, preference of the Indian child must be considered. *See* 25 U.S.C. 1915(c). The rule adds that the child must be of "sufficient age and capacity to understand the decision that is being made" but leaves to the fact-finder to make the determination as to age and capacity. *See* FR § 23.132(c)(2). The rule also leaves to the fact-finder any consideration of whether it appears the child was coached to express a certain preference.

Comment: One commenter agreed with not restricting this provision to children age 12 or older, but recommended language that the consent be completely voluntary and that there be a

determination that the child can understand the decision being made, to protect against the child being pressured. Two other commenters stated that the rule should set a baseline age because otherwise there will be starkly different treatments of Indian children (e.g., reporting that South Carolina has found a 3-year-old competent to testify whereas in Oklahoma a 12-year old is presumed competent to state a preference).

Response: Each Indian child and their circumstances differ to a degree that it is not be appropriate to establish a threshold age for a child to express a preference. The rule leaves it to the fact finder to determine whether the child is of "sufficient age and capacity" to able to understand the decision that is being made.

Comment: Several commenters suggested that the rule should provide that Tribal approval of the non-preferred placement constitutes good cause because the rule should defer to a Tribe's determination that a non-preferred placement is in the child's best interests.

Response: The statute provides that the preference of the parent or child should be considered and allows the Tribe to express its preference by establishing a different order of preference by resolution. 25 U.S.C. 1915(c). In addition, the statute and the rule make clear that a foster home specified by the Indian child's Tribe is a preferred placement. FR § 23.131(b)(2).

d. Ordinary Bonding and Attachment

Comment: Many commented on ordinary bonding and attachment. A high-level summary of these comments is provided here. Many commenters strongly supported PR § 23.131(c)(3), stating that "ordinary bonding or attachment" does not qualify as the extraordinary physical or emotional needs that may be a basis for good cause to deviate from the placement preferences. Some who supported the provision cited agencies' deliberate failure to identify preferred

placements as reasons for a child being initially placed with a non-preferred placement. Among the reasons cited for support of this provision were:

- Ordinary bonding is not relevant to good cause to deviate from placement preferences because ordinary bonding shows that the child is healthy and can bond again.
- The proposed provision is limited in that it still allows for consideration of extraordinary bonding as good cause.
- Many Western bonding and attachment theories are not as relevant to Indian children because they are based on non-indigenous beliefs and psychological theories about connection with one or two individual parents.
- Allowing normal emotional bonding to be considered good cause would negate ICWA's presumption that the statutory placement preferences are in the Indian child's best interest.
- The proposed provision is needed to address the tactic of placing Indian children in non-preferred placements, delaying notification to the child's Tribe and family, then arguing good cause to deviate from the placement preferences based on the child's bonding with the caregivers (in other words, the proposed provision is necessary to remove incentives to place children in non-preferred placement families and removes rewards for non-compliance).
- The proposed provision is necessary to encourage diligent searches to identify preferred placements.
- The proposed provision supports the intent of ICWA to return a child to biological family even where there is a psychological parenting relationship between the placement family

and child, and that Congress arrived at this approach after debate and ample testimony, including significant testimony from mental health practitioners.

- The proposed provision recognizes that the long-term best interests protected by ICWA outweigh short-term impacts of breaking an ordinary bond.
- Comparing emotional ties between the foster family and child to those with a biological family undermines the objective of reunification and preservation of families.
- Opposing arguments are unfounded.

Some interpreted the rule as establishing that ordinary bonding or attachment resulting from a non-preferred placement must not be the "sole basis" for a court refusing to return a child to his or her family and supported this interpretation.

Many commenters strongly opposed PR § 23.131(c)(3)'s exclusion of "ordinary bonding or attachment" as a basis for good cause to deviate from the placement preferences. According to these commenters, the main reason for initial non-preferred placements is unavailability of homes meeting the placement preferences, and that despite the best efforts of caseworkers to find preferred placements, it becomes necessary to put Indian children in non-preferred placements. Other cited reasons were that preferred placements were too far away or the Tribe delays finding a preferred placement. Among the reasons stated for opposition to the provision were:

- Ordinary bonding is relevant to whether there is good cause to deviate from the placement preferences because breaking ordinary bonds harms the child.
- The importance of bonding to children's well-being has been established by documented research.
- Indian children do not bond differently from other children.
- The proposed provision limits court discretion.

- The proposed provision violates children's constitutional rights, giving them less protection than other children to a stable, permanent placement that allows the caretaker to make a full emotional commitment to the child.
- The proposed provision violates precedent of a majority of State courts that have held they may consider the Indian child's attachment to, or bond with, current caregivers and the amount of time the child has been with caregivers.
- The proposed provision will increase resistance to ICWA.
- The proposed provision encourages breaking of ordinary bonds.
- The proposed provision will not address historical trauma.
- The proposed provision places Tribal interests above the child's interests.

Some commenters neither fully supported nor fully opposed the provision prohibiting consideration of ordinary bonding as good cause. A few agreed that a prolonged placement arising out of a violation of ICWA should not constitute good cause, but expressed concern that the provision could preclude a court's consideration of the likelihood of severe emotional trauma to a child from a change in placement under any circumstance, placing an unnecessary constraint on State courts and disserving Indian children. One commenter stated that bonding should not be considered, whether ordinary or extraordinary. Some commenters suggested alternative approaches to the provision prohibiting consideration of ordinary bonding as good cause.

Response: The final rule provides that a court may not consider, as the sole basis for departing from the preferences, ordinary bonding or attachment that flows from time spent in a non-preferred placement that was made in violation of ICWA. In response to commenters' concerns, the final rule adjusts the proposed provision regarding "ordinary bonding" as not being within the scope of extraordinary physical, mental, or emotional needs. PR § 23.131(c)(3). The

proposed provision may have inappropriately limited court discretion in certain circumstances. This is particularly the case, given the apparent ambiguity regarding the proposed provision's reference to "placement[s] that do[] not comply with ICWA." *Id.*

The Department recognizes that the concepts of bonding and attachment can have serious limitations in court determinations. *See e.g.*, Comments of Casey Family Programs, et al., at 6 n.9 (citing literature including David E. Arrendondo & Leonard P. Edwards, Attachment, Bonding, and Reciprocal Connectedness, 2 J. Ctr. for Fam. Child. & Cts. 109, 110-111 (2000) (discussing the ways that bonding and attachment theory "may mislead courts")). The Department also recognizes that, as the Supreme Court has cautioned, courts should not "'reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation,'" *Holyfield*, 490 U.S. at 54 (citation omitted), by treating relationships established by temporary, non-ICWA-compliant placements as good cause to depart from ICWA's mandates.

The final rule, therefore, adjusts the "ordinary bonding" provision, stating that ordinary bonding and attachment that flows from length of time in a non-preferred placement due to a violation of ICWA should not be the sole basis for departing from the placement preferences. This provision addresses concerns that parties may benefit from failing to identify that ICWA applies, conduct the required notifications, or identify preferred placements. While it can be difficult for children to shift from one custody arrangement to another, one way to limit any disruption is to mandate careful adherence to procedures that minimize errors in temporary or initial custodial placements. It can also be beneficial to facilitate connections between an Indian child and potential preferred placements. For example, if a child is in a non-preferred placement due to geographic considerations and to promote reunification with the parent, the agency or

court should promote connections and bonding with extended family or other preferred placements who may live further away. In this way, the child has the opportunity to develop additional bonds with these preferred placements that will ease any transitions.

The comments reflected some confusion regarding what constitutes a "placement that does not comply with ICWA." For clarity, the final rule instead references a "violation" of ICWA to emphasize that there needs to be a failure to comply with specific statutory or regulatory mandates. The determination of whether there was a violation of ICWA will be fact specific and tied to the requirements of the statute and this rule. For example, failure to provide the required notice to the Indian child's Tribe for a year, despite the Tribe having been clearly identified at the start of the proceeding, would be a violation of ICWA. By comparison, placing a child in a non-preferred placement would not be a violation of ICWA if the State agency and court followed the statute and applicable rules in making the placement, including by properly determining that there was good cause to deviate from the placement preferences.

Comment: A few commenters stated that the rule eradicates courts' ability to find "good cause" to deviate from the placement preferences by requiring that only qualified expert witnesses can demonstrate good cause based on "extraordinary bonding."

Response: The final rule does not require testimony from a qualified expert witness to establish a good cause determination based on the extraordinary physical, mental, or emotional needs of the child. *See* FR § 23.132(c).

e. Unavailability of Placement as Good Cause

Comment: One commenter supported PR § 23.131(c)(4) except for the reference to "applicable agency" because the placement preferences apply even when no agency is involved.

Response: The final rule deletes reference to "applicable agency" in this section.

Comment: A few commenters suggested clarifying that a "diligent search" for a preferred placement must be conducted, rather than requiring "active efforts" because "active efforts" is a term of art with specific statutory application.

Response: The final rule clarifies that a diligent search must be conducted, rather than using the phrase "active efforts," because the statute uses the phrase "active efforts" in a different context. *See* FR § 23.132(c)(5).

Comment: A commenter objected to the language in PR § 23.131(c)(4) stating that a placement is not "unavailable" (as a basis for good cause to depart from the placement preferences) if the placement conforms to the prevailing social and cultural standards of the Indian community. The commenter stated that this language is not in ICWA and may lead to argument that good cause does not exist even where the placement does not pass a background check, potentially violating ASFA, which disqualifies people convicted of certain crimes from serving as a placement. This commenter asserted that inability to pass ASFA or State background check requirements is per se good cause.

Response: ICWA requires that the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community. *See* 25 U.S.C. 1915(d). Nothing in the rule eliminates other requirements under State or Federal law for determining the safety of a placement.

f. Other Suggestions Regarding Good Cause to Depart from Placement Preferences

Comment: One commenter stated that the rule should provide that "good cause" to deviate from the placement preferences exists if serious emotional or physical damage to the

child is likely to result, to follow the line of reasoning in section 1912(e) that uses that standard for continued custody.

Response: The final rule provides that the extraordinary physical, mental, or emotional needs of the child may be the basis for a good cause determination. *See* FR § 23.132(c)(4). In addition, the final rule provides that the unavailability of a suitable placement may be the basis for a good cause determination. *See* FR § 23.132(c)(5). Both of these provisions would allow a court to address the commenter's concern about preventing serious emotional or physical damage to a child. In addition, the final rule retains discretion for State courts to consider other factors when necessary.

6. Placement Preferences Presumed to be in the Child's Best Interest

Many commented on the intersection of a "best interests analysis" with ICWA's placement preferences. A high-level summary of these comments is provided here. Several commenters stated that a "best interest of the child" analysis is not appropriate for Indian children, for the following reasons.

- ICWA compliance already presumptively furthers best interests of the child and represents best practices in child welfare generally.
- There is a movement in literature to replace the "best interest" consideration altogether in favor of the least detrimental among available alternatives for the child, to focus on causing no harm to the child, rather than an implication that courts or agencies are well-positioned to determine what is "best."
- ICWA was passed to overcome the bias, often subconscious, and lack of knowledge about Tribes and Indian children, and leaving "best interests" to be argued by individuals

opposing ICWA's preferences evades ICWA's purposes. The "best interests" analysis is inherently open to bias.

- The "best interests of the child" analysis permits courts and agencies to ignore the placement preferences at will.
- The "best interests of the child" analysis is necessarily broader and richer for Indian children because it includes connection to Tribal community, identity, language and cultural affiliation.
- The "best interests" analysis is not appropriate in any determination of "good cause" because "good cause" and "best interest" appear in different parts of the statute, meaning Congress carefully and expressly "cabined" each concept, and as such should be treated separately.

Several commenters suggested adding language drawn from the Michigan Indian Family Preservation Act on how to determine a child's best interests.

Other commenters asked the Department to keep the focus on the best interests of the children and opposed having no independent consideration of the best interests of the Indian child for the following reasons:

- The presumption that ICWA compliance is in the child's best interest is not always true.
- The "best interests of the child" analysis is of paramount importance.
- The "best interests of the child" analysis is compatible with ICWA and should be explicitly allowed because ICWA was not enacted to ignore the physical and emotional needs of children and that every child should have all factors considered for the best possible outcome because not doing so would be treating them as possessions.
- The "best interests of the child" analysis is not different for Indian children.

- Case law establishes that the child's best interests must be considered and establishes that the child's best interests should be considered in "good cause" determinations.
- Not considering the child's best interest violates the constitutional rights of the children and parents.

Response: As discussed above, ICWA and this rule provide objective mandates that are designed to promote the welfare and short- and long-term interests of Indian children. Congress enacted ICWA to protect the best interests of Indian children. However, the regulations also provide flexibility for courts to appropriately consider the particular circumstances of the individual children and to protect those children. For example, courts do not need to follow ICWA's placement preferences if there is "good cause" to deviate from those preferences. The "good cause" determination should not, however, simply devolve into a free-ranging "best interests" determination. Congress was skeptical of using "vague standards like 'the best interests of the child,'" H.R. Rep. No. 95-1386 at 19, and intended good cause to be a limited exception, rather than a broad category that could swallow the rule.

N. Post-Trial Rights and Recordkeeping

The final rule describes requirements and standards for vacating an adoption based on consent having been obtained by fraud or duress. It also provides clarification regarding the application of 25 U.S.C. 1914, and the rights to information about adoptee's Tribal affiliations, while removing certain obligations the proposed rule imposed on agencies. The final rule provides procedures for how notice of a change in an adopted Indian child's status is to be provided, including provisions for waiver of this right to notice. The final rule also contains provisions regarding the transmittal of certain adoption records to the BIA, and the maintenance of State records.

1. Petition to Vacate Adoption

Comment: Several commenters opposed PR § 23.132(a) allowing a final decree of adoption to be set aside if the proceeding failed to comply with ICWA. These commenters pointed out that section 1913(d) of the Act only allows a collateral attack on an adoption decree if consent to the adoption was obtained through fraud or duress, not if the proceeding failed to comply with ICWA, while section 1914 allows for invalidation only of a foster-care placement or termination of parental rights if the proceeding failed to comply with ICWA.

Response: The final rule deletes "the proceeding failed to comply with ICWA" as a basis for vacating an adoption decree because FR § 23.136 implements section 1913(d) of the Act, which is limited to invalidation based on the parent's consent having been obtained through fraud or duress.

Comment: A commenter pointed out that PR § 23.133(a) refers generally to ICWA being violated, but the statute and PR § 23.133(b) both refer specifically to violations of Sections 1911, 1912, or 1913.

Response: The final rule specifies the appropriate sections of ICWA in FR § 23.137(a).

Comment: Several commenters stated that the two-year statute of limitations should not apply to section 1914 actions to invalidate foster-care placements and termination of parental rights. Some commenters asserted that State statutes of limitations should apply; others stated that State statutes of limitations should not apply because it would cause uncertainty and inconsistency. One commenter suggested adding a statute of limitation of 90 days. A few commenters suggested establishing a statute of limitations that allows minors three to five years after they turn age 18 to sue for violations of their rights under ICWA.

Response: The final rule clarifies that the two-year statute of limitations does not apply to actions to invalidate foster-care placements and terminations of parental rights, by clarifying that FR § 23.136 applies only to invalidation of adoptions based on parental consent having been obtained through fraud or duress. If a State's statute of limitations exceeds two years, then the State statute of limitations may apply; the two-year statute of limitations is a minimum timeframe. *See* 25 U.S.C. 1913. The statute does not establish a statute of limitations for invalidation of foster-care placements and termination of parental rights under section 1914, and the Department declines to establish one at this time.

Comment: A few commenters noted that PR § 23.133 fails to provide the requirement in section 1916(a) that the best interests of the child be considered before determining whether to return the child if the court invalidates an adoption decree or adoptive couples voluntarily terminate their parental rights.

Response: Section 1916(a) addresses a narrow set of circumstances: when an adoption fails because the court invalidates the adoption decree or the adoptive couples voluntarily terminate their parental rights. The statute provides that, under this narrow set of circumstances, the best interests of the child must be considered in determining whether to return the child to biological parent or prior Indian custodian. The regulation does not address this narrow set of circumstances. FR § 23.136(b) requires notice to the parent or Indian custodian of the right to petition for return of the child, but the final rule does not set out the standard for determining whether to return the child to the parent's or Indian custodian's custody. FR § 23.136(c) implements section 1913(d) of the Act, which provides that the court "shall" return the child to the parent if it finds the parent's consent was obtained through fraud or duress.

2. Who Can Make a Petition to Invalidate an Action

Comment: A few commenters requested changing "the court must determine whether it is appropriate to invalidate the action" to "the court must invalidate the action" in PR § 23.133. These commenters stated that the plain language of section 1914 does not allow for court discretion. These commenters further asked how the court would determine appropriateness and under what standard of review.

Response: 25 U.S.C. 1914 does not require the court to invalidate an action, but allows certain parties to petition for invalidation. For this reason, the final rule states that the court must determine whether it is appropriate to invalidate the action under the standard of review applicable under State law. *See* FR § 23.137.

Comment: A few commenters supported PR § 23.133(c) as clarifying that the Indian child, parents, or Tribe may seek to invalidate an action to uphold the political status and rights of each child. One commenter stated that PR § 23.133(c) is important in that it clarifies that certain provisions of ICWA cannot be waived because any party may challenge based on violations of another party's rights. A few other commenters stated that the rule purports to convey standing to those who do not have a personal stake in the controversy. These commenters claim there is no evidence Congress intended to grant the Department authority to rewrite constitutional standing requirements and the fundamental principle of American jurisprudence that someone seeking relief must have standing.

Response: The final rule does not dictate that a court must find that the listed parties have constitutional standing; rather, it recognizes the categories of those who may petition. The statutory scheme allows one party to assert violations of ICWA requirements that may have impacted other parties rights (e.g., a parent can assert a violation of the requirement for a Tribe to receive notice under section 1912(a)). There is no basis in the statute for the regulation to limit

the parties' opportunities for redress for violations of ICWA. Through section 1914, ICWA makes clear that a violation of Sections 1911, 1912, or 1913 necessarily impacts the Indian child, Indian parent or custodian, and the Indian child's Tribe such that each is afforded a right to petition for invalidation of an action taken in violation of any of these provisions. The provision also makes clear that one party cannot waive another party's right to seek to invalidate such an action. Additionally, parties may have other appeal rights under State or other Federal law in addition to the rights established in ICWA.

Comment: A commenter requested deleting from PR § 23.133(a)(2) "from whose custody such child was removed" because it would prevent a noncustodial biological parent from petitioning to invalidate the action.

Response: The final rule continues to include the qualifying phrase "from whose custody such child was removed" because the statute includes this phrase, authorizing parents or Indian custodians "from whose custody such child was removed" the right to petition to invalidate an action. 25 U.S.C. 1914; FR § 23.137(a)(2).

Comment: A commenter requested adding a guardian ad litem to the list of persons in PR § 23.133(a) who may petition to invalidate an action. A commenter requested adding that the child must be a minimum age to petition to invalidate an action.

Response: The final rule does not add a guardian ad litem to the list of persons who may petition to invalidate an action because the statute does not list this category of persons. Nor does the final rule add a minimum age for a child to be able to petition to invalidate an action because the statute does not provide a minimum age. The statute allows an Indian child to petition, which necessarily means that someone with authority to act for the child may petition on the child's behalf. *See* 25 U.S.C. 1914.

Comment: One commenter suggested adding "or was" to read "an Indian child who is or was the subject of any action" to account for actions that occurred in the past.

Response: The final rule adds the requested clarification because it can be inferred from the statute that the action for foster-care placement or termination of parental rights need not be in process at the time the child petitions to invalidate the action. *See* FR § 23.136(a)(1).

Comment: A State commenter requested clarification of whether the "court of competent jurisdiction" may be a Tribal court, district court, or different court from where the original proceedings occurred.

Response: The court of competent jurisdiction may be a different court from the court where the original proceedings occurred.

Comment: A State commenter requested clarification of whether the ability to challenge the proceeding applies to the proceeding at issue or a subsequent proceeding and stated that, as written, it appears the adoption proceeding could be undone due to failures to follow ICWA in the underlying termination case. This commenter requested clarification that only the proceeding currently before the court may be invalidated.

Response: The ability to petition to invalidate an action does not necessarily affect only the action that is currently before the court. For example, an action to invalidate a termination of parental rights may affect an adoption proceeding. *See, e.g.*, *In re the Adoption of C.B.M.*, 992 N.E.2d 687 (Ind. 2013) (where termination of parental rights has been overturned on appeal, "letting the adoption stand would be an overreach of State power into family integrity"); *State ex rel. T.W. v. Ohmer*, 133 S.W.3d 41, 43 (Mo. 2004) (ordering lower court to set aside adoption decree where parent has appealed termination decision).

3. Rights of Adult Adoptees

Comment: A few commenters supported outlining post-trial rights to protect adopted Indian children, Tribes, parents, and family members. A few commenters opposed PR § 23.134(b) and (c) as undermining the established practice in some jurisdictions of opening adoption-related records for Indian adoptees when they would otherwise be closed. These commenters expressed concern that PR § 23.134(b) and (c) could be interpreted to allow States to keep records sealed.

Response: The final rule addresses section 1917 of the Act at FR § 23.138 and addresses section 1951 at FR § 23.140. The rule clarifies that it is addressing certain specific rights of adult adoptees to information on Tribal affiliation, in accordance with the statute, rather than all rights of adult adoptees. States may provide additional rights. At FR § 23.71(b), the final rule replaces the proposed text with language restating the Secretary's duty under section 1951(b) of the Act.

Comment: A commenter suggested edits to PR § 23.134(b) and (c) to clarify that it is the court that must seek the assistance of BIA and communicate directly with the Tribe's enrollment office. A few commenters opposed PR § 23.134 to the extent it shifts responsibility to the States, particularly with regard to requiring agencies to communicate directly with Tribal enrollment offices. A few commenters stated that PR § 23.134(c) should include other offices designated by the Tribe, rather than just the Tribal enrollment office.

Response: The final rule deletes the provisions referenced by the commenters.

Comment: One commenter stated that the rule should require disclosure of information to allow adult adoptees to reunite with their siblings.

Response: The final rule does not add the requested requirement because it is beyond the scope of the statute; however, some States have registries that allow individuals to obtain information on siblings for purposes of reunification.

Comment: A few commenters stated that the final adoption decree should require adoptive parents to maintain ties to the Tribe for the benefit of the child or include Tribal affiliation in the adoption papers.

Response: The final rule does not include this requirement. The statute and the regulations, however, provide a range of provisions, including Sections 1917 and 1951, which are focused on promoting the relationship between the adoptee and the Tribe.

Comment: A few commenters noted that the Act provides for BIA to assist adult adoptees in securing information to establish their rights as Tribal citizens, and suggested the rule add a provision to this effect.

Response: The final rule includes a provision at FR § 23.71(b) that incorporates the statute's requirements for BIA assistance to adult adoptees.

4. Data Collection

Comment: A few commenters suggested minimizing non-preferred placements by saying the placement must be documented throughout the case.

Response: FR §§ 23.129(c) and 23.132(c) require that the court's good cause determination be on the record. FR § 23.141 also requires that the record of placement include information justifying the placement determination. This regulatory requirement ensures the statutory provision allowing the Department and Tribe to review State placement records for compliance with the placement preferences is fulfilled. *See* 25 U.S.C. 1915(e).

Comment: A State commenter requested clarification that the agency that places the child must maintain the records.

Response: FR § 23.141 clarifies that the State must maintain the records, but allows a State court or agency to fulfill that role.

Comment: A few commenters opposed PR § 23.136 to the extent it duplicates obligations already assigned to BIA under the current regulation at § 23.71.

Response: The commenters are correct that PR § 23.134 and PR § 23.136 duplicated the content in 25 CFR 23.71 to a large extent. The final rule addresses these comments by keeping those provisions that address BIA responsibilities in FR § 23.71, and moving those provisions that address State responsibilities to FR § 23.140. FR § 23.71 keeps provisions in former § 23.71(b) governing BIA, with minor modifications for readability and to replace the reference to the BIA "chief Tribal enrollment officer" with a general reference to BIA. Other provisions at former § 23.71(a) are contained in FR § 23.140.

Comment: Several commenters supported the proposed data-collection requirements as necessary to determine compliance with the Act. Some stated concern that the information is not currently being maintained and suggested BIA conduct mandatory compliance checks on each State to determine record maintenance and availability.

Response: The regulation is intended to strengthen the effectiveness of States' implementation of this important provision.

Comment: One commenter noted that the first sentence of PR § 23.136(a) uses the term "child" rather than "Indian child."

Response: The final rule specifies "Indian child." *See* FR § 23.140(a).

Comment: A few commenters suggested adding that the documentation be sent to the child's Tribe, in addition to BIA.

Response: The statute, at section 1951(a), requires only that the State provide the Secretary with this information.

Comment: A few commenters opposed PR § 23.137, stating that the requirements for a single repository in each State and the seven-day timeframe are beyond the requirements of § section 1915(e) and would be an administrative and fiscal burden on States. A commenter stated that the cost to courts in relocating the approximate 1,123 files throughout 58 counties to a single location would be significant and disruptive. Some claimed it would be an unfunded mandate. A few requested clarifications on how the records must be maintained in a single location. A commenter suggested a timeframe of 30 days would be more appropriate.

Response: The final rule deletes the requirement for storing records of placement in a single repository, but retains a timeframe. The statute provides that the State must make the record available at any time upon the request of the Secretary or the Indian child's Tribe. *See* 25 U.S.C. 1915(e). A timeframe is appropriate to ensure that the record is available upon request "at any time," but the final rule ensures States have the flexibility to determine the best way to maintain their records to ensure that they can comply with the timeframe. In response to comments about the reasonableness of the timeframe, the final rule extends the timeframe to 14 days, which will generally allow two full working weeks to provide the record. *See* FR § 23.141.

Comment: A commenter requested clarification of whether copies or the original files must be maintained and provided.

Response: The regulation does not clarify whether the files must be originals or may be copies because as long as the copies are true copies of the originals, there is no need to specify.

Comment: A commenter requested clarification as to whether only court records are within the regulation's scope or if the regulation covers State agencies or private adoption agencies.

Response: FR § 23.141 directly addresses only court records because the court records must include all evidence justifying the placement determination. *See* 25 U.S.C. 1915, FR § 23.132. States may require that additional records be maintained.

Comment: One commenter suggested requiring States to submit annual reports assessing compliance with the regulations. Other commenters suggested BIA work closely with the U.S. Department of Health and Human Services to encourage broader data collection in AFCARS reporting and enforcement. A Tribal commenter stated that there are currently no reliable data sources for information on Indian children in State care and, without accurate numbers, it is difficult to ascertain with any precision the needs of Indian children in any State.

Response: The final rule does not requiring annual reporting. The Department is working closely with the Department of Health and Human Services on data collection regarding ICWA. *See* AFCARS Proposed Rule at 81 FR 20283 (April 7, 2016).

Comment: A commenter suggested the rule should address the records filed with the Secretary, including who may access them, the procedure for gaining access, and the timeframe for the Secretary to respond to requests for access.

Response: BIA has maintained a central repository of adoption decrees and responds to requests for access. The final rule, at FR § 23.71(b), incorporates section 1951(b) of the Act, to clarify that someone can request the records from the Secretary.

Comment: A commenter suggested adding a mechanism for securing the information required by PR § 23.136(a) when a State court fails to comply, for example, by requiring them to provide the information to the Secretary.

Response: FR § 23.140(a) implements section 1951(a) of the Act which establishes a State court responsibility to provide information to the Secretary. This provision was formerly located at 25 CFR 23.71(a).

Comment: A commenter suggested that the "good cause" basis stated on the record should be reported in the State database and reported to Tribes and adoptees.

Response: The regulation requires that the State record the basis for "good cause" to deviate from the preferred placements (*see* FR § 23.129(c)); this information and evidence must be included in the court record.

Comment: A commenter suggested that PR § 23.136 clarify that an affidavit requesting anonymity does not preclude disclosure of identifying information to the Tribe for the purpose of approving an application for Tribal membership, which the Tribe undertakes in its sovereign capacity. The commenter also suggested the rule clarify that all non-identifying information will still be disclosed, including for example, the name and Tribal affiliation of the Tribe and the identity of the court or agency with relevant information. The commenter also suggests the adoptive parents' identities may be disclosed.

Response: FR § 23.71(a) implements section 1951(a) of the Act, providing a role for the Secretary to provide information as may be necessary for the enrollment of an Indian child in the Tribe.

Comment: A commenter suggested that one parent's affidavit for anonymity should not extend anonymity to the other parent.

Response: An affidavit of one parent would not extend anonymity to the other parent.

Comment: A commenter suggested an affidavit requesting anonymity should not preclude disclosure of the adoptive parents' identities.

Response: The Act only addresses an affidavit of anonymity for the biological parent or parents. *See* 25 U.S.C. 1951(a).

Comment: A commenter suggested PR § 23.136 should provide for notification of foster and adoptive parents of their right and the right of their adoptive child upon reaching age 18 to apply for the adoption records held by the Secretary.

Response: Neither the statute nor the final rule require the Secretary to proactively reach out to adoptive and foster parents and adopted children regarding their records; rather, the Act at section 1917 and the final rule provide that the State court provides such information upon application.

Comment: The commenter suggested that, when there is an affidavit for anonymity, the Secretary notify the biological parent of the request and allow them the opportunity to withdraw anonymity if desired.

Response: The parent may have the right to withdraw or rescind an affidavit for anonymity under State law; the parent should contact the State court or agency for directions.

Comment: A commenter suggested adding a section to authorize release of records maintained by the Secretary to any Indian child, parent or Indian custodian, or child's Tribe upon a showing that the records are needed as evidence in an action to invalidate a placement in violation of Sections 1911, 1912, 1913 or 1915.

Response: Section 1951 of the Act provides that the Secretary may release such information as may be necessary for the enrollment of an Indian child… or for determining any rights or benefits associated with that membership. To the extent a party seeks evidence in an action to invalidate a placement in violation of Sections 1911, 1912, 1913, or 1915, the party would be able to seek that information from the State and through discovery.

O. Effective Date and Severability

The final rule includes a new section, FR § 23.143, that provides that the provisions of this rule will not affect a proceeding under State law for foster-care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to 180 after the publication date of the rule, but will apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child. This is drawn from the language of 25 U.S.C. 1923.

This provision ensures that ongoing proceedings are not disrupted or delayed by the issuance of this rule and that there is an orderly phasing in of the effect of the rule. *See* H.R. Rep. No. 95-1386, at 25. Standards affecting pending proceedings should not be changed in midstream. This could create confusion, duplication, and delays in proceedings. And, by providing 180 days from the date of issuance for the rule to be fully effective, all parties affected—States courts, State agencies, Tribes, private agencies, and others—have ample time to adjust their practices, forms, and guidance as necessary.

FR § 23.144 states the Department's intent that if some portion of this rule is held to be invalid by a court of competent jurisdiction, the other portions of the rule should remain in effect. The Department has considered whether the provisions of the rule can stand alone, and has determined that they can. For example, the agency has considered whether particular provisions that are intended to be followed in both voluntary and involuntary proceedings should remain valid if a court finds the provision invalid as applied to one type of proceeding, and has concluded that they should. The Department has also considered whether the particular requirements of the rule (e.g., requirements for notice, active efforts, consent, transfer, placement

preferences) may each function independently if other requirements were determined to be invalid. The Department has determined that they can.

Comment: One commenter stated that the ICWA regulations should be retroactive to include all Indian children currently involved in ICWA cases.

Response: As discussed above, the final rule includes a provision that mirrors 25 U.S.C. 1923, providing none of the provisions of this rule will affect a proceeding which was initiated or completed prior to 180 days from the date of issuance.

P. Miscellaneous

1. Purpose of Subpart

Comment: A few commenters supported PR § 23.101 and especially supported reiterating that the Indian canons of construction are to be used when interpreting ICWA. A few commenters suggested explaining in PR § 23.101, for the general public, that ICWA is not a race-based preference, but is a political decision because of the government-to-government relationship between Tribes and the Federal Government.

Response: The Department agrees that statutes are to be liberally construed to the benefit of Indians but determined it was not necessary to reiterate that canon here. Further, ICWA is based on an individual's political affiliation with a Tribe.

Comment: A few commenters suggested strengthening the provision stating that ICWA establishes minimum Federal standards. These commenters suggested adding reference to the national policy is that these standards define the best interests of Indian children.

Response: The statement that ICWA establishes minimum Federal standards is sufficient. Congress enacted ICWA to protect the best interests of Indian children.

2. Interaction with State Laws

Comment: A few commenters stated that PR § 23.105, providing that if applicable State law provides a higher standard of protection, then the State court must apply that standard, should specify that if the State imposes sanctions, that constitutes a higher standard of protection.

Response: It is unclear what the commenters mean by "sanctions." ICWA provides that, where State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under [ICWA], the State or Federal court shall apply the State or Federal standard. 25 U.S.C. 1921. The final rule is designed to reflect that requirement.

Comment: One commenter stated that the regulation should emphasize that ICWA's provisions in Sections 1911 through 1917 and Sections 1920 through 1922 are mandatory standards that supplant State law. Other commenters requested clarification that minimum Federal standards do not supplant State laws and regulations and Tribal-State agreements applying standards beyond the minimum Federal standards, and that State law and Tribal-State agreements may expand upon or clarify ICWA consistent with the statute. A commenter recommended stating that the minimum Federal Standards preempt State laws that directly conflict with the Federal standards and do not provide heightened protections.

Response: Congress established minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture. 25 U.S.C. 1902. Congress's clear intent in ICWA is to displace State laws and procedures that are less protective. *See, e.g., In re Adoption of M.T.S.,* 489 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). By establishing "minimum" standards for removal and

placement of Indian children, Congress made clear that it was not preempting the entire field of child-custody or adoption law as to Indian children, including all State laws that provide greater protection to such children than those established by ICWA. *See e.g.,* H.R. Rep. No. 95-1386, at 19. ICWA specifically provides that, where State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under ICWA, the State or Federal court shall apply the State or Federal standard." 25 U.S.C. 1921.

Comment: A commenter suggested deleting "in which ICWA applies" from PR § 23.105(a) because ICWA is applicable to all child-custody proceedings, so this phrase is redundant and adds confusion.

Response: The final rule deletes the phrase "and are applicable in all child-custody proceedings…" because FR § 23.103 addresses applicability.

Comment: A few commenters stated that the new regulations conflict with various judicial decisions and asked whether the regulations will supersede existing case law.

Response: The regulations are intended to provide a binding, consistent, nationwide interpretation of the minimum requirements of ICWA. If State law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under ICWA, as interpreted by this rule, State law will still apply. *See* 25 U.S.C. 1921.

3. Time Limits and Extensions

Comment: One commenter stated that ICWA section 1912(a) allows "up to 20 days" whereas PR § 23.111(c)(4)(v) adds a burden of stating a specific number of days, and the regulation should mirror the Act because it is difficult to obtain continuances.

Response: FR § 23.111(c)(4)(v) deletes the requirement to specify a number of days and now reflects the statutory language allowing "up to 20 days." Other provisions also now reflect that the extension may be "up to an additional 20 days."

Comment: One commenter suggested imposing timeframes on States for providing notice to Tribes.

Response: To promote the statute's intent, FR § 23.111(a) adds that the State must "promptly" provide notice to Tribes.

Comment: A commenter suggested splitting PR § 23.111(h), regarding time periods, into two subsections, one to address involuntary placements and one to address termination of parental responsibilities, and adding that findings and orders at involuntary placement proceedings are not binding on parties who did not receive notice but should have, and that courts will make diligent efforts to ensure timely notice.

Response: The statute and regulation provide a mechanism for addressing instances where parties who did not receive notice but should have can seek to invalidate the action, by filing a petition under section 1914 of the Act. *See* FR § 23.137.

Comment: A few commenters suggested that timeframes longer than those set out in PR § 23.112 are appropriate in Alaska, where a majority of villages are remote and subject to extreme weather conditions.

Response: The timeframes in FR § 23.112 are established by statute in section 1912(a). The minimum timeframes are to ensure that the parents or Indian custodians, and Indian child's Tribe have sufficient advance notice and time to prepare for a proceeding. State courts have discretion to allow for more time.

Comment: A few commenters expressed their support for PR § 23.112's timeframes as key accountability mechanisms. One commenter stated that additional extensions of time should not be allowed in PR § 23.112(a) unless it is for good reason (e.g., deployment in the military). Another suggested a good reason would be to allow for a child's participation.

Response: The final rule does not impose restrictions on additional extensions because the Act does not provide any parameters for additional extensions, thereby leaving such additional extensions to the discretion of State courts.

Comment: One commenter requested clarification in PR § 23.112(b) as to how many times a party may ask for an additional 20 days to prepare, and whether this is for each "proceeding" or each "hearing."

Response: The parent, Indian custodian, and Indian child's Tribe are entitled to one extension of up to 20 days for each proceeding. As discussed above, any extension beyond the initial extension up to 20 days is subject to the judge's discretion.

4. Participation by Alternative Methods (Telephone, Videoconferencing, etc.)

Comment: A few commenters suggested that the provision located throughout the proposed rule allowing for participation by alternative methods be moved into a separate section, applicable to all stages, instead of repeating the provision throughout the rule.

Response: The final rule consolidates provisions on alternative methods of participation into one section at FR § 23.133.

Comment: Many commenters supported the provisions throughout the regulations for the court to allow alternative methods of participation in State proceedings. Commenters noted that Tribes have citizens living in many States and allowing participation by phone or video allows Tribes and all stakeholders to participate when they are unable to travel or appear, whether due

to financial constraints, distance, or otherwise. Several commenters suggested the rule require the court to allow alternative methods of participation, rather than making it discretionary, because the burden on States to allow such participation is low and the rights protected by allowing alternative methods of participation are important. One suggested the court must allow it if it has the capability.

Response: The final rule retains the word "should" rather than making the provision mandatory.

Comment: One State commenter stated that alternative methods of participation should not be available for testimony because the witness must be in person for the court to make credibility determinations. This commenter also noted that the proceedings are closed, confidential proceedings and the court would be unable to monitor who was present if alternative methods were allowed.

Response: Several courts allow judges to determine credibility by phone or video, including in criminal proceedings. The Department notes that requesting statements under oath, even by teleconference, as to who is present may provide sufficient safeguards to maintain control over who is present on the teleconference for the purposes of confidentiality.

Comment: One commenter suggested adding Skype as an example of an alternative method.

Response: A service such as Skype would be included in "other methods."

Comment: A few commenters requested adding parents, Indian custodians, presumed parents, Indian children, and qualified expert witnesses to the list of those who may participate by alternative methods.

Response: The final rule allows for participation by alternative methods generally, without specifying who may so participate.

Comment: A few commenters stated that the rule should specify that the State may not charge fees for participation by alternative methods, and noted that some courts are requiring fees of as much as $85 per hearing and continuing the hearing until the fees are paid. The commenters state that such fees are prohibitive for Tribes and families.

Response: This is not addressed in the proposed or final rule. However, in March 2016, the Department of Justice issued a Dear Colleague letter to State and local courts regarding their legal obligations (under the U.S. Constitution and/or other Federal Laws) with respect to the enforcement of fines and fees. States should review the letter as they consider the appropriateness of fees in this context.

5. *Adoptive Couple v. Baby Girl* and *Tununak II*

Comment: Many commented on how the rule should be interpreted in light of the Supreme Court's decision in *Adoptive Couple v. Baby Girl.* Some commenters stated that the regulations should explicitly address the *Adoptive Couple* holding in various ways. For example, several requested the rule clarify that the decision should not be applied outside of the private adoption context and to provide guidance on how it should be implemented to better serve Native children, families, and Tribes. A few commenters stated that, without such guidance, courts will use the ruling to evade ICWA. A few commenters stated that the rule should clarify that the *Adoptive Couple* ruling should not be applied as broadly as the Alaska Supreme Court applied it in *Tununak II,* in which the Alaska Supreme Court stated that the grandmother must have filed a formal adoption petition to enjoy the placement preference in an involuntary

proceeding. Several commenters stated that the proposed rule is contrary to the Supreme Court's ruling in *Adoptive Couple.*

Response: Adoptive Couple addresses a specific individual factual scenario. The regulations do not explicitly address the *Adoptive Couple* holding because the regulation governs implementation of ICWA generally.

Comment: A few commenters suggested addressing the holding in *Tununak II,* to provide that in an involuntary proceeding, ICWA's placement preferences apply without regard to whether a preferred individual has come forward, sought to adopt, or filed a formal adoption petition. Commenters noted that, otherwise, the holding in *Tununak II* makes it harder for preferred parties to adopt by imposing procedural burdens. Another commenter stated the rule should expressly provide that preferred parties need not have sought to adopt the child in order to be eligible as a placement, because ICWA does not require formal attempts to adopt.

Response: The Department recommends that States provide clear guidance to preferred placements on how to assert their rights under ICWA and that States should work to eliminate obstacles to preferred placements doing so. For example, the State of Alaska issued an emergency regulation following the ruling in *Tununak* to consider certain actions a proxy for a formal petition for adoption. *See* Alaska Admin. Code tit. 7 § 54.600 (2015).

6. Enforcement

Comment: Multiple commenters asked how the regulations will be enforced or requested including an enforcement mechanism. Some suggested various enforcement mechanisms, such as imposing civil or criminal penalties or sanctions for agency and court noncompliance or tying compliance to State or Federal funding. Commenters stated that such penalties would better promote compliance with ICWA and the final rule. One commenter noted their experience in

hearing excuses for noncompliance because there are no consequences for failure to comply with ICWA and, therefore, little incentive to comply. Commenters had several additional suggestions for improving monitoring and compliance with ICWA.

Response: The final rule clarifies the right of particular parties to seek to invalidate a foster-care placement or termination of parental rights based on certain violations of ICWA. FR § 23.137. The final rule does not expressly address other enforcement mechanisms that may be available to the Federal government or other parties.

7. Unrecognized Tribes

Comment: A few commenters noted that some Indian Tribes are not federally recognized and that the rules leave those Tribes in danger of losing their children by addressing only children of federally recognized Indian Tribes. These commenters assert that the rule should apply to children of non-federally recognized Tribes, including but not limited to State-recognized Tribes.

Response: The statute defines "Indian Tribe" as federally recognized Tribes; therefore, the regulations address children who are members of federally recognized Tribes, or who are eligible for membership in a federally recognized Indian Tribe and whose parent is a member of a federally recognized Indian Tribe. *See* 25 U.S.C. 1903(8).

8. Foster Homes

Comment: Several commenters had suggestions for increasing the availability of Indian foster homes, including comments that the rule should:

- Require States to work with Tribes and families to break down obstacles to make it easier and faster to license Indian foster homes and to facilitate funding of those homes;
- Require acceptance of Tribal licensure of foster homes;

- Exclude individuals who are preferred placements from requirements necessary to become a foster home because they create barriers for Indian families;
- Require each State social services agency to publish its criteria to become a licensed foster home;
- Require each State social services agency to maintain a centralized registry containing all rejected foster-home applications for periodic review by Federal officials;
- Eliminate State requirements that contradict traditional practices and cause problems for Indian foster homes, such as the requirement for each child to have a separate bedroom.

Response: ICWA establishes Indian foster homes as preferred placements, but does not elaborate on how to increase the availability of such placements. The Department nevertheless encourages States and Tribes to collaborate to increase the availability of Indian foster homes. Organizations such as the National Resource Center for Diligent Recruitment at AdoptUSKids provide tools and resources for recruiting Indian homes. S*ee, e.g.*, National Resource Center for Diligent Recruitment, *For Tribes: Tool and Resources* (last visited Apr. 27, 2016), http://www.nrcdr.org/for-tribes/tools-and-resources.

9. Other Miscellaneous

Comment: A commenter suggested adding "local" to PR § 23.104(c), so it states that assistance may be sought "from the BIA local, Regional Office and/or Central Office."

Response: The final rule makes this addition for clarification at FR § 23.105(c).

Comment: A few commenters expressed concern that biological parents use ICWA as a tool to disrupt the child's placement. One commenter stated that if a child has been in a home for six months or more, they should not be forced to leave unless abuse is a factor.

Response: ICWA is designed to prevent the breakup of the Indian family and thereby focuses on maintaining the biological parents (or Indian custodian) with the Indian child, rather than the bond between the foster parents and the Indian child. Biological parents may avail themselves of their rights under ICWA and reunification with the biological parents or a change in placement may be appropriate even after many months or years, depending on the circumstances (as is true for non-Indian children as well).

Comment: One commenter suggested clarifying how immediate termination-of-parental-rights proceedings in cases involving shocking and heinous abuse or previous terminations as to other children should be handled to comply with ICWA.

Response: ICWA does not allow for "immediate termination of parental rights" because it requires certain timeframes for notice of the proceedings. *See* 25 U.S.C. 1912(a). Emergency removal and emergency placement may be appropriate for immediate action if the requirements of section 1922 of the Act are met, and the child may be placed in foster care pending the termination-of-parental-rights proceeding if the requirements of section 1912(e) of the Act are met.

Comment: A few commenters stated that Indian people should be removed from the State index for crimes if the crime was committed over five years ago, because States are refusing to place children with Indian relatives who are in the index.

Response: ICWA does not address restrictions on placements due to past criminal convictions.

Comment: A few commenters suggested the rule should provide for legal representation of Indian children through a guardian ad litem or equivalent to ensure the child's viewpoint is considered.

Response: ICWA addresses legal representation of Indian children in section 1912(b).

Comment: Several commenters stated that attorneys should be appointed to represent parents and extended family members as a matter of indigenous rights.

Response: ICWA states that the parent or Indian custodian has the right to court-appointed counsel in an ICWA proceeding. *See* 25 U.S.C. 1912(b).

Comment: A commenter stated that the regulations impermissibly attempt to shift Federal responsibility to the State courts and agencies.

Response: ICWA establishes minimum standards to be applied in State child-custody proceedings. The final rule is consistent with ICWA, and elaborates on these minimum standards. It does not shift Federal responsibilities to State courts and agencies.

Comment: Several commenters suggested making all provisions of the rule mandatory, rather than using the word "should."

Response: The final rule generally uses mandatory language, as it represents binding interpretations of Federal law. In a few instances, the Department did not use mandatory language, such as to indicate the best means of compliance with another statutory or regulatory requirement.

Comment: A commenter stated that the regulations should encourage States, in coordination with Tribes, to advance ICWA implementation beyond what is required by the regulations, to ensure that the "minimum Federal standards" do not become the maximum standards. One commenter suggested including standard forms to help guide States in which ICWA is less frequently used, to help familiarize States with ICWA and save time. The commenter suggested reviewing the forms at www.nd.gov/dhs/Triballiaison/forms.

Response: The Department underscores that these regulations are indeed minimum standards. The Department encourages States and Tribes to collaborate to advance ICWA implementation and suggests looking to some of the tools developed by States to aid in implementation of ICWA. For example:

- New York has published a State guide to ICWA (*see A Guide to Compliance with the Indian Child Welfare Act* published by the New York Office of Children and Family Services at http://ocfs.ny.gov/main/publications/pub4757guidecompliance.pdf);
- Washington has established a State evaluation of ICWA implementation, which it performs in partnership with Tribes (*see 2009 Washington State Indian Child Welfare Case Review* at https://www.dshs.wa.gov/sites/default/files/SESA/oip/documents/Region%202%20ICW%20CR%20report.pdf).
- Michigan has established a "bench card" as a tool for judges implementing ICWA and the State counterpart law (*see 2014 Michigan Indian Family Preservation Act (MIFPA) Bench Card* (last visited Apr. 27, 2016), http://courts.mi.gov/Administration/SCAO/OfficesPrograms/CWS/CWSToolkit/Documents/BC_ICWA_MIFPA.pdf)
- Several States have established State-Tribal forums to discuss child-welfare policy and practice issues (*see* Montana, North Dakota, Oklahoma, Oregon, Utah, and Washington).
- Several States have established State-Tribal court improvement forums where court system representatives meet regularly to improve cooperation between their jurisdictions (*see* California, Michigan, New Mexico, New York, and Wisconsin).

In addition, several non-governmental entities offer tools for ICWA implementation, such as the National Council of Juvenile and Family Court Justices, National Indian Child Welfare Association, and Native American Rights Fund.

Comment: A few commenters stated their concerns over comments provided by adoption lawyers, stating that they are primarily concerned with making money from private adoptions of Indian children. These commenters noted that the private adoption industry profits in the billions of dollars annually and require fees for adopting Indian infants. A few other commenters stated their concern that Tribes are seeking more power through the regulations.

Response: The Department has considered the substance of each comment and without presuming the commenters' motivations.

Comment: A commenter suggested using "or" rather than "and/or" throughout the regulation.

Response: The final rule continues to use the term "and/or" in several places for clarity.

Comment: A commenter suggested Tribes and birth parents enter into "Contract After Adoption" agreements whereby non-Indian adoptive parents agree to register the child with the Tribe, stating that these agreements have been productive and protective of rights. Another commenter suggested requiring adoptive parents to enter a cultural outreach program as defined by the Tribe, to ensure continued connection that strengthens the culture.

Response: This is beyond the scope of this rule.

Comment: A commenter stated that State child-welfare agencies should include input from Tribes in their plans for implementing ICWA. Likewise, a commenter stated that States and Tribes should join forces to look at early intervention, prevention, and rehabilitative services to avoid ICWA situations, and work together for the good and welfare of our children.

Response: This is beyond the scope of this rule. The Department encourages States to collaborate with Tribes on implementation of ICWA.

Comment: A commenter suggested BIA ask Tribes whether State courts and agencies complied with ICWA because if BIA relies only on agency documentation, it will not receive the whole picture. This commenter provided an example of one State that claimed compliance but the Tribes in the State disagree.

Response: This is beyond the scope of this rule.

Comment: A commenter stated that guardian ad litems should have significant understanding of indigenous cultures and traditions so they can better interface with the children.

Response: State law governs the standards and procedures for appointing guardian ad litem. The Department encourages appointment of guardian ad litem with significant understanding of the Indian child's culture.

Comment: A commenter asserted that one of the greatest challenges State courts face is reconciling the ICWA provisions with other Federal statutes governing child-welfare matters, such as Title IV-E of the Social Security Act and suggests BIA and HHS work together to ensure there is no conflict.

Response: Interior and the Department of Health and Human Services are committed to working together to ensure harmonious implementation of the various Federal statutory requirements.

Comment: Many commenters noted the dire need for additional funding to Tribes, preferred placements, and others to better support ICWA implementation. A few commenters stated that there should be enforcement to ensure any ICWA funding provided to Tribes is used for that purpose.

Response: While the final rule cannot affect funding levels, the Department notes the importance of funding in implementation.

Comment: Many commenters noted the dire need for ICWA training and suggested requiring State social workers, attorneys, and judges to undergo training on ICWA. One commenter stated that education regarding legal, social, historical, and ethical components of ICWA would strengthen compliance. Other commenters suggested requiring non-Indian adoptive families to take certified training on the history of Native Americans and issues concerning Tribes today.

Response: ICWA does not establish requirements for training, but the Department notes the importance of training in implementation.

V. Summary of Final Rule and Changes from Proposed Rule to Final Rule

The following table summarizes changes made from the proposed rule to the final rule.

Proposed Rule	**Final Rule**	**Summary of Changes from Proposed Rule to Final Rule**	**Summary of Final Rule (As Compared to Rule in Effect Before this Final Rule)**
23.2 Definitions	23.2 Definitions	Added definitions for emergency proceeding, hearing, Indian foster home, involuntary proceeding, proceeding, and voluntary proceeding. Revised definitions of active efforts, child-custody proceeding, continued custody, domicile, Indian child, Indian child's Tribe, Indian custodian, and upon demand. Deleted definitions of imminent physical damage or harm and voluntary placement.	Added definitions for active efforts, continued custody, custody, domicile, emergency proceeding, hearing, Indian foster home, involuntary proceeding, proceeding, status offenses, upon demand, and voluntary proceeding. Revised definitions of child-custody proceeding, extended family member, Indian child, Indian child's Tribe, Indian custodian, parent, reservation, Secretary, and Tribal court.
23.11 Notice.	23.11 Notice.	Revises current (a) to delete requirement to send a copy of	Restates current 23.11, but deletes the requirement to

		the notice to BIA Central Office. Clarifies that notice must include the information specified in 23.111. Clarifies that certain BIA duties remain. Replaces "certified mail" with "registered or certified mail." Specifies where notice should be sent.	send a copy of the notice that goes to the BIA Regional Director to the BIA Central Office, and replaces "certified mail" with "registered or certified mail." Updates information on where notice should be sent. Moves provisions from § 23.11(b), (d), (e) to FR § 23.111.
N/A	23.71 Recordkeeping and information availability.	Deletes provisions of current § 23.71(a) because duplicative of § 23.140. Moves current § 23.71(b) to (a) as part of non-material changes to restructure the section. Revises 23.71(b) to more closely match section 1951(b) of the Act. Deletes reference to BIA Tribal enrollment officer because position no longer exists.	Revises current 23.71 to more closely match section 1951(b) of the Act.
23.101 What is the purpose of this subpart?	23.101 What is the purpose of this subpart?	Deletes sentence on when the regulations apply because FR § 23.103 addresses when ICWA applies.	New section. Establishes the purpose of the new subpart.
23.102 What terms do I need to know?	23.102 What terms do I need to know?	Revises definition of "agency."	New section. Defines "agency" and "Indian organization" for the purposes of this subpart only.
23.103 When does ICWA apply?	23.103 When does ICWA apply?	Clarifies what types of proceedings ICWA does and does not apply to. Revises text addressing "existing Indian family" exception. Moves provisions regarding the requirement to ask whether ICWA applies to FR § 23.107. Moves provision requiring treatment of a child as an Indian child pending verification to § 23.107. Clarifies that if ICWA applies at the commencement of a proceeding, it continues to	New section. Delineates when ICWA's requirements may apply and do not apply. Establishes that there is no exception to the application of ICWA based on certain factors. Establishes that ICWA continues to apply even if the child reaches the age of 18.

		apply even if the child reaches age 18.	
N/A	23.104 What provisions of this subpart apply to each type of child-custody proceeding?	Adds a chart to clarify which type of proceeding each rule provision applies to.	New section. Delineates what type of proceeding the sections of the subpart apply to.
23.104 How do I contact a Tribe under the regulations in this subpart?	23.105 How do I contact a Tribe under the regulations in this subpart?	No significant changes.	New section. Establishes how to contact a Tribe to provide notice or obtain information or verification.
23.105 How does this subpart interact with State laws?	23.106 How does this subpart interact with State and Federal laws?	Deletes provision regarding ICWA applicability because applicability is addressed in 23.103.	New section. Specifies that the regulations provide minimum Federal standards, and that more protective State or Federal laws apply.
23.106 When does the requirement for active efforts begin?	N/A	Deletes section.	N/A
23.107 What actions must an agency and State court undertake to determine whether a child is an Indian child?	23.107 How should a State court determine if there is a reason to know the child is an Indian child?	Limits provision to standards applicable in State-court proceedings. Clarifies that inquiry is required in emergency, involuntary, and voluntary proceedings. Clarifies that if there is "reason to know" the child is an Indian child, this triggers certain obligations. Deletes list of information that the court may require the agency to provide. Replaces "active efforts" to identify Tribes with "due diligence" to identify Tribes. Moves provision requiring treatment of the child as an Indian child from proposed 23.103(d). Adds to the list of factors providing "reason to know" the child is an "Indian child" that the child is or has been a ward of Tribal court and that either parent or child possesses a Tribal identification card, but	New section. Establishes that State courts must ask as a threshold question at the start of a proceeding whether there is reason to know the child is an Indian child. Establishes that, if there is reason to know the child is an Indian child, the State court must confirm the agency used due diligence to identify and work with Tribes to obtain verification, and must treat the child as an Indian child unless and until it is determined otherwise. Establishes what factors indicate a "reason to know." Establishes that a court and Tribe must keep documents confidential if a consenting parent requested anonymity in a voluntary proceeding.

		removes residency on an Indian reservation or in a predominantly Indian community. Adds that, where anonymity is requested in voluntary proceedings, the Tribe must keep the information confidential.	
23.108 Who makes the determination as to whether a child is a member of a Tribe?	23.108 Who makes the determination as to whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member of a Tribe?	Adds that a Tribal determination of membership or eligibility may be reflected in facts of evidence, such as Tribal enrollment documentation.	New section. Establishes that only the Tribe may make determinations as to Tribal membership or eligibility, and that such determinations may be reflected in documentation issued by the Tribe.
23.109 What is the procedure for determining an Indian child's tribe when the child is a member or eligible for membership in more than one Tribe?	23.109 How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?	Deletes provision requiring notification by agencies. Clarifies process and considerations where more than one Tribe is involved. Deletes requirement for notifying all other Tribes that a particular Tribe was designated as the child's Tribe. Deletes statement that a Tribe can designate another Tribe to act as its representative.	New section. Incorporates statutory provisions for establishing the child's Tribe. Establishes that deference must be given to Tribe in which the child is already a member unless otherwise agreed to by the Tribes. Establishes that, where the child is a member in more than one Tribe or eligible for membership in more than one Tribe, the court must provide opportunity for the Tribes to determine which should be designated as the child's Tribe. Establishes what the State court should consider in determining which has "more significant contacts" if Tribes are unable to reach an agreement.
23.110 When must a State court dismiss an action?	23.110 When must a State court dismiss an action?	Adds that the provision is subject to agreements between States and Tribes pursuant to 25 U.S.C. 1919. Requires the Tribe be expeditiously notified of the pending dismissal and sent information regarding the	New section. Establishes that a State court must determine its jurisdiction and when a State court must dismiss an action. Requires State court to ensure the Tribal court is

		child-custody proceeding.	expeditiously notified and sent information on the proceeding.
23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?	23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?	Limited to standards to be applied in State-court proceedings. Clarifies that provision applies to involuntary foster-care-placement and termination-of-parental-rights proceedings. Adds "certified mail" as an option. Incorporates additional information from current 23.11 (e.g., maiden names, requirement to keep confidential information in the notice). Deletes provision stating that counsel is appointed only if authorized by State law. Deletes provision requiring a specific amount of additional time to be included in the request. Clarifies language-access requirements. Removes provision addressing Interstate Compact on Placement of Children. Moves provision regarding no rulings occurring until the waiting period has elapsed to 23.112(a).	New section. Establishes required contents of the notice. Allows notice to be sent by certified or registered mail, as long as return receipt is requested. Incorporates provisions of current 23.11. Incorporates statutory provision requiring court to inform a parent or Indian custodian who appears in court without an attorney of certain rights. Requires a State court to provide language-access services as required by Federal law.
23.112 What time limits and extensions apply?	23.112 What time limits and extensions apply?	Reorganizes section. States that no proceeding can be held until at least 10 days after the required notice is provided. Clarifies that extensions may be "up to" an additional 20 days. Moves provision regarding alternative methods of participation to 23.133. Clarifies that additional extensions of time may be granted.	New section. Incorporates statutory prohibition on foster care or termination-of-parental-rights proceedings being held until certain timelines are passed.
23.113 What is the process for the	23.113 What are the standards for	Adds that emergency removal/placement must	New section. Incorporates statutory limitations on

emergency removal of an Indian child?	emergency proceedings involving an Indian child?	terminate immediately when no longer necessary to prevent imminent physical damage or harm. Clarifies what standards state court should apply in emergency proceedings involving an Indian child. Changes standard from whether emergency removal/placement is "proper" to whether it is "necessary to prevent imminent physical damage or harm to the child." Removes certain requirements on the agency. Clarifies that agency may terminate the emergency removal/placement. Requires additional statements in the petition or accompanying documents. Replaces provision requiring a hearing if emergency removal/placement is continued for more than 30 days with a requirement for a court determination that restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm, and the court cannot transfer jurisdiction to the Tribe, and that it is not possible to initiate a child-custody proceeding defined in § 23.2. Moves provision regarding alternative methods of participation to § 23.133.	State emergency removals and emergency placements. Establishes what a petition, or accompanying documents, for emergency removal or emergency placement should include. Requires State court to determine at each hearing whether the emergency removal or emergency placement is no longer necessary. Establishes a 30-day deadline by which emergency removal and emergency placement should end unless the court determines that restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm, and the court cannot transfer jurisdiction to the Tribe, and that it is not possible to initiate a child-custody proceeding defined in § 23.2.
23.114 What are the procedures for determining improper removal?	23.114 What are the requirements for determining improper removal?	Changes "reason to believe" to "reason to know" of an improper removal. Changes "immediately stay the proceeding until a determination can be made on the question of improper removal…" to "expeditiously determine whether there was improper removal or retention."	New section. Establishes that the State court must expeditiously determine whether there was an improper removal or retention under certain circumstances. Requires the child to be returned immediately to parents if there has been an

		Changes standard from "imminent physical damage or harm" to "substantial and immediate danger or threat of such danger."	improper removal or retention, unless it would subject the child to substantial and immediate danger or threat of such danger.
23.115 How are petitions for transfer of proceeding made?	23.115 How are petitions for transfer of a proceeding made?	Adds that a request for transfer may be made at any stage of each proceeding. Clarifies that provision applies to foster-care and termination-of-parental-rights proceedings. Moves provision regarding alternative methods of participation to § 23.133.	New section. Establishes how petitions for transfer may be made.
23.116 What are the criteria and procedures for ruling on transfer petitions?	23.117 What are the criteria for ruling on transfer petitions?	Changes "case" to "child-custody proceeding" Clarifies that a court must make a determination when transfer is not appropriate. Moves provision for court to provide records related to the proceeding to Tribal court to § 23.119.	New section. Establishes that a State court must transfer a proceeding unless one or more of the listed criteria are met.
23.117 How is a determination of "good cause" not to transfer made?	23.118 How is a determination of "good cause" to deny transfer made?	Clarifies that the court "must not" consider certain factors, rather than "may not." Combines the two separate lists of factors that must not be considered into one list. Clarifies when court must not consider whether the proceeding is at an advanced stage. Adds that the court must not consider whether there have been prior proceedings involving the child for which no petition to transfer was filed. Changes the factor on whether the transfer "would" result in a change in placement to whether the transfer "could" affect placement. Changes the factor on the Indian child's "contacts" to Indian child's "cultural connections." Eliminates language regarding burden of proof. Requires the basis for denying	New section. Prohibits State court from considering certain factors in determining whether good cause to deny transfer exists. Requires the basis for denying transfer to be stated on the record or in a written opinion.

		transfer to be stated on the record or in a written opinion.	
23.118 What happens when a petition for transfer is made?	23.116 What happens when a petition for transfer is made? 23.119 What happens after a petition for transfer is granted?	Splits the proposed section into two sections. Deletes provision stating the notice should specify how long the Tribal court has to make its decision and requiring at least 20 days for Tribal court to decide. Adds that the State court "may request a timely response" regarding whether the Tribe wishes to decline the transfer. Changes "promptly provide the Tribal court with all court records" to "expeditiously provide the Tribal court with all records related to the proceeding." Adds language regarding coordination between State and Tribal courts.	New section. Establishes that the State court must ensure the Tribal court is promptly notified in writing of a transfer petition. New section. Establishes that State court should expeditiously provide the Tribal court with all records related to the proceeding if the Tribal court accepts transfer, and should coordinate the transfer with the Tribal court.
23.119 Who has access to reports or records?	23.134 Who has access to reports or records during a proceeding?	Deletes provision stating that decisions of the court must be based only upon what is in the record.	New section. Establishes rights of parties to examine records of proceedings.
23.120 What steps must a party take to petition a State court for certain actions involving an Indian child?	23.120 How does the State court ensure that active efforts have been made?	Deletes provision directly imposing requirements on any party petitioning for foster care or termination of parental rights; instead requires the court to conclude that active efforts have been made.	New section. Requires State court to conclude that active efforts to avoid the need to remove the Indian child from his or her parents or Indian custodian were made prior to ordering an involuntary foster-care placement or termination-of-parental-rights. Requires documentation of active efforts.
23.121 What are the applicable standards of evidence?	23.121 What are the applicable standards of evidence?	Clarifies that court "must not issue an order" absent the appropriate standard of evidence, rather than "may not issue an order." Changes standard from "seriously physical damage or harm" to "serious emotional or	New section. Establishes standards of evidence in foster-care placement proceedings and termination-of-parental-rights proceedings. Requires the existence of a causal relationship

		physical damage." Clarifies that a causal relationship is required for finding both clear and convincing evidence and evidence beyond a reasonable doubt. States that none of the listed factors may be the sole evidence without a causal relationship for both clear and convincing evidence and evidence beyond a reasonable doubt.	between the particular conditions in the home and risk of serious emotional or physical damage to the child. Establishes that, without the causal relationship, certain factors may not be the sole factor for meeting the standard of evidence.
23.122 Who may serve as a qualified expert witness?	23.122 Who may serve as a qualified expert witness?	Clarifies that expert witness must be able to testify regarding whether the Indian child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage, and should also have specific knowledge of the prevailing social and cultural standards of the Indian child's Tribe. Changes text from "specific knowledge of the child's Indian Tribe's culture and customs" to "knowledge of the prevailing social and cultural standards of the Indian child's Tribe." Eliminates the list of persons presumed to meet the requirements to two categories, and states instead that a person may be designated by the Indian child's Tribe has having knowledge of the prevailing social and cultural standards of that Tribe.	New section. Establishes that a qualified expert witness should have knowledge of the prevailing social and cultural standards of the Indian child's Tribe.
N/A	23.123	Reserved for numbering purposes.	Reserved for numbering purposes.
23.123 What actions must an agency and State court undertake in voluntary proceedings?	23.124 What actions must a State court undertake in voluntary proceedings?	Deletes requirements directed at agencies. Clarifies that courts must ensure the party seeking placement has taken all reasonable steps to verify the child's status. Adds that State courts must ensure that the placement	New section. Requires State courts to ask whether the child is an "Indian child" in voluntary proceedings. Where there is reason to know that the child is an Indian child, requires State courts to ensure the party

		complies 23.129-23.132.	seeking placement has taken all reasonable steps to verify the child's status. Requires State courts to ensure that the placement complies 23.129-23.132.
23.124 How is consent obtained?	23.125 How is consent obtained?	Clarifies that the consent must be made before a judge, not necessarily in court. Clarifies what the court must explain to the parent/Indian custodian prior to accepting consent, and separates out the limitations applicable to each type of proceeding. Clarifies that the court's explanation must be on the record and in English (unless English is not the primary language of the parent/Indian custodian). Clarifies that consent need not be executed in open court but still must be made before a court of competent jurisdiction.	New section. Requires consent to voluntary termination of parental rights, foster-care placement, or adoption to be in writing and recorded before a court of competent jurisdiction. Requires court to explain the consequences of the consent in detail and certify that terms and consequences were explained in English or the language of the parent or Indian custodian.
23.125 What information should the consent document contain?	23.126 What information must the consent document contain?	Clarifies that the consent document must contain the identifying Tribal enrollment number "where known" rather than "if any." Adds that the parent or Indian custodian's identifying information must be included, rather than definitively requiring their addresses.	New section. Establishes required contents of consent document.
23.126 How is withdrawal of consent achieved in a voluntary foster-care placement?	23.127 How is withdrawal of consent to a foster-care placement achieved?	Clarifies that a parent or Indian custodian may withdraw consent to foster-care placement at any time. Removes requirement for the withdrawal to be filed in the same court where the consent document was executed. Adds that State law may provide additional methods of withdrawing. Clarifies that the court must ensure the child is returned as soon as practicable.	New section. Establishes when and how consent of foster-care placement may be withdrawn. Establishes that the child must be returned to the parent or Indian custodian as soon as practicable.
23.127 How is	23.128 How is	Separates out provisions for	New section. Establishes

withdrawal of consent to a voluntary adoption achieved?	withdrawal of consent to a termination of parental rights or adoption achieved?	withdrawing consent to a termination of parental rights from provisions for withdrawing consent to an adoption. Adds that withdrawal may be accomplished by testimony before the court. Adds that State law may provide additional methods of withdrawing. Changes "clerk of the court" to "the court."	when and how consent to a termination of parental rights and an adoption may be withdrawn. Establishes that the child must be returned to the parent or Indian custodian as soon as practicable.
23.128 When do the placement preferences apply?	23.129 When do the placement preferences apply?	Deletes provisions directed at agencies. Clarifies that the Tribe's placement preferences may apply. Clarifies that the court must consider requests for anonymity in voluntary proceedings. Moves provisions regarding documentation to 23.137 and 23.138.	New section. Establishes when placement preferences apply. Establishes that where a parent requests anonymity in a voluntary proceeding, the court must give weight to this request. Establishes that the placement preferences must be followed unless a determination is made on the record that good cause exists not to apply those preferences.
23.129 What placement preferences apply in adoptive placements?	23.130 What placement preferences apply in adoptive placements?	Clarifies that the Tribe's placement preferences may apply. Clarifies that the court "must" consider, where appropriate, the preferences of the Indian child or parent.	New section. Lists the placement preferences in adoptive placements. Establishes that the Tribe may establish a different order of preference by resolution.
23.130 What placement preferences apply in foster care or preadoptive placements?	23.131 What placement preferences apply in foster-care or preadoptive placements?	Clarifies that preferences apply to changes in placements. Adds that sibling attachment as a consideration in whether the placement approximates a family. Clarifies that the Tribe's placement preferences may apply. Deletes the provision "whether on or off the reservation" as superfluous. Clarifies that the Tribe's placement preferences established by order or	New section. Lists the placement preferences in foster- care and preadoptive placements. Establishes that the Tribe may establish a different order of preference by resolution. Requires the court to consider the preference of the Indian child or parent.

		resolution apply, so long as the placement is the least restricted setting appropriate to the particular needs of the child. Requires the court to consider the preference of the Indian child or parent.	
23.131 How is a determination for "good cause" to depart from the placement preferences made?	23.132 How is a determination for "good cause" to depart from the placement preferences made?	Clarifies that the court must ensure reasons for good cause are on the record and available to the parties. Clarifies that a determination of good cause must be justified on the record or in writing. Changes the requirement for the court to base good cause on the listed considerations to a statement that the court "should" base good cause on the listed considerations. Clarifies that the request of one or both parents may be a consideration for good cause. Adds the presence of a sibling attachment as a consideration for good cause. Adds "mental" needs of the child. Deletes the provision stating that extraordinary needs does not include ordinary bonding and attachment. Deletes requirement for qualified expert witness. Changes unavailability of placements to unavailability of "suitable" placements, and clarifies that a placement may not be considered "unavailable" if it conforms to prevailing social and cultural standards of the Indian community. Changes requirement for active efforts to find placements to a "diligent search" to find placements. Adds that the court may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a	New section. Requires the court to ensure the reasons for good cause are on the record and available to parties. Establishes that the standard for proving good cause is clear and convincing evidence. Requires the good cause determination to be in writing. Establishes considerations that the good cause determination should be based on. Prohibits court from departing from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

		non-preferred placement that was made in violation of ICWA.	
N/A	23.133 Should courts allow participation by alternative methods?	New section, incorporating provisions previously at PR §§ 23.112, 23.113, and 23.115.	New section. Establishes that courts should allow, where they possess the capability, alternative methods of participation in proceedings.
23.132 What is the procedure for petitioning to vacate an adoption?	23.136 What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?	Clarifies that this provision addresses vacating an adoption (deletes "termination of parental rights"). Deletes provision allowing an adoption decree to be vacated based on the proceeding failing to comply with ICWA.	New section. Establishes the procedure for vacating an adoption based on consent having been obtained through fraud or duress.
23.133 Who can make a petition to invalidate an action?	23.137 Who can make a petition to invalidate an action for certain ICWA violations?	Clarifies which sections of ICWA violations of may justify a petition to invalidate an action. Clarifies that an Indian child that was, in the past, the subject of an action for foster care or termination of parental rights may petition. Moves provision regarding alternative methods of participation to § 23.133.	New section. Establishes who can make a petition to invalidate an action based on a violation of certain statutory provisions.
23.134 What are the rights of adult adoptees?	23.138 What are the rights to information about adoptees' Tribal affiliations?	Narrows section to apply only to rights to information about adult adoptees' Tribal affiliations. Deletes provision regarding BIA helping adoptee obtain information because an updated version of this provision is at § 23.71. Deletes provision about closed adoptions. Deletes provision about Tribes identifying a Tribal designee to assist adult adoptees.	New section. Establishes how adult adoptees may receive information on Tribal affiliations.
23.135 When must notice of a change in child's status be given?	23.139 Must notice be given of a change in an adopted Indian child's status?	Clarifies that notice is required for Indian children who have been adopted. Deletes provision regarding change in placement.	New section. Requires notice to be given to the child's biological parents or prior Indian custodians and Tribe of certain

		Adds that the notice must include the current name and any former names of the Indian child, and must include sufficient information to allow the recipient to participate in any scheduled hearings. Adds provisions requiring the court to explain the consequences of a waiver of the right to notice and certify that the explanation was provided. Adds that a waiver need not be made in a session of court open to the public but must be before a court. Clarifies that a revocation of the right to receive notice does not affect completed proceedings.	actions affecting an Indian child that has been adopted. Establishes the required content for the notice. Establishes provisions allowing the parent or Indian custodian to waive notice.
23.136 What information must States furnish to the Bureau of Indian Affairs?	23.140 What information must State courts furnish to the Bureau of Indian Affairs?	Clarifies applicability to voluntary and involuntary adoptions. Adds time period from 23.71 to provide that State court must provide a copy of the adoptive decree or order within 30 days. Adds requirement from 23.71 that the child's birthdate must be included in the information State courts provide to BIA. Incorporates provisions from 23.71(a) regarding marking information "confidential" and regarding State agencies assuming reporting responsibilities.	Incorporates some of § 23.71(a) regarding State requirement to provide a copy of the adoptive placement decree or order to BIA within 30 days, along with certain information.
23.137 How must the State maintain records?	23.141 What records must the State maintain?	Deletes requirement for State to establish a single location to maintain records. Increases the time in which the State must make the record available to the Tribe or Secretary from 7 days to 14 days. Adds requirement for the record to include document on efforts to comply with the placement preferences and the court order authorizing departure, if the placement	New section. Requires States to maintain records of all placements made under the Act. Establishes a minimum of what each record must include.

		departs from the placement preferences. Clarifies that records may be maintained by a State court or State agency.	
23.138 How does the Paperwork Reduction Act affect this subpart?	23.139 How does the Paperwork Reduction Act affect this subpart.	Adds the OMB Control number.	New section. Addresses information collection requirements in the subpart.
NA	23.143 How does this subpart apply to pending proceedings?		New section. States that the provisions of the rule will not affect a child-custody proceeding initiated prior to 180 days after publication date of the rule.
NA	23.144 What happens if some portion of this part is held to be invalid by a court of competent jurisdiction?		New section. States that if any portion of the rule is determined to be invalid by a court, the other portions of the rule remains in effect.

VI. Procedural Requirements

A. Regulatory Planning and Review (E.O. 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is not significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. The Department has developed this rule in a manner consistent with these requirements.

B. Regulatory Flexibility Act

This rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.). The rule directly affects courts that hear Indian child welfare proceedings, and indirectly affects public child welfare agencies and private placement agencies. All of these categories of affected entities likely include entities that qualify as small entities, so the Department has estimated that rule affects approximately 7,625 small entities in these categories. Therefore, the Department has determined that this rule will have an impact on a substantial number of small entities. However, the Department has determined that the impact on entities affected by the rule will not be

significant because of the total economic impact of this rule's requirements on any given entity is likely to be limited to an order of magnitude that is minimal in comparison to the entity's annual operating budget. The Department's detailed review of the potential economic effects resulting from new regulatory requirements is available upon request.

C. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The rule does not have an annual effect on the economy of $100 million or more. The rule's requirements will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. As noted above, the rule's requirements on any given entity is a minimal order of magnitude compared to an entity's annual operating budget. In cases where that is not true, the entity (such as a private adoption agency) may choose to pass their costs on to parties seeking placement and, on an individual level, the incremental increase in costs is minimal. Nor will this rule have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of the U.S.-based enterprises to compete with foreign-based enterprises because the rule affects only placement of domestic children who qualify as an "Indian child" under the Act. The Department has reviewed the potential increase in costs resulting from new regulatory requirements, and this analysis is available upon request.

D. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. A statement containing

the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 et seq.) is not required.

E. Takings (E.O. 12630)

Under the criteria in Executive Order 12630, this rule does not affect individual property rights protected by the Fifth Amendment nor does it involve a compensable "taking." A takings implication assessment is therefore not required.

F. Federalism (E.O. 13132)

Under the criteria in Executive Order 13132, this rule does not have sufficient Federalism implications to warrant preparation of a Federalism summary impact statement. The Department carefully reviewed comments regarding potential Federalism implications and determined that this rule complies with the fundamental Federalism principles and policymaking criteria established in EO 13132. Congress determined that the issue of Indian child welfare is sufficiently national in scope and significance to justify a statute that applies uniformly across States. This rule invokes the United States' special relationship with Indian Tribes and children by establishing a regulatory baseline for implementation to further the goals of ICWA. Such goals include protecting the best interests of Indian children and promoting the stability and security of Indian Tribes and families by establishing minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes that reflect the unique values of Indian culture. States are required to comply with ICWA even in the absence of this rule, and that requirement has existed since ICWA's passage in 1978.

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

This rule complies with the requirements of Executive Order 12988. Specifically, this rule meets the criteria of section 3(a) requiring all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation and meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

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

The Department strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have identified substantial direct effects on federally recognized Indian Tribes that will result from this rule. This rule will affect Tribes by promoting implementation of a Federal statute intended to promote the stability and security of Indian Tribes and families. These regulations are the outcome of recommendations made by Tribes during several listening sessions on the ICWA guidelines. The Department hosted several formal Tribal consultation sessions on the proposed rule, including on April 20, 2015, in Portland, Oregon; April 23, 2015, in Rapid City, South Dakota; May 5, 2015, in Albuquerque, New Mexico; May 7, 2015, in Prior Lake, Minnesota; May 11, 2015, by teleconference; and May 14, 2015, in Tulsa, Oklahoma. Many federally recognized Indian Tribes submitted written comments and nearly all, if not all, uniformly supported the regulations, though some had suggestions for improvements. The Department considered each Tribe's comments and their suggested improvements and has addressed them, where possible, in the final rule.

I. Paperwork Reduction Act

This rule contains information collection requirements and a submission to OMB under the Paperwork Reduction Act (PRA) is required. The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq., prohibits a Federal agency from conducting or sponsoring a collection of information that requires OMB approval, unless such approval has been obtained and the collection request displays a currently valid OMB control number. Nor is any person required to respond to an information collection request that has not complied with the PRA. OMB has approved the information collection for this rule and has assigned a control number:

OMB Control Number: 1076-0186

Title: Indian Child Welfare Act (ICWA) Proceedings in State Court

Brief Description of Collection: This collection addresses the reporting, third-party disclosure, and recordkeeping requirements of ICWA, which requires State courts and agencies and private businesses to provide notice to or contact Tribes and parents/custodians of any child custody proceeding that may involve an "Indian child," and requires State courts and agencies to document certain actions and maintain certain records regarding the removal and placement of an "Indian child."

Type of Review: Existing collection in use without OMB control number.

Respondents: State and Tribal governments, businesses, and individuals.

Number of Respondents: 6,906 on average (each year).

Number of Responses: 98,069 on average (each year).

Frequency of Response: On occasion.

Estimated Time per Response: Ranges from 15 minutes to 12 hours.

Estimated Total Annual Hour Burden: 301,811 hours.

Estimated Total Annual Non-Hour Cost: $309,630.

Sec.	Respondent	Information Collection	Annual Number of Respondents	Frequency of Responses	Annual Number of Responses	Completion Time per Response	Total Annual Burden Hours
23.107	State court and/or agency	Obtain information on whether child is "Indian child"	50	260	13,000	12	156,000
23.108, 23.109	Tribe	Respond to State regarding Tribal membership	567	23	13,041	1	13,041
23.110	State court	Notify Tribal court of dismissal and provide records	50	5	250	0.25	63
23.11, 23.111	State court and/or agency	Notify Tribe, parents, Indian custodian of child custody proceeding	50	273	13,650	6	81,900
23.11, 23.111	Private placement agency	Notify Tribe, parents, Indian custodian of child custody proceeding	1,289	2	2,578	6	15,468
23.113	State agency or State court	Document basis for emergency removal/placement	50	260	13,000	0.5	6,500
23.116, 23.119	State court	Notify Tribal court of transfer request, and provide records	50	5	250	0.25	63
23.120	Agency	Document "active efforts"	50	167	8,350	0.5	4,175
23.125, 23.126	Parent / Indian custodian	Consent to termination or adoption (with required contents)	5,000	1	5,000	0.5	2,500
23.127, 23.128	State court	Notify placement of withdrawal of consent	50	2	100	0.25	25
23.136	State court	Notify of petition to vacate	50	5	250	0.25	63

23.138	State court	Inform adult adoptee of Tribal affiliation upon request	50	20	1,000	0.5	500
23.139	State court	Notify of change in status quo of adopted child	50	4	200	0.25	63
23.140	State court	Provide copy of final adoption decree/order	50	47	2,350	0.25	588
23.141	State court	Maintain records of each placement (including required documents)	50	167	8,350	0.5	4,175
23.141	State court or agency	Provide placement records to Tribe or Secretary upon request within 14 days	50	167	8,350	1.5	12,525
23.141	State court or State agency	Notify where records maintained	50	167	8,350	0.5	4,175
					98,069		**301,811**

The annual cost burden to respondents associated with providing notice by certified mail is $6.74 and the cost of a return receipt green card is $2.80. For each Indian child-custody proceeding, at least two notices must be sent—one to the parent and one to the Tribe, totaling $19.08. At an annual estimated 13,000 child welfare proceedings that may involve an "Indian child," where approximately 650 of these include an interstate transfer (13,650), this totals: $260,442. In addition, there are approximately 2,578 voluntary proceedings for which parties may choose to provide notice, at a cost of $49,118. Together, the total cost burden is $309,630.

Comment was taken on this information collection in the proposed rule, as part of the public notice and comment period proposed rule, in compliance with OMB regulations. One commenter, the California Health and Human Services Agency, Department of Social Services

(CHHS) submitted comments specifically in response to the request for comments on the information collection burden.

- *Comment on Proposed § 23.111:* The proposed rule states that notice must be by registered mail, whereas the current 23.11(a) allows for notice by certified mail. To require registered mail will increase costs that undermine noticing under ICWA. *Response:* The statute specifies "registered mail with return receipt requested." 25 U.S.C. 1912(a). In response to these comments, the Department examined whether certified mail with return receipt requested is allowable under the statute, and determined that it is because certified mail with return receipt requested better meets the goals of prompt, documented notice. The final rule allows for certified mail.
- *Comment on Proposed § 23.104, providing information on how to contact a Tribe:* The rule should clarify BIA's obligation in gathering the information for the list of Tribe's designated agents and contact information because the current list is outdated, inefficient, and inconsistently maintained. The list is hampered by publication in the Federal Register and BIA should be required to publish updates on the Web. The list also no longer maintains the historical affiliations, which was helpful. *Response:* BIA is now publishing the list using historical affiliations, as requested, and making the list available on its website, where it can be updated more frequently. The rule does not address this because these are procedures internal to the BIA.
- *Comment on Proposed § 23.111(i), requiring notice by both States where child is transferred interstate:* Requiring both the originating State court and receiving State court to provide notice is duplicative and burdensome because notice should only be required in the State where the actual court proceeding is pending. Another commenter

stated that the provision appears to apply to transfers between Tribes and States, where notice is unnecessary. *Response:* The final rule deletes this provision.

- *Comment on Proposed § 23.134, requiring BIA to disclose information to adult adoptees:* This section appears to be creating duplicative work of the BIA and States, because both sections require each to provide adult adoptees information for Tribal enrollment. *Response:* The Act imposes this responsibility on both BIA and the State. Section 1951(b) of the Act imposes the responsibility on BIA, which is in § 23.71(b) of the final rule. Section 1917 of the Act imposes the responsibility on States, which is addressed at § 23.134 of the final rule.
- *Comment on Proposed § 23.137, requiring the State to establish a single location for placement records:* This requirement would be an unfunded mandate with undue burden and would require relocating 1,145 files to a different location and require changes to existing recordkeeping systems. Another State agency commented that there is a significant fiscal and annual burden due to the staffing, costs for copying, packaging and transferring physical files to a different location. *Response:* The final rule deletes the provision requiring States to establish a single, central repository. The associated information collection request has also been deleted.
- *Comment on Proposed § 23.137, requiring providing records to the Department or Tribe upon request:* The 15-minute burden estimate allocated to this task is too low. The time to copy, package and mail the documents will be no less than one hour, but more realistically two hours. *Response:* The final rule updates the burden estimates to reflect 1.5 hours.

If you have comments on this information collection, please submit them to Elizabeth K. Appel, Office of Regulatory Affairs & Collaborative Action – Indian Affairs, U.S. Department of the Interior, 1849 C Street, NW, MS-3071, Washington, DC 20240, or by email to elizabeth.appel@bia.gov.

J. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment because it is of an administrative, technical, and procedural nature. *See*, 43 CFR 46.210(i). No extraordinary circumstances exist that would require greater review under the National Environmental Policy Act.

K. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

List of Subjects in 25 CFR Part 23

Administrative practice and procedure, Child welfare, Indians, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, amends part 23 in Title 25 of the Code of Federal Regulations as follows:

PART 23 – INDIAN CHILD WELFARE ACT

1. The authority citation for part 23 continues to read as follows:

5 U.S.C. 301; 25 U.S.C. 2, 9, 1901-1952.

2. In § 23.2:

a. Add a definition for “active efforts” in alphabetical order;

b. Revise the definition of “child-custody proceeding”;

c. Add definitions for “continued custody”, “custody”, and “domicile” in alphabetical order;

d. Add a definition for “emergency proceeding” in alphabetical order;

e. Revise the definition of “extended family member”;

f. Add a definition for “hearing” in alphabetical order;

g. Revise the definitions of “Indian child”, “Indian child’s Tribe”, and “Indian custodian”;

h. Add a definition for “Indian foster home” in alphabetical order;

i. Add a definition of “involuntary proceeding” in alphabetical order;

j. Revise the definition of “parent”;

k. Revise the definitions of “reservation” and “Secretary”;

l. Add a definition for “status offenses” in alphabetical order;

m. Revise the definition of “Tribal court”; and

n. Add definitions for “upon demand”, and “voluntary proceeding” in alphabetical order.

The additions and revisions read as follows:

§ 23.2 Definitions.

*****

Active efforts means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life

of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

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

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

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

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

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

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

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

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

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

(9) Monitoring progress and participation in services;

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

(11) Providing post-reunification services and monitoring.

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Child-custody proceeding. (1) "Child-custody proceeding" means and includes any action, other than an emergency proceeding, that may culminate in one of the following outcomes:

(i) *Foster-care placement,* which is any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

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

(iii) *Preadoptive placement,* which is the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; or

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

(2) An action that may culminate in one of these four outcomes is considered a separate

child-custody proceeding from an action that may culminate in a different one of these four outcomes. There may be several child-custody proceedings involving any given Indian child. Within each child-custody proceeding, there may be several hearings. If a child is placed in foster care or another out-of-home placement as a result of a status offense, that status offense proceeding is a child-custody proceeding.

*****

Continued custody means physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law, that a parent or Indian custodian already has or had at any point in the past. The biological mother of a child has had custody of a child.

Custody means physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law. A party may demonstrate the existence of custody by looking to Tribal law or Tribal custom or State law.

Domicile means:

(1) For a parent or Indian custodian, the place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere.

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

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

Extended family member is defined by the law or custom of the Indian child's Tribe or, in the absence of such law or custom, is a person who has reached age 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

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

*****

Indian child means any unmarried person who is under age 18 and either:

(1) Is a member or citizen of an Indian Tribe; or

(2) Is eligible for membership or citizenship in an Indian Tribe and is the biological child of a member/citizen of an Indian Tribe.

Indian child's Tribe means:

(1) The Indian Tribe in which an Indian child is a member or eligible for membership; or

(2) In the case of an Indian child who is a member of or eligible for membership in more than one Tribe, the Indian Tribe described in § 23.109.

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

Indian foster home means a foster home where one or more of the licensed or approved foster parents is an "Indian" as defined in 25 U.S.C. 1903(3).

Involuntary proceeding means a child-custody proceeding in which the parent does not consent of his or her free will to the foster-care, preadoptive, or adoptive placement or termination of parental rights or in which the parent consents to the foster-care, preadoptive, or adoptive placement under threat of removal of the child by a State court or agency.

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Parent or *parents* means any biological parent or parents of an Indian child, or any Indian who has lawfully adopted an Indian child, including adoptions under Tribal law or custom. It does not include an unwed biological father where paternity has not been acknowledged or established.

Reservation means Indian country as defined in 18 U.S.C 1151 and any lands, not covered under that section, title to which is held by the United States in trust for the benefit of any Indian Tribe or individual or held by any Indian Tribe or individual subject to a restriction by the United States against alienation.

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

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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).

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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.

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

*****

Voluntary proceeding means a child-custody proceeding that is not an involuntary proceeding, such as a proceeding for foster-care, preadoptive, or adoptive placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, consented to for the Indian child, or a proceeding for voluntary termination of parental rights.

3. Revise § 23.11 to read as follows:

§ 23.11 Notice.

(a) In any involuntary proceeding in a State court where the court knows or has reason to know that an Indian child is involved, and where the identity and location of the child's parent or Indian custodian or Tribe is known, the party seeking the foster-care placement of, or termination of parental rights to, an Indian child must directly notify the parents, the Indian custodians, and the child's Tribe by registered or certified mail with return receipt requested, of the pending child-custody proceedings and their right of intervention. Notice must include the requisite information identified in § 23.111, consistent with the confidentiality requirement in § 23.111(d)(6)(ix). Copies of these notices must be sent to the appropriate Regional Director listed in paragraphs (b)(1) through (12) of this section by registered or certified mail with return receipt

requested or by personal delivery and must include the information required by § 23.111.

(b)(1) For child-custody proceedings in Alabama, Connecticut, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, or any territory or possession of the United States, notices must be sent to the following address: Eastern Regional Director, Bureau of Indian Affairs, 545 Marriott Drive, Suite 700, Nashville, Tennessee 37214.

(2) For child-custody proceedings in Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio, or Wisconsin, notices must be sent to the following address: Minneapolis Regional Director, Bureau of Indian Affairs, 331 Second Avenue South, Minneapolis, Minnesota 55401-2241.

(3) For child-custody proceedings in Nebraska, North Dakota, or South Dakota, notices must be sent to the following address: Aberdeen Regional Director, Bureau of Indian Affairs, 115 Fourth Avenue, SE, Aberdeen, South Dakota 57401.

(4) For child-custody proceedings in Kansas, Texas (except for notices to the Ysleta del Sur Pueblo of El Paso County, Texas), or the western Oklahoma counties of Alfalfa, Beaver, Beckman, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Cotton, Custer, Dewey, Ellis, Garfield, Grant, Greer, Harmon, Harper, Jackson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Major, Noble, Oklahoma, Pawnee, Payne, Pottawatomie, Roger Mills, Texas, Tillman, Washita, Woods or Woodward, notices must be sent to the following address: Anadarko Regional Director, Bureau of Indian Affairs, P.O. Box 368, Anadarko, Oklahoma 73005. Notices to the Ysleta del Sur Pueblo must be sent to the Albuquerque Regional Director at the address listed in paragraph (b)(6) of this section.

(5) For child-custody proceedings in Wyoming or Montana (except for notices to the

Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana), notices must be sent to the following address: Billings Regional Director, Bureau of Indian Affairs, 316 N. 26th Street, Billings, Montana 59101. Notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, must be sent to the Portland Regional Director at the address listed in paragraph (b)(11) of this section.

(6) For child-custody proceedings in the Texas counties of El Paso and Hudspeth or in Colorado or New Mexico (exclusive of notices to the Navajo Nation from the New Mexico counties listed in paragraph (b)(9) of this section), notices must be sent to the following address: Albuquerque Regional Director, Bureau of Indian Affairs, 615 First Street, P.O. Box 26567, Albuquerque, New Mexico 87125. Notices to the Navajo Nation must be sent to the Navajo Regional Director at the address listed in paragraph (b)(9) of this section.

(7) For child-custody proceedings in Alaska (except for notices to the Metlakatla Indian Community, Annette Island Reserve, Alaska), notices must be sent to the following address: Juneau Regional Director, Bureau of Indian Affairs, 709 West 9th Street, Juneau, Alaska 99802-1219. Notices to the Metlakatla Indian Community, Annette Island Reserve, Alaska, must be sent to the Portland Regional Director at the address listed in paragraph (b)(11) of this section.

(8) For child-custody proceedings in Arkansas, Missouri, or the eastern Oklahoma counties of Adair, Atoka, Bryan, Carter, Cherokee, Craig, Creek, Choctaw, Coal, Delaware, Garvin, Grady, Haskell, Hughes, Jefferson, Johnson, Latimer, LeFlore, Love, Mayes, McCurtain, McClain, McIntosh, Murray, Muskogee, Nowata, Okfuskee, Okmulgee, Osage, Ottawa, Pittsburg, Pontotoc, Pushmataha, Marshall, Rogers, Seminole, Sequoyah, Stephens, Tulsa, Wagoner, or Washington, notices must be sent to the following address: Muskogee Regional Director, Bureau of Indian Affairs, 101 North Fifth Street, Muskogee, Oklahoma 74401.

(9) For child-custody proceedings in the Arizona counties of Apache, Coconino (except for notices to the Hopi Tribe of Arizona and the San Juan Southern Paiute Tribe of Arizona) or Navajo (except for notices to the Hopi Tribe of Arizona); the New Mexico counties of McKinley (except for notices to the Zuni Tribe of the Zuni Reservation), San Juan, or Socorro; or the Utah county of San Juan, notices must be sent to the following address: Navajo Regional Director, Bureau of Indian Affairs, P.O. Box 1060, Gallup, New Mexico 87301. Notices to the Hopi and San Juan Southern Paiute Tribes of Arizona must be sent to the Phoenix Regional Director at the address listed in paragraph (b)(10) of this section. Notices to the Zuni Tribe of the Zuni Reservation must be sent to the Albuquerque Regional Director at the address listed in paragraph (b)(6 of this section).

(10) For child-custody proceedings in Arizona (exclusive of notices to the Navajo Nation from those counties listed in paragraph (b)(9) of this section), Nevada, or Utah (exclusive of San Juan County), notices must be sent to the following address: Phoenix Regional Director, Bureau of Indian Affairs, 1 North First Street, P.O. Box 10, Phoenix, Arizona 85001.

(11) For child-custody proceedings in Idaho, Oregon, or Washington, notices must be sent to the following address: Portland Regional Director, Bureau of Indian Affairs, 911 NE 11th Avenue, Portland, Oregon 97232. All notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, located in the Montana counties of Flathead, Lake, Missoula, and Sanders, must also be sent to the Portland Regional Director.

(12) For child-custody proceedings in California or Hawaii, notices must be sent to the following address: Sacramento Regional Director, Bureau of Indian Affairs, Federal Office Building, 2800 Cottage Way, Sacramento, California 95825.

(c) Upon receipt of the notice, the Secretary will make reasonable documented efforts to

locate and notify the child's Tribe and the child's parent or Indian custodian. The Secretary will have 15 days, after receipt of the notice, to notify the child's Tribe and parents or Indian custodians and to send a copy of the notice to the court. If within the 15-day period the Secretary is unable to verify that the child meets the criteria of an Indian child as defined in § 23.2, or is unable to locate the parents or Indian custodians, the Secretary will so inform the court and state how much more time, if any, will be needed to complete the verification or the search. The Secretary will complete all research efforts, even if those efforts cannot be completed before the child-custody proceeding begins.

(d) Upon request from a party to an Indian child-custody proceeding, the Secretary will make a reasonable attempt to identify and locate the child's Tribe, parents, or Indian custodians to assist the party seeking the information.

4. Revise § 23.71 to read as follows:

§ 23.71 Recordkeeping and information availability.

(a) The Division of Human Services, Bureau of Indian Affairs (BIA), is authorized to receive all information and to maintain a central file on all State Indian adoptions. This file is confidential and only designated persons may have access to it.

(b) Upon the request of an adopted Indian who has reached age 18, the adoptive or foster parents of an Indian child, or an Indian Tribe, BIA will disclose such information as may be necessary for purposes of Tribal enrollment or determining any rights or benefits associated with Tribal membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, BIA must certify to the Indian child's Tribe, where the information warrants, that the child's parentage and other circumstances entitle the

child to enrollment under the criteria established by such Tribe.

(c) BIA will ensure that the confidentiality of this information is maintained and that the information is not subject to the Freedom of Information Act, 5 U.S.C. 552, as amended.

5. Add subpart I to read as follows:

Subpart I –Indian Child Welfare Act Proceedings

General Provisions

Pretrial Requirements

Petitions to Transfer to Tribal Court

Adjudication of Involuntary Proceedings

Voluntary Proceedings

Dispositions

Access

Post-Trial Rights & Responsibilities

Recordkeeping

Effective Date

Severability

23.144 What happens if some portion of this part is held to be invalid by a court of competent jurisdiction?

Subpart I –Indian Child Welfare Act Proceedings

General Provisions

§ 23.101 What is the purpose of this subpart?

The regulations in this subpart clarify the minimum Federal standards governing implementation of the Indian Child Welfare Act (ICWA) to ensure that ICWA is applied in all States consistent with the Act's express language, Congress's intent in enacting the statute, and to promote the stability and security of Indian tribes and families.

§ 23.102 What terms do I need to know?

The following terms and their definitions apply to this subpart. All other terms have the meanings assigned in § 23.2.

Agency means a nonprofit, for-profit, or governmental organization and its employees, agents, or officials that performs, or provides services to biological parents, foster parents, or adoptive parents to assist in the administrative and social work necessary for foster, preadoptive, or adoptive placements.

Indian organization means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians or a Tribe, or a majority of whose members are Indians.

§ 23.103 When does ICWA apply?

(a) ICWA includes requirements that apply whenever an Indian child is the subject of:

(1) A child-custody proceeding, including:

(i) An involuntary proceeding;

(ii) A voluntary proceeding that could prohibit the parent or Indian custodian from regaining custody of the child upon demand; and

(iii) A proceeding involving status offenses if any part of the proceeding results in the need for out-of-home placement of the child, including a foster-care, preadoptive, or adoptive placement, or termination of parental rights.

(2) An emergency proceeding.

(b) ICWA does not apply to:

(1) A Tribal court proceeding;

(2) A proceeding regarding a criminal act that is not a status offense;

(3) An award of custody of the Indian child to one of the parents including, but not limited to, an award in a divorce proceeding; or

(4) A voluntary placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, chosen for the Indian child and that does not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand.

(c) If a proceeding listed in paragraph (a) of this section concerns a child who meets the statutory definition of "Indian child," then ICWA will apply to that proceeding. In determining whether ICWA applies to a proceeding, the State court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum.

(d) If ICWA applies at the commencement of a proceeding, it will not cease to apply simply because the child reaches age 18 during the pendency of the proceeding.

§ 23.104 What provisions of this subpart apply to each type of child-custody proceeding?

The following table lists what sections of this subpart apply to each type of child-custody proceeding identified in § 23.103(a):

Section	Type of Proceeding
23.101 - 23.106 (General Provisions)	Emergency, Involuntary, Voluntary
Pretrial Requirements	---
23.107 (How should a State court determine if there is reason to know the child is an Indian child?)	Emergency, Involuntary, Voluntary
23.108 (Who makes the determination as to whether a child is a member whether a child is eligible for membership, or whether a biological parent is a member of a Tribe?)	Emergency, Involuntary, Voluntary
23.109 (How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?)	Emergency, Involuntary, Voluntary
23.110 (When must a State court dismiss an action?)	Involuntary, Voluntary
23.111 (What are the notice requirements for a child-custody proceeding involving an Indian child?)	Involuntary (foster-care placement and termination of parental rights)
23.112 (What time limits and extensions apply?)	Involuntary (foster-care placement and termination of parental rights)
23.113 (What are the standards for emergency proceedings involving an Indian child?)	Emergency
23.114 (What are the requirements for determining improper removal?)	Involuntary
Petitions to Transfer to Tribal Court	---
23.115 (How are petitions for transfer of a proceeding made?)	Involuntary, Voluntary (foster-care placement and termination of parental rights)
23.116 (What happens after a petition for transfer is made?)	Involuntary, Voluntary (foster-care placement and termination of parental rights)
23.117 (What are the criteria for ruling on transfer petitions?)	Involuntary, Voluntary (foster-care placement and termination of parental rights)
23.118 (How is a determination of "good cause" to deny transfer made?)	Involuntary, Voluntary (foster-care placement and termination of parental rights)
23.119 (What happens after a petition for transfer is granted?)	Involuntary, Voluntary (foster-care placement and termination of parental rights)
Adjudication of Involuntary Proceedings	---
23.120 (How does the State court ensure that active efforts have been made?)	Involuntary (foster-care placement and termination of parental rights)
23.121 (What are the applicable standards of evidence?)	Involuntary (foster-care placement and termination of parental rights)
23.122 (Who may serve as a qualified expert witness?)	Involuntary (foster-care placement

	and termination of parental rights)
23.123 Reserved.	N/A
Voluntary Proceedings	---
23.124 (What actions must a State court undertake in voluntary proceedings?)	Voluntary
23.125 (How is consent obtained?)	Voluntary
23.126 (What information must a consent document contain?)	Voluntary
23.127 (How is withdrawal of consent to a foster-care placement achieved?)	Voluntary
23.128 (How is withdrawal of consent to a termination of parental rights or adoption achieved?)	Voluntary
Dispositions	---
23.129 (When do the placement preferences apply?)	Involuntary, Voluntary
23.130 (What placement preferences apply in adoptive placements?)	Involuntary, Voluntary
23.131 (What placement preferences apply in foster-care or preadoptive placements?)	Involuntary, Voluntary
23.132 (How is a determination of "good cause" to depart from the placement preferences made?)	Involuntary, Voluntary
Access	---
23.133 (Should courts allow participation by alternative methods?)	Emergency, Involuntary
23.134 (Who has access to reports and records during a proceeding?)	Emergency, Involuntary
23.135 Reserved.	N/A
Post-Trial Rights & Responsibilities	---
23.136 (What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?)	Involuntary (if consent given under threat of removal), voluntary
23.137 (Who can petition to invalidate an action for certain ICWA violations?)	Emergency (to extent it involved a specified violation), involuntary, voluntary
23.138 (What are the rights to information about adoptees' Tribal affiliations?)	Emergency, Involuntary, Voluntary
23.139 (Must notice be given of a change in an adopted Indian child's status?)	Involuntary, Voluntary
Recordkeeping	
23.140 (What information must States furnish to the Bureau of Indian Affairs?)	Involuntary, Voluntary
23.141 (What records must the State maintain?)	Involuntary, Voluntary
23.142 (How does the Paperwork Reduction Act affect this subpart?)	Emergency, Involuntary, Voluntary
Effective Date	---
23.143 (How does this subpart apply to pending proceedings?)	Emergency, Involuntary, Voluntary
Severability	---
23.144 (What happens if some portion of part is held to be invalid by a court of competent jurisdiction?)	Emergency, Involuntary, Voluntary

Note: For purposes of this table, status-offense child-custody proceedings are included as a type of involuntary proceeding.

§ 23.105 How do I contact a Tribe under the regulations in this subpart?

To contact a Tribe to provide notice or obtain information or verification under the regulations in this subpart, you should direct the notice or inquiry as follows:

(a) Many Tribes designate an agent for receipt of ICWA notices. The BIA publishes a list of Tribes' designated Tribal agents for service of ICWA notice in the Federal Register each year and makes the list available on its 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).

§ 23.106 How does this subpart interact with State and Federal laws?

(a) The regulations in this subpart provide minimum Federal standards to ensure compliance with ICWA.

(b) Under section 1921 of ICWA, where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires the State or Federal court to apply the higher State or Federal standard.

Pretrial Requirements

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

(a) State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record. State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.

(b) If there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an "Indian child," the court must:

(1) Confirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership); and

(2) Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an "Indian child" in this part.

(c) A court, upon conducting the inquiry required in paragraph (a) of this section, has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if:

(1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;

(2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;

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

(4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;

(5) The court is informed that the child is or has been a ward of a Tribal court; or

(6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.

(d) In seeking verification of the child's status in a voluntary proceeding where a consenting parent evidences, by written request or statement in the record, a desire for anonymity, the court must keep relevant documents pertaining to the inquiry required under this section confidential and under seal. A request for anonymity does not relieve the court, agency, or other party from any duty of compliance with ICWA, including the obligation to verify whether the child is an "Indian child." A Tribe receiving information related to this inquiry must keep documents and information confidential.

§ 23.108 Who makes the determination as to whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member of a Tribe?

(a) The Indian Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) determines whether the child is a member of the Tribe, or whether the child is eligible for membership in the Tribe and a biological parent of the child is a member of the Tribe, except as otherwise provided by Federal or Tribal law.

(b) The determination by a Tribe of whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member, is solely within the jurisdiction and authority of the Tribe, except as otherwise provided by Federal or Tribal law. The State court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe.

(c) The State court may rely on facts or documentation indicating a Tribal determination of membership or eligibility for membership in making a judicial determination as to whether the child is an "Indian child." An example of documentation indicating membership is a document issued by the Tribe, such as Tribal enrollment documentation.

§ 23.109 How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?

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

(b) If the Indian child meets the definition of "Indian child" through more than one Tribe, deference should be given to the Tribe in which the Indian child is already a member, unless otherwise agreed to by the Tribes.

(c) If an Indian child meets the definition of "Indian child" through more than one Tribe because the child is a member in more than one Tribe or the child is not a member of but is eligible for membership in more than one Tribe, the court must provide the opportunity in any involuntary child-custody proceeding for the Tribes to determine which should be designated as the Indian child's Tribe.

(1) If the Tribes are able to reach an agreement, the agreed-upon Tribe should be designated as the Indian child's Tribe.

(2) If the Tribes are unable to reach an agreement, the State court designates, for the purposes of ICWA, the Indian Tribe with which the Indian child has the more significant contacts as the Indian child's Tribe, taking into consideration:

(i) Preference of the parents for membership of the child;

(ii) Length of past domicile or residence on or near the reservation of each Tribe;

(iii) Tribal membership of the child's custodial parent or Indian custodian; and

(iv) Interest asserted by each Tribe in the child-custody proceeding;

(v) Whether there has been a previous adjudication with respect to the child by a court of one of the Tribes; and

(vi) Self-identification by the child, if the child is of sufficient age and capacity to meaningfully self-identify.

(3) A determination of the Indian child's Tribe for purposes of ICWA and the regulations in this subpart do not constitute a determination for any other purpose.

§ 23.110 When must a State court dismiss an action?

Subject to 25 U.S.C. 1919 (Agreements between States and Indian Tribes) and § 23.113 (emergency proceedings), the following limitations on a State court's jurisdiction apply:

(a) The court in any voluntary or involuntary child-custody proceeding involving an Indian child must determine the residence and domicile of the Indian child. If either the residence or domicile is on a reservation where the Tribe exercises exclusive jurisdiction over child-custody proceedings, the State court must expeditiously notify the Tribal court of the pending dismissal based on the Tribe's exclusive jurisdiction, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.

(b) If the child is a ward of a Tribal court, the State court must expeditiously notify the Tribal court of the pending dismissal, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.

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

(a) When a court knows or has reason to know that the subject of an involuntary foster-care-placement or termination-of-parental-rights proceeding is an Indian child, the court must ensure that:

(1) The party seeking placement promptly sends notice of each such child-custody proceeding (including, but not limited to, any foster-care placement or any termination of parental or custodial rights) in accordance with this section; and

(2) An original or a copy of each notice sent under this section is filed with the court together with any return receipts or other proof of service.

(b) Notice must be sent to:

(1) Each Tribe where the child may be a member (or eligible for membership if a biological parent is a member) (*see* § 23.105 for information on how to contact a Tribe);

(2) The child's parents; and

(3) If applicable, the child's Indian custodian.

(c) Notice must be sent by registered or certified mail with return receipt requested. Notice may also be sent via personal service or electronically, but such alternative methods do not replace the requirement for notice to be sent by registered or certified mail with return receipt requested.

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

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

(2) All names known (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and Tribal enrollment numbers if known;

(3) If known, the names, birthdates, birthplaces, and Tribal enrollment information of other direct lineal ancestors of the child, such as grandparents;

(4) The name of each Indian Tribe in which the child is a member (or may be eligible for membership if a biological parent is a member);

(5) A copy of the petition, complaint, or other document by which the child-custody proceeding was initiated and, if a hearing has been scheduled, information on the date, time, and location of the hearing;

(6) Statements setting out:

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

(ii) The right of any parent or Indian custodian of the child, if not already a party to the child-custody proceeding, to intervene in the proceedings.

(iii) The Indian Tribe's right to intervene at any time in a State-court proceeding for the foster-care placement of or termination of parental rights to an Indian child.

(iv) That, if the child's parent or Indian custodian is unable to afford counsel based on a determination of indigency by the court, the parent or Indian custodian has the right to court-appointed counsel.

(v) The right to be granted, upon request, up to 20 additional days to prepare for the child-custody proceedings.

(vi) The right of the parent or Indian custodian and the Indian child's Tribe to petition the court for transfer of the foster-care-placement or termination-of-parental-rights proceeding to Tribal court as provided by 25 U.S.C. 1911 and § 23.115.

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

(viii) The potential legal consequences of the child-custody proceedings on the future parental and custodial rights of the parent or Indian custodian.

(ix) That all parties notified must keep confidential the information contained in the notice and the notice should not be handled by anyone not needing the information to exercise rights under ICWA.

(e) If the identity or location of the child's parents, the child's Indian custodian, or the Tribes in which the Indian child is a member or eligible for membership cannot be ascertained, but there is reason to know the child is an Indian child, notice of the child-custody proceeding must be sent to the appropriate Bureau of Indian Affairs Regional Director (see www.bia.gov). To establish Tribal identity, as much information as is known regarding the child's direct lineal ancestors should be provided. The Bureau of Indian Affairs will not make a determination of Tribal membership but may, in some instances, be able to identify Tribes to contact.

(f) If there is a reason to know that a parent or Indian custodian possesses limited English proficiency and is therefore not likely to understand the contents of the notice, the court must provide language access services as required by Title VI of the Civil Rights Act and other Federal laws. To secure such translation or interpretation support, a court may contact or direct a party to contact the Indian child's Tribe or the local BIA office for assistance in locating and obtaining the name of a qualified translator or interpreter.

(g) If a parent or Indian custodian of an Indian child appears in court without an attorney, the court must inform him or her of his or her rights, including any applicable right to appointed counsel, right to request that the child-custody proceeding be transferred to Tribal court, right to object to such transfer, right to request additional time to prepare for the child-custody proceeding as provided in § 23.112, and right (if the parent or Indian custodian is not already a party) to intervene in the child-custody proceedings.

§ 23.112 What time limits and extensions apply?

(a) No foster-care-placement or termination-of-parental-rights proceeding may be held until at least 10 days after receipt of the notice by the parent (or Indian custodian) and by the Tribe (or the Secretary). The parent, Indian custodian, and Tribe each have a right, upon request, to be granted up to 20 additional days from the date upon which notice was received to prepare for participation in the proceeding.

(b) Except as provided in 25 U.S.C. 1922 and § 23.113, no child-custody proceeding for foster-care placement or termination of parental rights may be held until the waiting periods to which the parents or Indian custodians and to which the Indian child's Tribe are entitled have expired, as follows:

(1) 10 days after each parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111;

(2) 10 days after the Indian child's Tribe (or the Secretary if the Indian child's Tribe is unknown to the party seeking placement) has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111;

(3) Up to 30 days after the parent or Indian custodian has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111, if the parent or Indian custodian has requested up to 20 additional days to prepare for the child-custody proceeding as provided in 25 U.S.C. 1912(a) and § 23.111; and

(4) Up to 30 days after the Indian child's Tribe has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111, if the Indian child's Tribe has requested up to 20 additional days to prepare for the child-custody proceeding.

(c) Additional time beyond the minimum required by 25 U.S.C. 1912 and § 23.111 may also be available under State law or pursuant to extensions granted by the court.

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

(a) Any emergency removal or placement of an Indian child under State law must terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(b) The State court must:

(1) Make a finding on the record that the emergency removal or placement is necessary to prevent imminent physical damage or harm to the child;

(2) Promptly hold a hearing on whether the emergency removal or placement continues to be necessary whenever new information indicates that the emergency situation has ended; and

(3) At any court hearing during the emergency proceeding, determine whether the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(4) Immediately terminate (or ensure that the agency immediately terminates) the emergency proceeding once the court or agency possesses sufficient evidence to determine that

the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(c) An emergency proceeding can be terminated by one or more of the following actions:

(1) Initiation of a child-custody proceeding subject to the provisions of ICWA;

(2) Transfer of the child to the jurisdiction of the appropriate Indian Tribe; or

(3) Restoring the child to the parent or Indian custodian.

(d) A petition for a court order authorizing the emergency removal or continued emergency placement, or its accompanying documents, should contain a statement of the risk of imminent physical damage or harm to the Indian child and any evidence that the emergency removal or placement continues to be necessary to prevent such imminent physical damage or harm to the child. The petition or its accompanying documents should also contain the following information:

(1) The name, age, and last known address of the Indian child;

(2) The name and address of the child's parents and Indian custodians, if any;

(3) The steps taken to provide notice to the child's parents, custodians, and Tribe about the emergency proceeding;

(4) If the child's parents and Indian custodians are unknown, a detailed explanation of what efforts have been made to locate and contact them, including contact with the appropriate BIA Regional Director (see www.bia.gov);

(5) The residence and the domicile of the Indian child;

(6) If either the residence or the domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the Tribe affiliated with that reservation or village;

(7) The Tribal affiliation of the child and of the parents or Indian custodians;

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

(9) If the child is believed to reside or be domiciled on a reservation where the Tribe exercises exclusive jurisdiction over child-custody matters, a statement of efforts that have been made and are being made to contact the Tribe and transfer the child to the Tribe's jurisdiction; and

(10) A statement of the efforts that have been taken to assist the parents or Indian custodians so the Indian child may safely be returned to their custody.

(e) An emergency proceeding regarding an Indian child should not be continued for more than 30 days unless the court makes the following determinations:

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

(2) The court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian Tribe; and

(3) It has not been possible to initiate a "child-custody proceeding" as defined in § 23.2.

§ 23.114 What are the requirements for determining improper removal?

(a) If, in the course of any child-custody proceeding, any party asserts or the court has reason to believe that the Indian child may have been improperly removed from the custody of his or her parent or Indian custodian, or that the Indian child has been improperly retained (such as after a visit or other temporary relinquishment of custody), the court must expeditiously determine whether there was improper removal or retention.

(b) If the court finds that the Indian child was improperly removed or retained, the court must terminate the proceeding and the child must be returned immediately to his or her parent or Indian custodian, unless returning the child to his parent or Indian custodian would subject the child to substantial and immediate danger or threat of such danger.

Petitions to Transfer to Tribal Court

§ 23.115 How are petitions for transfer of a proceeding made?

(a) Either parent, the Indian custodian, or the Indian child's Tribe may request, at any time, orally on the record or in writing, that the State court transfer a foster-care or termination-of-parental-rights proceeding to the jurisdiction of the child's Tribe.

(b) The right to request a transfer is available at any stage in each foster-care or termination-of-parental-rights proceeding.

§ 23.116 What happens after a petition for transfer is made?

Upon receipt of a transfer petition, the State court must ensure that the Tribal court is promptly notified in writing of the transfer petition. This notification may request a timely response regarding whether the Tribal court wishes to decline the transfer.

§ 23.117 What are the criteria for ruling on transfer petitions?

Upon receipt of a transfer petition from an Indian child's parent, Indian custodian, or Tribe, the State court must transfer the child-custody proceeding unless the court determines that transfer is not appropriate because one or more of the following criteria are met:

(a) Either parent objects to such transfer;

(b) The Tribal court declines the transfer; or

(c) Good cause exists for denying the transfer.

§ 23.118 How is a determination of "good cause" to deny transfer made?

(a) If the State court believes, or any party asserts, that good cause to deny transfer exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing on the record and to the parties to the child-custody proceeding.

(b) Any party to the child-custody proceeding must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists.

(c) In determining whether good cause exists, the court must not consider:

(1) Whether the foster-care or termination-of-parental-rights proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage;

(2) Whether there have been prior proceedings involving the child for which no petition to transfer was filed;

(3) Whether transfer could affect the placement of the child;

(4) The Indian child's cultural connections with the Tribe or its reservation; or

(5) Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems.

(d) The basis for any State-court decision to deny transfer should be stated orally on the record or in a written order.

§ 23.119 What happens after a petition for transfer is granted?

(a) If the Tribal court accepts the transfer, the State court should expeditiously provide the Tribal court with all records related to the proceeding, including, but not limited to, the pleadings and any court record.

(b) The State court should work with the Tribal court to ensure that the transfer of the custody of the Indian child and of the proceeding is accomplished smoothly and in a way that minimizes the disruption of services to the family.

Adjudication of Involuntary Proceedings

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

(a) Prior to ordering an involuntary foster-care placement or termination of parental rights, the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful.

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

§ 23.121 What are the applicable standards of evidence?

(a) The court must not order a foster-care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(b) The court must not order a termination of parental rights for an Indian child unless evidence beyond a reasonable doubt is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(c) For a foster-care placement or termination of parental rights, the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding.

(d) Without a causal relationship identified in paragraph (c) of this section, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.

§ 23.122 Who may serve as a qualified expert witness?

(a) A qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. A person may be designated by the Indian child's Tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.

(b) The court or any party may request the assistance of the Indian child's Tribe or the BIA office serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses.

(c) The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child-custody proceedings concerning the child.

§ 23.123 [Reserved]

Voluntary Proceedings

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

(a) The State court must require the participants in a voluntary proceeding to state on the record whether the child is an Indian child, or whether there is reason to believe the child is an Indian child, as provided in § 23.107.

(b) If there is reason to believe the child is an Indian child, the State court must ensure that the party seeking placement has taken all reasonable steps to verify the child's status. This may include contacting the Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) to verify the child's status. As described in § 23.107, where a consenting parent requests anonymity, a Tribe receiving such information must keep relevant documents and information confidential.

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

§ 23.125 How is consent obtained?

(a) A parent's or Indian custodian's consent to a voluntary termination of parental rights or to a foster-care, preadoptive, or adoptive placement must be executed in writing and recorded before a court of competent jurisdiction.

(b) Prior to accepting the consent, the court must explain to the parent or Indian custodian:

(1) The terms and consequences of the consent in detail; and

(2) The following limitations, applicable to the type of child-custody proceeding for which consent is given, on withdrawal of consent:

(i) For consent to foster-care placement, the parent or Indian custodian may withdraw consent for any reason, at any time, and have the child returned; or

(ii) For consent to termination of parental rights, the parent or Indian custodian may withdraw consent for any reason, at any time prior to the entry of the final decree of termination and have the child returned; or

(iii) For consent to an adoptive placement, the parent or Indian custodian may withdraw consent for any reason, at any time prior to the entry of the final decree of adoption, and have the child returned.

(c) The court must certify that the terms and consequences of the consent were explained on the record in detail in English (or the language of the parent or Indian custodian, if English is not the primary language) and were fully understood by the parent or Indian custodian.

(d) Where confidentiality is requested or indicated, execution of consent need not be made in a session of court open to the public but still must be made before a court of competent jurisdiction in compliance with this section.

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

§ 23.126 What information must a consent document contain?

(a) If there are any conditions to the consent, the written consent must clearly set out the conditions.

(b) A written consent to foster-care placement should contain, in addition to the information specified in paragraph (a) of this section, the name and birthdate of the Indian child; the name of the Indian child's Tribe; the Tribal enrollment number for the parent and for the Indian child, where known, or some other indication of the child's membership in the Tribe; the name, address, and other identifying information of the consenting parent or Indian custodian;

the name and address of the person or entity, if any, who arranged the placement; and the name and address of the prospective foster parents, if known at the time.

§ 23.127 How is withdrawal of consent to a foster-care placement achieved?

(a) The parent or Indian custodian may withdraw consent to voluntary foster-care placement at any time.

(b) To withdraw consent, the parent or Indian custodian must file a written document with the court or otherwise testify before the court. Additional methods of withdrawing consent may be available under State law.

(c) When a parent or Indian custodian withdraws consent to a voluntary foster-care placement, the court must ensure that the Indian child is returned to that parent or Indian custodian as soon as practicable.

§ 23.128 How is withdrawal of consent to a termination of parental rights or adoption achieved?

(a) A parent may withdraw consent to voluntary termination of parental rights at any time prior to the entry of a final decree of termination.

(b) A parent or Indian custodian may withdraw consent to voluntary adoption at any time prior to the entry of a final decree of adoption.

(c) To withdraw consent prior to the entry of a final decree of adoption, the parent or Indian custodian must file a written document with the court or otherwise testify before the court. Additional methods of withdrawing consent may be available under State law.

(d) The court in which the withdrawal of consent is filed must promptly notify the person or entity who arranged any voluntary preadoptive or adoptive placement of such filing, and the Indian child must be returned to the parent or Indian custodian as soon as practicable.

Dispositions

§ 23.129 When do the placement preferences apply?

(a) In any preadoptive, adoptive, or foster-care placement of an Indian child, the placement preferences specified in § 23.130 and § 23.131 apply.

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

(c) The placement preferences must be applied in any foster-care, preadoptive, or adoptive placement unless there is a determination on the record that good cause under § 23.132 exists to not apply those placement preferences.

§ 23.130 What placement preferences apply in adoptive placements?

(a) In any adoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (b) of this section, preference must be given in descending order, as listed below, to placement of the child with:

(1) A member of the Indian child's extended family;

(2) Other members of the Indian child's Tribe; or

(3) Other Indian families.

(b) If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply.

(c) The court must, where appropriate, also consider the placement preference of the Indian child or Indian child's parent.

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

(a) In any foster-care or preadoptive placement of an Indian child under State law, including changes in foster-care or preadoptive placements, the child must be placed in the least-restrictive setting that:

(1) Most approximates a family, taking into consideration sibling attachment;

(2) Allows the Indian child's special needs (if any) to be met; and

(3) Is in reasonable proximity to the Indian child's home, extended family, or siblings.

(b) In any foster-care or preadoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (c) of this section, preference must be given, in descending order as listed below, to placement of the child with:

(1) A member of the Indian child's extended family;

(2) A foster home that is licensed, approved, or specified by the Indian child's Tribe;

(3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(4) An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

(c) If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply, so long as the placement is the least-restrictive setting appropriate to the particular needs of the Indian child, as provided in paragraph (a) of this section.

(d) The court must, where appropriate, also consider the preference of the Indian child or the Indian child's parent.

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

(a) If any party asserts that good cause not to follow the placement preferences exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties to the child-custody proceeding and the court.

(b) The party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is "good cause" to depart from the placement preferences.

(c) A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and should be based on one or more of the following considerations:

(1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;

(2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;

(3) The presence of a sibling attachment that can be maintained only through a particular placement;

(4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;

(5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a

placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

(d) A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement.

(e) A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

Access

§ 23.133 Should courts allow participation by alternative methods?

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

§ 23.134 Who has access to reports and records during a proceeding?

Each party to an emergency proceeding or a foster-care-placement or termination-of-parental-rights proceeding under State law involving an Indian child has a right to timely examine all reports and other documents filed or lodged with the court upon which any decision with respect to such action may be based.

§ 23.135 [Reserved]

Post-Trial Rights & Responsibilities

§ 23.136 What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?

(a) Within two years after a final decree of adoption of any Indian child by a State court, or within any longer period of time permitted by the law of the State, the State court may invalidate the voluntary adoption upon finding that the parent's consent was obtained by fraud or duress.

(b) Upon the parent's filing of a petition to vacate the final decree of adoption of the parent's Indian child, the court must give notice to all parties to the adoption proceedings and the Indian child's Tribe and must hold a hearing on the petition.

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

§ 23.137 Who can petition to invalidate an action for certain ICWA violations?

(a) Any of the following may petition any court of competent jurisdiction to invalidate an action for foster-care placement or termination of parental rights under state law where it is alleged that 25 U.S.C. 1911, 1912, or 1913 has been violated:

(1) An Indian child who is or was the subject of any action for foster-care placement or termination of parental rights;

(2) A parent or Indian custodian from whose custody such child was removed; and

(3) The Indian child's Tribe.

(b) Upon a showing that an action for foster-care placement or termination of parental rights violated any provision of 25 U.S.C. 1911, 1912, or 1913, the court must determine whether it is appropriate to invalidate the action.

(c) To petition for invalidation, there is no requirement that the petitioner's rights under ICWA were violated; rather, a petitioner may challenge the action based on any violations of 25 U.S.C. 1911, 1912, or 1913 during the course of the child-custody proceeding.

§ 23.138 What are the rights to information about adoptees' Tribal affiliations?

Upon application by an Indian who has reached age 18 who was the subject of an adoptive placement, the court that entered the final decree of adoption must inform such individual of the Tribal affiliations, if any, of the individual's biological parents and provide such other information necessary to protect any rights, which may include Tribal membership, resulting from the individual's Tribal relationship.

§ 23.139 Must notice be given of a change in an adopted Indian child's status?

(a) If an Indian child has been adopted, the court must notify, by registered or certified mail with return receipt requested, the child's biological parent or prior Indian custodian and the Indian child's Tribe whenever:

(1) A final decree of adoption of the Indian child has been vacated or set aside; or

(2) The adoptive parent has voluntarily consented to the termination of his or her parental rights to the child.

(b) The notice must state the current name, and any former name, of the Indian child, inform the recipient of the right to petition for return of custody of the child, and provide sufficient information to allow the recipient to participate in any scheduled hearings.

(c) A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice and filing the waiver with the court.

(1) Prior to accepting the waiver, the court must explain the consequences of the waiver and explain how the waiver may be revoked.

(2) The court must certify that the terms and consequences of the waiver and how the waiver may be revoked were explained in detail in English (or the language of the parent or Indian custodian, if English is not the primary language), and were fully understood by the parent or Indian custodian.

(3) Where confidentiality is requested or indicated, execution of the waiver need not be made in a session of court open to the public but still must be made before a court of competent jurisdiction in compliance with this section.

(4) The biological parent or Indian custodian may revoke the waiver at any time by filing with the court a written notice of revocation.

(5) A revocation of the right to receive notice does not affect any child-custody proceeding that was completed before the filing of the notice of revocation.

Recordkeeping

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

(a) Any State court entering a final adoption decree or order in any voluntary or involuntary Indian-child adoptive placement must furnish a copy of the decree or order within 30 days to the Bureau of Indian Affairs, Chief, Division of Human Services, 1849 C Street NW., Mail Stop 4513 MIB, Washington, DC 20240, along with the following information, in an envelope marked "Confidential":

(1) Birth name and birthdate of the Indian child, and Tribal affiliation and name of the Indian child after adoption;

(2) Names and addresses of the biological parents;

(3) Names and addresses of the adoptive parents;

(4) Name and contact information for any agency having files or information relating to the adoption;

(5) Any affidavit signed by the biological parent or parents asking that their identity remain confidential; and

(6) Any information relating to Tribal membership or eligibility for Tribal membership of the adopted child.

(b) If a State agency has been designated as the repository for all State-court adoption information and is fulfilling the duties described in paragraph (a) of this section, the State courts in that State need not fulfill those same duties.

§ 23.141 What records must the State maintain?

(a) The State must maintain a record of every voluntary or involuntary foster-care, preadoptive, and adoptive placement of an Indian child and make the record available within 14 days of a request by an Indian child's Tribe or the Secretary.

(b) The record must contain, at a minimum, the petition or complaint, all substantive orders entered in the child-custody proceeding, the complete record of the placement determination (including, but not limited to, the findings in the court record and the social worker's statement), and, if the placement departs from the placement preferences, detailed documentation of the efforts to comply with the placement preferences.

(c) A State agency or agencies may be designated to be the repository for this information. The State court or agency should notify the BIA whether these records are maintained within the court system or by a State agency.

§ 23.142 How does the Paperwork Reduction Act affect this subpart?

The collections of information contained in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned OMB Control Number 1076–0186. Response is required to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless the form or regulation requesting the information displays a currently valid OMB Control Number. Send comments regarding this collection of information, including suggestions for reducing the burden, to the Information Collection Clearance Officer – Indian Affairs, 1849 C Street, NW., Washington, DC 20240.

Effective Date

§ 23.143 How does this subpart apply to pending proceedings?

None of the provisions of this subpart affects a proceeding under State law for foster-care placement, termination of parental rights, preadoptive placement, or adoptive placement that was initiated prior to [INSERT DATE 180 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], but the provisions of this subpart apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

Severability

§ 23.144 What happens if some portion of this part is held to be invalid by a court of competent jurisdiction?

If any portion of this part is determined to be invalid by a court of competent jurisdiction, the other portions of the part remain in effect. For example, the Department has considered separately whether the provisions of this part apply to involuntary and voluntary proceedings; thus, if a particular provision is held to be invalid as to one type of proceeding, it is the Department's intent that it remains valid as to the other type of proceeding.

Dated: June 6, 2016

Lawrence S. Roberts,
Acting Assistant Secretary – Indian Affairs.
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