NICWA
National Indian Child Welfare Association
Protecting Our Children • Preserving Our Culture

May 18, 2015

Ms. Elizabeth Appel
Office of Regulatory Affairs and Collaborative Action
Indian Affairs, U.S. Department of the Interior
1849 C Street NW, MS 3642
Washington, DC 20240

Re: *Notice of Proposed Rulemaking—Regulations for State Courts and Agencies in Indian Child Custody Proceedings—RIN 1076-AF25—Federal Register (March 20, 2015)*

Dear Ms. Appel,

The National Indian Child Welfare Association ("NICWA") is pleased to provide comments on the Notice of Public Rulemaking regarding Regulations for State Courts and Agencies in Indian Child Custody Proceedings. 80 Fed. Reg. 14,880-94 (Mar. 20, 2015) (to be codified at 25 C.F.R. pt. 23) [*hereinafter*, "the Proposed Rule"].

NICWA is a national American Indian and Alaska Native ("AI/AN") non-profit organization located in Portland, Oregon. NICWA has provided technical assistance and training to tribes, states, private entities, and federal agencies on Indian child welfare, children's mental health, and juvenile justice issues for over 30 years. NICWA is a leading advocate for public policy that supports the well-being of AI/AN children and families, including compliance with the Indian Child Welfare Act of 1978 ("ICWA"). 25 U.S.C. §§ 1901-1963. NICWA also engages in research that informs improved services for AI/AN children and families. NICWA is the nation's most comprehensive source of information on AI/AN child maltreatment, child welfare, and children's mental health issues.

ICWA was enacted in 1978 in response to a crisis affecting Indian children, families, and tribes. Studies revealed that large numbers of Indian children were being separated from their parents, extended families, and communities to be placed in non-Indian homes. Congressional testimony documented the devastating impact this was having upon AI/AN children, families, and tribes. As a result, Congress enacted mandatory minimum legal standards to be followed by state courts adjudicating the rights of, and state agencies serving, AI/AN children and families.

Although progress has been made as a result of ICWA, out-of-home placement still occurs more frequently for AI/AN children than it does for the general population. National Council of Juvenile and Family Court Judges, *Disproportionality Rates for Children of Color in Foster Care* (2014). Further, Indian children continue to be regularly placed in non-Indian homes. Rose M. Kreider, *Interracial Adoptive Families and Their Children: 2008*, *in* National Council for Adoption, Adoption Factbook V (2011). These facts are not surprising when research shows that state agencies' compliance with ICWA is erratic, and state courts' decisions are inconsistent. Casey Family Programs, *Indian Child Welfare Act: Measuring Compliance* (2015). Thus, federal regulations are greatly needed.

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The issuance of the Proposed Rule is long overdue. Over the past 36 years, the absence of federal regulation has allowed public and private agencies, as well as state courts, to misinterpret and misapply ICWA. In this landscape, public and private agencies have requested regulations to guide their practice, state courts have asked for regulations to guide their decision-making processes, and advocates for children and families have pushed for regulations to curb the negative consequences that occur when ICWA is not implemented. The unregulated status quo has contributed to widespread non-compliance with ICWA and the breakup of thousands of AI/AN families over the past 36 years. NICWA strongly supports the clarity and consistency that ICWA regulations will bring.

Our comments will focus on the following:

- The authority of the Department of the Interior ("DOI") to promulgate ICWA regulations
- General considerations for the final rule
- Suggested changes to individual provisions

DOI Authority to Promulgate Regulations

The text and purpose of ICWA unambiguously provide DOI with authority to promulgate the Proposed Rule. ICWA states,: "Within [180] days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." 25 U.S.C. § 1952. This section grants the Secretary of the Interior broad authority to issue rules to ensure that ICWA is fully and properly implemented. Additionally, as stated by Congress in ICWA, "The United States has a direct interest, as trustee, in protecting Indian children." 25 U.S.C. § 1901(3). The Proposed Rule is intended to improve the implementation of ICWA, carry out the United States' trust responsibilities and further ICWA's purpose "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.

The Secretary of the Interior is also charged generally with "the management of all Indian affairs and of all matters arising out of Indian relations" and may "prescribe such regulations as [s]he may think fit for carrying into effect the various provisions of any act relating to Indian affairs." 25 U.S.C. §§ 2, 9. This is another clear grant of authority to issue regulations such as these. ICWA is clearly an "act relating to Indian affairs," which the Secretary of the Interior intends to implement and enforce with the Proposed Rule.

These proposed regulations are not the first time that DOI has issued regulations with regard to ICWA. Following ICWA's enactment, DOI issued regulations in July 1979 addressing notice procedures for involuntary child custody proceedings involving Indian children and governing the provision of funding for, and administration of, Indian child and family service programs authorized by ICWA. *See* 25 C.F.R. pt. 23.

Finally, we endorse and point to the comments filed by the Association on American Indian Affairs, which provide detailed analysis on the authority of DOI to promulgate these regulations under ICWA. Those comments discuss in detail two important points that we reiterate here:

- Case law over the past 36 years has led to widely divergent interpretations of a number of ICWA provisions by state courts and uneven implementation by state agencies. This has diminished ICWA's purpose—to establish consistent minimum federal standards governing state court proceedings.
- Case law established since 1979 on the Administrative Procedures Act and on general regulatory authority undermines DOI's previous interpretation of its authority and reaffirms the authority exercised in the current rulemaking.

DOI has both the authority and the obligation to act to provide the clarity needed to protect Indian children and families.

General Considerations

We urge DOI to promulgate a final rule that provides clarity, promotes consistency, and protects Indian children and families. In order to do this, the final rule must be firmly grounded in DOI's authority to promulgate regulations, must be consistent with Supreme Court precedent, must account for the language *and intent* of the law, must clarify how ICWA and these regulations interact with other state and federal laws, and must provide clear justifications for the specific policy decisions made in each provision.

Suggested Changes to Individual Provisions

Section 23.2: *Definitions*.

Active Efforts
The Proposed Rule defines "active efforts" as "actions intended primarily to maintain and reunite an Indian child with his or her family or tribal community and constitute more than "reasonable efforts" as required by Title IV-E of the Social Security Act (42 U.S.C. 671(a)(15))." 80 Fed. Reg. at 14885 (to be codified at 25 C.F.R. § 23.2). The proposed rule provides 15 examples of active efforts, including the following: engaging the child, parents, extended family members, or custodians; taking steps to keep the siblings together; providing services; identifying, notifying, and inviting representatives of the child's tribe; employing family preservation strategies; and many more. *Id.*

We strongly support this definition of active efforts. As this definition makes clear, the "active efforts" standard requires more than a "reasonable efforts" standard. *People in Interest of P.S.E.*, 2012 SD 49, 816 N.W.2d 110; *In re Nicole B.*, 927 A.2d 1194 (Md. Ct. Spec. App. 2007); *K.C.J.*, 228 Or. App. 70, 207 P.3d 423 (2009); *In re J.L.*, 483 Mich. 300, 770 N.W.2d 853 (2009); *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008); *In re J.S.*, 177 P.3d 590, 593 (Okla. Civ. App. 2008). This definition is in line with the language and intent of ICWA, which provides heightened protections with the goal of preserving Indian families. *See, e.g.,* 25 U.S.C. § 1912 (b) (providing parents counsel throughout the course of an ICWA proceeding); 25 U.S.C. § 1912 (e) (providing a heightened burden of proof for foster care proceedings); 25 U.S.C. § 1912 (f) (providing a heightened burden of proof for termination of parental rights proceedings); 25 U.S.C. § 1913 (providing additional protections in voluntary foster care and adoption proceedings). The "reasonable efforts" standard for non-Indian family preservation efforts first

appeared in a statute enacted in 1980, just two years after ICWA's passage. Title IV-E of the Social Security Act, 42 U.S.C. § 671(a)(15). Had Congress intended Title IV-E to provide the same protections as ICWA, the term "active efforts" would have been used. The use of "reasonable efforts" instead demonstrates that Congress did not intend for the two to be considered synonymous.

The legislative history of the "active efforts" provision demonstrates that Congress intended to require state courts to affirmatively provide Indian families with substantive services, not merely to make those services available. A comparison of the two versions of what would become 25 U.S.C. § 1912(d) is instructive. The Senate passed the first version of the statute that would become the Indian Child Welfare Act in 1977. Indian Child Welfare Act of 1977, 123 Cong. Rec. 37,226 (Nov. 7, 1977). The provision in that bill did not use the phrase "active efforts." Instead, it used the phrase "made available." Section 101(a)(2), S. 1212, 95th Cong. (1st Sess 1977), *reprinted in* 123 Cong. Rec. 32,224 (Nov. 7, 1977). The entire subsection reads, "No placement of an Indian child, except as provided in the Act shall be valid or given any legal force or effect … unless … the party seeking to effect the child placement affirmatively shows that available remedial services and rehabilitative programs designed to prevent the breakup of the Indian family *have been made available* and proved unsuccessful." *Id.* (emphasis added). In contrast, the final version of the bill, passed on October 14, 1978, reads, "Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that *active efforts* have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." Indian Child Welfare Act, 124 Cong. Rec. 38,110 (Oct. 14, 1978); 25 U.S.C. § 1912(d) (emphasis added). The change is subtle, but significant. Congress chose to require not only that services be made "available" to Indian families, but also that state agencies make "active efforts" to provide those services.

The testimony Congress heard in the years prior to the passage of ICWA, describing the crisis which ICWA sought to remedy, also sheds light on the meaning of "active efforts," as well as the intent of Congress in enacting the provision. A clear theme emerges from the testimony in hearings on "active efforts"– namely, that state agencies rarely provided any services to Indian families at all and, when state agencies did provide services, they did so without respect for tribal cultures, undermining any chance that the services would be effective. *See, generally*, David Getches, et. al., *Cases and Materials on Federal Indian Law* 647-664 (6th ed. 2011).

We further the support the numerous examples of "active efforts" the Proposed Rule provides. These examples clarify specifically how to effectuate the general understanding that "[t]he term active efforts, by definition, implies heightened responsibility compared to passive efforts." *In re A.N.*, 106 P.3d 556, 560 (Mont. 2005); *A.M. v. State*, 945 P.2d 296, 306 (Alaska 1997) (citing Craig J. Dorsay, *The Indian Child Welfare Act and Laws Affecting Indian Juveniles Manual* 157- 58 (1984)) (stating that "passive efforts entail merely drawing up a reunification plan and requiring the 'client' to use 'his or her own resources to . . . bring . . . it to fruition,'" and that "active efforts, on the other hand, include 'tak[ing] the client through the steps of the plan rather than requiring the plan to be performed on its own.'"));*In re CJ*, 18 P.3d 1214, 1219 (Alaska 2001).

We recommend the following changes:

— Clarify that there are no timelines for, and no exceptions to, the provision of "active efforts." This will further distinguish ICWA's active efforts requirement from the Adoption and Safe Families Act (ASFA) "reasonable efforts" requirement. For a number of reasons, ASFA should not be viewed as affecting the application of ICWA in the case of Indian children involved in state child custody proceedings.

First, the Adoption Assistance and Child Welfare Act of 1980 (P.L. 96- 272) was the first reform of federal child welfare law. It created Title IV-E and revised Title IV-B. P.L. 96-272 made no specific reference to ICWA and, in spite of its later date of enactment, has never been interpreted as modifying the provisions of ICWA. ASFA, which amended Titles IV-B and IV-E of the Social Security Act, contains no provision or legislative history that indicates an intent to modify ICWA. Thus, given that Titles IV-B and IV-E of the Social Security Act have not been interpreted as modifying or affecting the application of ICWA, ASFA should not be interpreted to do so either.

Additionally, in 1994 an amendment to Title IV-B was passed that required, for the first time, that state Title IV-B plans "contain a description, developed after consultation with tribal organizations...in the State, of the specific measures taken by the State to comply with the Indian Child Welfare Act." Pub. L. No. 103-432, § 204 (codified at 42 U.S.C. § 622(11)). This section was not changed by ASFA. *See also Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews,* 65 Fed. Reg. 4020-01, 4029-30 (Jan. 25, 2000) (interpreting AFSA and concluding that "nothing in this regulation supersedes ICWA requirements").

Finally, standard rules of statutory construction provide further support for the proposition that no part of ASFA should be interpreted as modifying ICWA. First, ASFA deals with all children who become involved with the foster care or adoption system, whereas ICWA is a specific enactment dealing with one subsection of children — Indian children involved in child custody proceedings. ICWA is based upon extensive hearings, which demonstrated that the specific needs of Indian children are usually best served by maintaining their relationships with their tribes and extended families. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32-37, 49-50 (1988). It is a standard rule of statutory construction that specific legislative enactments take precedence over general statutory enactments. *See, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.") Second, as part of its trust relationship with Native people, Congress routinely enacts Indian-specific legislation which is specifically targeted toward the particular and special needs of Native Americans. *See, e.g.*, Indian Reorganization Act, 48 Stat. 984; Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638; American Indian Religious Freedom Act, Pub. L. No. 95-341. Such Indian-specific statutes, which include ICWA, are to be liberally interpreted for the benefit of the people on whose behalf they were enacted. See, e.g., *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832, 838 (1982).

We suggest inclusion of the language provided in the new ICWA Guidelines to further differentiate "active efforts" from the application of ASFA's requirements: *"'Active efforts' are separate and distinct from requirements of the Adoption and Safe Families Act (ASFA), (Pub. Law 105-89). ASFA's*

exceptions to [and timelines regarding] reunification efforts do not apply to ICWA proceedings." Guidelines for State Courts and Agencies in Indian Child Custody Proceeding, [*hereinafter* "BIA Guidelines"] 80 Fed. Reg. 10146, A.2 (bracketed language added by NICWA).

— Include a section that clarifies that the interpretation of the "active efforts" provision by the Supreme Court in *Adoptive Couple v. Baby Girl,* 133 S. Ct. 2552 (2013) is relevant only in private adoption cases where a parent has not had "continued custody" of the child *and* has "abandoned" the child. *See infra* discussion of the term of abandon.

In *Baby Girl*, the Court found that § 1912(d) did not apply in circumstances where a parent (1) did not have legal or physical custody of the child and (2) abandoned the child. 133 S. Ct. at 2562-64. This should be clarified in the final rule.

Importantly, Justice Breyer enumerated certain circumstances where ICWA may apply in the absence of prior custody. *Baby Girl,* 133 S.Ct. at 2571 (Breyer, J., concurring). In agreeing, he stated that this case does not involve "a father with visitation rights or who has paid 'all of his child support obligation,'" "special circumstances such as a father who was deceived about the existence of the child," or "a father who was prevented from supporting his child." *Id*. The "active efforts" requirement still, therefore, applies to those subsegments of non-custodial parents, even in the private adoption context described by Breyer. This should be clarified in the final rule.

Justice Breyer's concurrence—necessary for the five-vote majority—limited the scope of the Court's holding to the factual circumstances in the case. Specifically, the concurrence insisted that the decision "decided no more than is necessary." *Baby Girl,* 133 S.Ct. at 2571 (Breyer, J., concurring). Justice Breyer's narrow reading of the Court's ruling—one that limits its application to termination petitions that are filed in the context of contested private adoption proceedings—is also supported by the Court's overall analysis. Much of the Court's analysis of § 1912(d) was based on the specific facts of the case, particularly the voluntary adoption context from which it arose. *Id.* at 2563. Stating, for example, "It would, however be unusual to apply § 1912 in the context of an Indian parent who abandoned a child prior to birth and who never had custody of the child. The decision below illustrates this point." *Id.* In fact, the Court stated that "[s]ection 1912(d) is a sensible requirement when applied to state social workers who might otherwise be too quick to remove Indian children from their Indian families." *Id.* This statement indicates that the Court's interpretation in *Baby Girl* has no application in involuntary state child custody proceedings that are part of the dependency or child welfare system (as opposed to private voluntary adoptions). This should be clarified in the final rule.

Finally, it is important to emphasize that there is nothing in the opinion that would *preclude* "active efforts" in any case. The Court's holding was only that it is not required in certain narrow circumstances.

The rule should, ultimately, therefore clarify that "active efforts" are required in all circumstances, with the narrow exception of the *Baby Girl* fact pattern.

— Include "Promoting the acknowledgement and establishment of the paternity of the biological father when it has not yet been acknowledged or established" as an example of active efforts. Acknowledgement or establishment of paternity guarantees fathers' protections under the Act. It is key to preventing the breakup of the Indian family and critical to determining whether ICWA applies early in a case.

Child Custody Proceeding

The proposed rule defines "child custody proceeding" as "any proceeding that involves (1) Foster care placement, which is any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, although parental rights have not been terminated; (2) Termination of parental rights, which is any action resulting in the termination of the parent-child relationship; (3) Preadoptive placement, which is the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; (4) Adoptive placement, which is the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption." 80 Fed. Reg. at 14885 (to be codified at 25 C.F.R. § 23.2).

We recommend the following changes:

— Clarify that intra-family custody disputes that involve foster care placement (including guardianship/ conservatorship), or relinquishment and adoption are "child custody proceedings" for purposes of ICWA. A minority of state courts have erroneously excluded such disputes, finding that they are not child custody proceedings when the petitioner is a third-party family member (e.g. grandmother, uncle, cousin). *In re Bertelson*, 617 P.2d 121 (Mont. 1980) (reasoning in a guardianship case involving a mother and paternal grandmother, that the Act is not directed at disputes between Indian families regarding custody of Indian children); *see also In re Sengstock*, 477 N.W.2d 310 (Wis. Ct. App. 1991); *Comanche Nation v. Fox*, 128 S.W.3d 745 (Tex. App. 2004). A majority of courts have rejected this analysis as contrary to the express provision of the Act. *Comanche Indian Tribe of Okla. v. Hovis*, 847 F. Supp. 871 (W.D. Okla. 1994)("*Hovis I*"); *D.J. v. P.C.*, 36 P.3d 663 (Alaska 2001); *J.W. v. R.J.*, 951 P.2d 1206 (Alaska 1998); *In re D.A.C.*, 933 P.2d 993 (Utah Ct. App. 1997); *In re Q.G.M.*, 808 P.2d 684 (Okla. 1991); *In re A.K.H.*, 502 N.W.2d 790 (Minn. Ct. App. 1993); *In re S.B.R.*, 719 P.2d 154 (Wash. Ct. App. 1986); *In re Jennifer A.*, 127 Cal. Rptr. 2d 54 (Ct. App. 2002); *In re Lindsay C.*, 280 Cal. Rptr. 194 (Ct. App. 1991); *In re Crystal K.*, 276 Cal. Rptr. 619 (Ct. App. 1990). Additional language will promote consistent interpretation in line with the law.

— Clarify that proceedings where a change in foster care placement occurs are included in the definition of "foster care proceedings" and are, therefore, "child custody proceedings" under ICWA. When a child is moved between two foster homes a new placement is being effectuated and the relevant provisions of ICWA should be applied. Additional language will ensure ICWA's protections in these situations.

— Clarify that voluntary placements considered in the definition of "foster care placement" in 25 U.S.C. § 1903(1) (and Section 23.103(f) of the Proposed Rule) are different from voluntary foster care

placements described under 25 U.S.C. § 1913(a) where a parent can ostensibly have their child returned on demand. Voluntary placements continue to be used coercively by state child welfare agencies; parents are sometimes asked to sign a voluntary agreement under threat of involuntary removal in situations where removal would not actually be justified. Section 1913 provides important protections to parents that should be recognized and not confused with the definition of foster care described in § 1903(1).

— Clarify that status offenses are included in the definition of child custody proceedings, pursuant to 25 U.S.C. § 1903(1). This will provide consistency between the Act and the regulations. Although status offenses are included in section 23.103 of the Proposed Rule, discussing them in the definition of "child custody proceeding" is consistent with the organization of the Act and will, therefore, further promote compliance.

— Clarify that any placement of an Indian child in foster care as a result of a juvenile delinquency proceeding—e.g., where a state court determines that it is not safe or that it is inconsistent with the rehabilitation of the child to return a child to the parent or guardian—is a foster care proceeding under the definition of the Act. Foster homes, especially foster family treatment homes, are increasingly being used by state juvenile justice systems as interventions for youth in delinquency cases. Although this is included in section 23.103 of the Proposed Rule, including it here as well is consistent with the organization of the Act and will, therefore, promote compliance.

Continued Custody

The Proposed Rule defines "continued custody" as "physical and/or legal custody that a parent already has or has had at any point in the past. The biological mother of a child has had custody of a child." 80 Fed. Reg. at 14885 (to be codified at 25 C.F.R. § 23.2).

We recommend the following changes:

— Clarify that this interpretation is consistent with *Baby Girl*, which states in relevant part that "[t]he phrase 'continued custody' therefore refers to custody that a parent already has (or at least had at some point in the past)." 133 S. Ct. at 2560. *Baby Girl* held that Dusten Brown was not protected by sections 1912(d) & 1912(f) of ICWA "because he had *never* had legal or physical custody of Baby Girl as of the time of the adoption proceedings." *Id.* (emphasis added).

— Include the following language after "physical and/or legal custody": "including the right to assert custodial rights as a custodial father." This avoids potential equal protection violations by providing a constitutionally sound presumption of custody for both mothers and fathers.

Custody

The proposed rule defines "custody" as "physical and/or legal custody under any applicable tribal law or tribal custom or State law. A party may demonstrate the existence of custody by looking to tribal law or tribal custom or state law." 80 Fed. Reg. at 14885 (to be codified at 25 C.F.R. § 23.2).

We strongly support this definition. The definition appropriately recognizes that tribal courts may have jurisdiction over the establishment of custody for parents in ICWA cases and that many tribal governments base custody and custody decisions on customs and customary law. *See, generally*, Barbara Ann Atwood, *Children, Tribes, and States: Adoption and Custody Conflicts over American Indian Children* (2010).

Domicile

Under the Proposed Rule, "domicile" means: "(1) For a parent or any person over the age of eighteen, physical presence in a place and intent to remain there; (2) For an Indian child, the domicile of the Indian child's parents. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's mother." 80 Fed. Reg. at 14885 (to be codified at 25 C.F.R. § 23.2).

We recommend the following changes:

— Change the definition to match the common law definition of domicile. We suggest inclusion of the language provided by Black's Law Dictionary: *"[t]he 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 even though currently residing elsewhere." See Domicile*, Black's Law Dictionary (10th ed. 2014).

— Clarify that a temporary absence from a reservation, such as absence for military service, college attendance, vocational training, or seasonal work does not alter the domicile of the parent or child. This is an important clarification that is consistent with the common law definition of domicile and case law. In *Holyfield*, where the Supreme Court stated that "'domicile' is not necessarily synonymous with 'residence'" for the purposes of ICWA; "[f]or adults, domicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there." 490 U.S. at 48; *see also Texas v. Florida*, 306 U.S. 398, 424 (1939). *Holyfield* stated that "[o]ne acquires a 'domicile of origin' at birth, and that domicile continues until a new one (a domicile of choice') is acquired." 490 U.S. at 48.

— Specify that the domicile of a child is the domicile of his or her parent or Indian custodian. When the child's parents aren't married, the domicile of the Indian child is that of the custodial parent with whom the child lives most often, or when the child is living with neither parent the domicile of the Indian child is that of her mother.

Indian child

The definition of "Indian child" is not revised in the Proposed Rule. As defined by current regulations and by ICWA, "Indian child" means "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4); 25 C.F.R. § 23.2.

We recommend the following changes:

— For the purposes of determining whether a child is "eligible for membership and is the biological child of a member of an Indian tribe" the regulations should clarify that membership of the parent in a

different tribe than the tribe in which the child is eligible for membership meets the definition. *Angus v. Joseph*, 60 Or. App. 546, 655 P.2d 208 (1982), *rev. denied*, 294 Or. 569, *cert. denied*, 464 U.S. 830 (1983) (finding the child does not have to be eligible for membership in the same tribe as the parent for ICWA to apply).

— Clarify that a child needs only be 18 at the time of the *initial* child custody proceeding for ICWA to apply for the duration of the case. New federal laws provide federal funding for state foster care and other child welfare services for young adults between the ages of 18 and 21 if the child was placed outside of the home earlier in his or her life. 42 U.S.C. 675(8)(iii). Accordingly, an increasing number of states extend foster care and services for children up to age 21. When this occurs, the protections of ICWA (for example, the right of the tribe to be a party to the state child custody case) should apply throughout the entire case.

Parent

The Proposed Rule defines "parent" as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include an unwed father where paternity has not been acknowledged or established." 80 Fed. Reg. at 14886 (to be codified at 25 C.F.R. § 23.2).

We recommend the following change:

— Define what it means to "acknowledge or establish," which is used in this definition and the complementary provision in ICWA. 25 U.S.C. § 1903(9). Appellate courts of last resort are split on the definition of these terms, and defining them here would resolve the inconsistency that exists with regard to its definition and application. In three jurisdictions, a putative father's parental status under ICWA is an independent determination. *Adoptive Couple v. Baby Girl*, 746 S.E.2d 54 (S.C. 2013) *overruled on other grounds,* 133 S. Ct. 2552; *Bruce L. v. W.E.*, 247 P.3d 966, 979 (Alaska 2011) ("We hold that even though Bruce did not comply with the Alaska legitimation statute . . ., he sufficiently acknowledged paternity of Timothy to invoke the application of ICWA."); *Jared P. v. Glade T.*, 209 P.3d 157, 160-61 (Ariz. Ct. App. 2009); *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960, 963 (Ariz. Ct. App. 2000) (concluding that state law requirements for establishing or acknowledging paternity "are not required" under ICWA). In five jurisdictions, a putative father's parental status under ICWA is contingent upon compliance with state paternity laws. *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re Adoption of Baby Boy D*, 742 P.2d 1059, 1064 (Okla. 1985), *overruled on other grounds, In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004); *In re Daniel M.*, 1 Cal. Rptr. 3d 897, 900 (Ct. App. 2003) ("[B]ecause the ICWA does not provide a standard for the acknowledgment or establishment of paternity, courts have resolved the issue under state law."); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 173 (Tex. App. Ct. 1995); *In re S.A.M.*, 703 S.W.2d 603, 607 n.4 (Mo. Ct. App. 1986). Further, the Supreme Court did not address this issue when recently given the opportunity to provide uniformity and clarity. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2560 ("We need not—and therefore do not—decide whether Biological Father is a 'parent.'"). This lack of clarity is precisely the reason that regulations are necessary.

A clear definition is necessary to ensure that fathers' rights are protected and do not vary from state-to-state. Further, application of state law is counter to the intent of ICWA and is preempted by the Act:

> First, and most fundamentally, the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term; quite the contrary. It is clear from the very text of the ICWA, not to mention its legislative history and the hearings that led to its enactment, that Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities. ...Indeed, the congressional findings that are a part of the statute demonstrate that Congress perceived the States and their courts as partly responsible for the problem it intended to correct. ...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.

Holyfield, 490 U.S. at 44-45.

We suggest the following definition: "To qualify as a parent, an unwed father need only take reasonable steps to acknowledge paternity. Such steps may include acknowledging paternity in the action at issue or establishing paternity through DNA testing [or through any actions taken to acknowledge or establish paternity under any applicable tribal law or tribal custom or State law]" *Guidelines for State Courts and State Agencies in Indian Child Custody Proceedings*, 80 Fed. Reg. 10146, A.2 (bracketed language added by NICWA).

Imminent physical damage or harm

The Proposed Rule defines "imminent physical damage or harm" as "present or impending risk of serious bodily injury or death." 80 Fed. Reg. at 14885 (to be codified at 25 C.F.R. § 23.2).

We support the inclusion of a definition for this previously undefined term in the rule and recommend the following changes:

— Clarify that present or impending risk of sexual abuse and battery is also considered imminent physical damage or harm. This technical inclusion will provided certainty to this definition and ensure AI/AN children's protection.

— Clarify that imminent physical damage or harm is not present when the implementation of a safety plan or safety intervention would otherwise protect the child while allowing them to remain in the home. This definition is consistent with social work best practices. The majority of Native children removed from their homes are removed with a stated cause of "neglect." Nationally, of all AI/AN cases of maltreatment reported, 79.4% are based on neglect, 10.6% are based on physical abuse, and 5.2% are based on sexual abuse. Children's Bureau, *Child Maltreatment 2008* (2010). Although neglect can certainly pose imminent physical damage or harm, in many instances an effective safety plan can put protections in place that ensure the child's safety without the trauma of removal. Theresa Rue Lubb & Jennifer Renne, *American Bar Association: Child Safety, A Guide for Judges and Attorneys*, 21 (2009) (stating that "[a]n unsafe child does not automatically require placement outside

the home. Consider alternative safety plans... A safety plan's objective is to control threats in the least intrusive manner.") This addition is in line with ICWA's dual purposes of promoting the stability and security of Indian families by preventing courts from sanctioning unnecessary removals.

State Courts

The definition of "state courts" is not revised in the Proposed Rule. As defined in current regulations, "state courts" are "any agent or agency of a state, including the District of Columbia or any territory or possession of the United States, or any political subdivision empowered by law to terminate parental rights or to make foster care placements, preadoptive placements, or adoptive placements." 25 C.F.R. § 23.2.

We request that a revised definition be included in the final rule and recommend the following change:

— Include "all officers of the court" in the definition of state court. The inclusion of this term will clarify that all legal professionals are required to effectively implement ICWA in line with the practices described in the regulations. Many adoptions are coordinated by legal practitioners who personally arrange for adoptions without the use of a private state-licensed agency or other professional intermediaries. *See,* Melinda Lucas, *Distinguishing Between Grey Market and Black Market Adoptions*, 34 Fam. L. Q. 553 (2000). These practitioners and adoptions are not outside the purview of ICWA or these regulations. Additionally, other "officers of the court" may be involved in child custody proceedings, including Court Appointed Special Advocates and Guardians ad Litem, who represent the child and/or the best interests of the child. These practitioners must be aware of their responsibilities under ICWA and act to ensure that the law is followed. Including an expansive definition of "state courts" will make clear that it is the responsibility of all attorneys, judicial officers, and court personnel to comply with the requirements of ICWA and the corresponding regulations.

Upon Demand

The Proposed Rule defines "upon demand" to mean that "the parent or Indian custodians regain custody simply upon request, without any contingencies such as repaying the child's expenses." 80 Fed. Reg. at 14886 (to be codified at 25 C.F.R. § 23.2).

We support the inclusion of a definition for this previously undefined term in the rule and recommend the following changes:

— The phrase "such as repaying child's expenses" should be replaced with "without any contingencies." The suggestion of a specific contingency could unnecessarily limit the interpretation of this provision, and in this context upon demand necessarily means without *any* contingencies.

— Include the phrase "without court proceedings" after the phrase "upon request" to clarify that litigation is unnecessary to request the return of the child.

Voluntary Placement

The Proposed Rule defines voluntary placement as "a placement that either parent has, of his or her own free will, chosen for the Indian child, including private adoptions." 80 Fed. Reg. at 14886 (to be codified at 25 C.F.R. § 23.2).

We recommend the following changes:

— *Both* parents (not either parent) should be required to agree to and consent to the voluntary placement of an Indian child. Both parents have rights under ICWA when decisions about the placement of a child are made and that must be protected.

— Change "placement" to read "a foster care placement or a termination of parental rights" to track the language in 25 U.S.C. § 1913 and avoid confusion regarding the definition of a voluntary placement and application of ICWA to these proceedings. Termination of parental rights should include voluntary relinquishments/consent and the corresponding adoption.

— Change "chosen for the Indian child" to read "consented to." The language "chosen for the Indian child" could be erroneously interpreted as providing that the parents' choice can override the placement provisions requirements of 25 U.S.C. § 1915, which apply in all adoption proceedings, voluntary and involuntary. This change will clarify that consenting to a voluntary placement is unique from selecting the placement of the child.

Additional definitions we recommend for inclusion:

Abandon/Abandonment

Baby Girl determined that the "active efforts" provision of ICWA, 25 U. S. C. § 1912 (d), does not apply "when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody." 133 S. Ct. at 2559. However, "abandon" is not defined in *Baby Girl* or the Proposed Rule.

— The term "abandon/abandonment" is a term of art in child and family law, and varies greatly from state to state. Approximately 17 States and the District of Columbia include abandonment in their definitions of abuse or neglect, generally as a type of neglect. Approximately 18 States, Guam, Puerto Rico, and the Virgin Islands provide definitions for abandonment that are separate from the definition of neglect. *See* Child Welfare Information Gateway, *State Statutes: Definitions of Child Abuse and Neglect* (2011); *See also* Child Welfare Information Gateway, *State Statutes: Grounds for Involuntary Termination of Parental Rights* 2 (2013) ("The grounds for involuntary termination of parental rights are specific circumstances under which the child cannot safely be returned home because of risk of harm by the parent or the inability of the parent to provide for the child's basic needs. Each state is responsible for establishing its own statutory grounds, and these vary by State. The most common statutory grounds for determining parental unfitness include: [among others] abandonment of the child"). For this reason, a uniform definition of the term is necessary.

  We would also note that in some state jurisdictions, misunderstandings of tribal child rearing practices, especially those involving Indian extended family, have contributed to the mislabeling of Indian children as abandoned. This has allowed state courts, using provisions contained under the Adoption and Safe Families Act (P.L. 105-89), to assume that they can abandon efforts to reunify Indian children with their parents and move immediately to terminate parental rights. A definition for abandonment that protects parents to the extent allowable under *Baby Girl* should be included.

Best Interest of the Indian Child

ICWA was crafted with a purpose of "protect[ing] the best interest of Indian children." 25 U.S.C. § 1902. However, the term "best interest of the Indian child" is not defined in the Proposed Rule.

We request that this term be defined in the final rule and recommend the following:

— The Declaration of Policy included in ICWA states: "The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children…by the establishment of minimum federal standards for the removal of Indian children from their families." 25 U.S.C. § 1902. ICWA therefore embodies a Congressional finding that ICWA's protections are, as a general rule, in the best interests of Indian children. The definition of the term should make clear that ICWA-mandated practices are presumptively in the best interest of the Indian child.

  ICWA was crafted to create uniform minimum federal standards for Indian children in child custody proceedings. Nonetheless, State Courts have inconsistently used a general "best interest of the child test" to frustrate this purpose and avoid the application of the Act's requirements. *See, e.g.*, *Matter of Appeal in Maricopa County*, 667 P.2d 228 (Ariz. App. 1983) (best interest test used to avoid transfer); *Matter of Adoption T.R.M.*, 525 N.E.2d 298, 307-08 (Ind. 1988) (best interest test used to avoid transfer); *Matter of Appeal in Maricopa County Juvenile Action No. A-25525*, 667 P.2d 228, 234 (Ariz. App. 1983) (best interest test used to avoid placement preferences); *Matter of Adoption of M.*, 832 P.2d 518, 522 (Wash. App. 1992) (best interest test used to avoid placement preferences); *In re Interest of A.E., J.E., S.E., and X.E.,* 572 N.W.2d 579, 583-85 (Iowa 1997) (best interest test used to avoid placement preferences); *People ex. rel. of A.N.W.,* 976 P.2d 365, 369 (Colo. App. 1999) (best interest test used to avoid placement preferences); *In re Interest of C.G.L.*, 63 S.W.3d 693, 697-98 (Mo. App. 2002) (best interest test used to avoid placement preferences); *C.L. v. P.C.S.*, 17 P.3d 769, 773 (Alaska 2001) (best interest test used to avoid placement preferences); *In re Matter of the Adoption of Baby Girl B.*, 67 P.3d 359, 370-71 (Ok. App. 2003) (best interest test used to avoid placement preferences).

  A clear definition of the best interest of the Indian child that clarifies that ICWA is in the child's best interest, will prevent these outcomes. *See, generally,* Evelyn Blanchard, *The Question of Best Interest in* The Destruction of American Indian Families, 60 (Steven Ungar ed. 1977); *see, also, In re Interest of Zylena R.,* 825 N.W.2d 173, 185 (Neb. 2012) (finding that Best Interest of the Child test cannot be used to circumvent ICWA which describes the child's best interest). *People in Interest of J.L.P.*, 870 P.2d 1252 (Colo. App.1994) (same); *Matter of Ashley Elizabeth R.*, 863 P.2d 451 (N.M. Ct. App.1993); *In re Armell*, 550 N.E.2d 1060 (Ill. App. Ct. 1990) (same); *In re S.E.G.*, 507 N.W.2d 872, 878 (Minn. Ct. App. 1993), *rev'd on other grounds*, 521 N.W.2d 357 (Minn. 1994) (Similar finding with regard to ICWA's placement preferences); *In re C.H.* 997 P.2d 776 (Mont. 2000) (same).

  Since the use of state law for the determination of best interest in an ICWA case is counter to the language and intent of ICWA, we recommend that BIA clarify that, in line with the purpose statement, ICWA is in the Indian child's best interest. *Holyfield*, 490 U.S. at 44-45. ("First, and most fundamentally, the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term; quite the contrary. It is clear from the very text of the

ICWA, not to mention its legislative history and the hearings that led to its enactment, that Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities.")

We recommend the following definition of "best interests of the *Indian* child": "In Indian child custody proceedings, the best interests of the Indian child shall be determined, in consultation with the Indian child's tribe, in accordance with the Indian Child Welfare Act, and the regulations specified in this section. Courts shall do the following: (1) Protect the best interests of Indian children and promote the stability and security of Indian tribes and families, and (2) Ensure that the agency and all practitioners uses practices in accordance with the Indian Child Welfare Act, this chapter, and other applicable law, that are designed to prevent the voluntary or involuntary out-of-home care placement of Indian children and, when an out-of-home care placement, adoptive placement, or preadoptive placement is necessary, place an Indian child in a placement that reflects the unique values of the Indian child's tribal culture and that is best able to assist the Indian child in establishing, developing, and maintaining a political, cultural, and social relationship with the Indian child's tribe and tribal community." This definition is in accord with the definition of the best interest of the Indian child in various jurisdictions. *See, e.g.,* Wis. Stat. Ann. § 48.01(2); Mich. Comp. Laws § 712B.5; Iowa Code Ann. § 232B.3.

Indian Family/"Other Indian Family"

The term "other Indian family" is used to describe the third adoptive placement preference under ICWA. 25 U.S.C. § 1915(a). The term is ambiguous and is not defined in the Proposed Rule.

We request that this term be defined in the final rule and recommend the following:

- Specify that "other Indian family" includes those families where *at least one parent/caregiver* in the homes is "Indian" as defined by ICWA, 25 U.S.C. § 1915(a). The definition should clarify that a home without an Indian parent/caregiver where another "Indian child" has been placed, in violation of ICWA's placement preferences, is not an "Indian family" under the act. Homes do not become an "Indian family" because of this unlawful presence of an "Indian child." This undermines the purpose of the placement preferences provision: to ensure that "where possible, an Indian child remains in the Indian community" connected to his or her culture. H. Rep.95-1386, 26 (1978).

Party

The term "party" is not defined in the Proposed Rule.

We request that this term be defined in the final rule and recommend the following:

- Specify that "party" includes only those individuals or entities with legal rights under the act—that is, actual parties to a child welfare case—this would limit parties to the parents, tribe, state, and the child. Placement resource families and/or "*de facto* parents" are not parties to the Act and are not protected by its text. A handful of jurisdictions have allowed non-family and non-Indian individuals to join cases as a "party" and assert rights under the Act not intended for their protection. The regulations should specify that these individuals do not have the right to partake in an ICWA child custody proceeding.

Tribal Representative

The term "tribal representative" is not defined in the Proposed Rule, yet it is used multiple times throughout. Specifically, it is used in the Proposed Rule's section 23.2 (referring to "representatives of the Indian child's tribe"), section 23.104 (referring to tribal agents), section 23.109 (referring to tribes acting as "representatives" for other tribes in child custody cases), and section 23.115 (transfer of a child custody proceeding).

We request that this term be defined in the final rule and recommend the following:

— Define "tribal representative" to include a person designated by the tribe to be its representative in a child custody proceeding. The final rule should not require the representative to be an attorney. Under a federal preemption analysis, the rights and interests of the tribe to participate in ICWA proceedings far outweigh the rights and interests of a state with regard to the practice of law:

> The state's interest in requiring attorney representation is not as substantial as the tribal interests in participating in ICWA proceedings. The state's interest in adequate representation and compliance with procedure and protocol in general cannot compare with a tribe's interests in its children and its own future existence. Also, in the narrow context of ICWA proceedings, the state interests are not compromised…. With the applicable preemption test weighted in favor of tribal interests, the state requirement of representation by an attorney is preempted in the narrow context of these ICWA proceedings.

State ex rel. Juv. Dept. v. Shuey, 850 P.2d 378, (Or. App. 1993); see also, In re the Interest of Elias L., 767 N.W.2d 98 (Neb. 2009). Tribal child welfare workers need the protection of federal regulations to prevent charges of unauthorized practice of law and maintain the tribe's practical ability to intervene.

— Define tribal representative to clarify that where the tribal representatives are attorneys, they are not be required to be licensed in the jurisdiction of the child custody proceeding in question. A preemption analysis also applies to the state requirement that tribal representatives when attorneys are bond by the rules of *pro hac vice*. *See, e.g.,* In re A.T., Order, No. 07JV5 (District Court Moffet County, Co, Jul 28, 2008). Under a federal preemption analysis, the rights and interests of the tribe to participate in ICWA proceedings far outweigh the rights and interests of a state with regard to the practice of law.

Tribal in-house ICWA attorneys face numerous barriers in their practice, but a large one is the potential for charges of unauthorized practice of law. Because tribes intervene in cases wherever the tribal children are, tribal attorneys must often appear in states where they are not licensed. This opens tribal attorneys up to unauthorized practice of law issues both in the state where they are intervening and in their home state. While appearing *pro hac vice* is often offered as a solution, it has significant limitations, including the right of the state to deny the application. *See* Ga. Comp. R. & Regs. 4.4(d)(1).

Other barriers include cost, number of appearances, and requirements of local co-counsel. Many states have significant fees for appearing *pro hac vice*. Rule 404(e), SCACR ($250 for each application in South Carolina); Mich. Ct. R. 8.126 (A)(1)(d) ("fee equal to discipline and client-

protection portions" of the bar member's annual dues); IBCR 227(a)(4) ($325 fee in Idaho); Tex. Gov. Code Ann. § 82.0361(b) ($250 for each case); Ga. Sup. Ct. R. 2, 3 ($75 for each application plus a $200 annual fee); Miss. Rules of App. Proc. R. 46(5)($200 for each application). More than one state limits the number of time an attorney can appear *pro hac vice*. Rule 404(f), SCACR (six times in a calendar year); Cal. R. Ct. 9.40 ("repeated appearances" cause for denial of application; Mich. Ct. R. 8.126 (A)(1)(c) (fewer than five appearances); Miss. R. App. Pro. 46 (b)(1)(iii)(five appearances); IBCR 227(h)(2) (reciprocal to the attorney's home state number). Other states require the local co-counsel to appear at each hearing. Rule 404(i), SCACR; Ind. Admis. Disc. R. 3; IBCR 227(b)(2); Miss. R. App. Pro. 46 (b)(4), which is cost prohibitive for tribes, essentially preventing tribes from asserting their rights under the law.

Many tribal attorneys are not licensed to practice in the jurisdiction where a child custody proceeding is located, so they need the protection of federal regulations to prevent charges of unauthorized practice of law and to maintain the tribe's practical ability to intervene. A provision could also be added which states that if the State Court does require either 1) that an attorney represent the tribe; or 2) that the tribe follow local *pro hac vice* rules and associate with local counsel, the court must provide counsel and/or cover these costs. See, e.g., *In re Alexandria Y.*, 53 Cal.Rptr.2d 679 (1996) (where court appointed counsel for the tribe).

— The final rule should also clarify that a state may not limit the number of ICWA child custody proceeding appearances a tribal attorney may make in a given time period, via *pro hac vice* rules or otherwise. The Act is clear that the tribe is not limited in the number of cases in which it can assert its rights. The tribal attorney should be allowed to represent the tribe in any and all cases involving a member child or child eligible for membership.

Section 23.102 What terms do I need to know?

Agency
The Proposed Rule defines agency as "a private state-licensed agency or public agency and their employees, agents or officials involved in and/or seeking to place a child in a child custody proceeding." 80 Fed. Reg. at 14885 (to be codified at 25 C.F.R. § 23.2).

We strongly support the inclusion of a definition for this term in the final rule. There are numerous examples of agencies who have engaged in unethical behavior in attempts to circumvent ICWA. Clarifying that this proposed rule must be followed by agencies as well as states will help prevent future ignorance or circumvention of the law. *See, e.g.*, *In Re Bridget R.*, 49 Cal. Rptr. 2d 507, 517 (Cal. Ct. App. 1996) (noting that the father in this voluntary private adoption had identified himself on the relinquishment form as Native American, but when advised by the adoption attorney that "the adoption would be delayed or prevented if Richard's Indian ancestry were known, [father] filled in a revised form, omitting the information that he was 'Indian'"); *In the Matter of the Adoption of Infant Boy Crews*, 803 P.2d 24, 26 (Wash. Ct. App. 1991) (noting birth mother's testimony that " at a meeting with [adoption counselor] in April, [adoption counselor] inquired whether [mother] had any Indian blood. [Mother] responded that she did, but did not know how much. [Adoption counselor] then told [mother] that an

investigation into potential tribal affiliation would delay the adoption, and might require that the baby reside in a foster home. [Adoption counselor] advised Crews not to mention her Indian blood to anyone, stating, "What I don't hear, I don't know."); *Catholic Soc Servs. v. CAA*, 783 P.2d 1159, 1161 (Alaska 1989) (listing the improprieties of the adoption agency who knew of mother's Indian heritage: "[Mother] appeared before a probate master in a voluntary relinquishment proceeding. [Mother] indicated that she wanted [child] to be adopted by the Caucasian couple with whom [child] now lives...At [adoption agency's] request, [mother] signed a Relinquishment of Parental Rights. [Adoption agency] did not offer [mother] the alternative consent to adoption form; neither did [adoption agency] explain to [mother] that [adoption agency] would become CMF's legal custodian once a decree terminating [mother's] parental rights was entered. Finally, [adoption agency] did not inform [mother] of the existence of her tribal organization, the Cook Inlet Tribal Council, or her right to be represented by her own attorney. The Cook Inlet Tribal Council (CITC) received no notice of the proceedings from any source and so did not intervene); *In re Adoption of Kenton H.*, 725 N.W.2d 548 (Neb. 2007)(Mother whose children had been placed in foster care and testified that she "was hospitalized and 'under the influence of morphine and other mind-altering medications' when she signed the relinquishment… and that while she was in this condition, a DHHS caseworker told her that her only hope of keeping any of her children was to voluntarily relinquish her rights to Kenton" for voluntary adoption).

We recommend the following changes:

— Clarify that these regulations apply to all agencies who contract with a state to provide child welfare and adoption services, regardless of whether or not they are formally "state-licensed"; not all agencies or practitioners who provide child welfare services and/or coordinate adoptions are state licensed, but all agencies should be included in the rule.

— Clarify that that it is the responsibility of the state to monitor contractors and subcontractors for compliance with ICWA and the promulgated regulations. States are moving toward privatizing child welfare and are increasingly using contractors to provide services to children and families; these agencies must comply with ICWA, but it is ultimately the responsibility of the State to ensure that ICWA is complied with, however state child welfare services are provided.

— Include in this term private attorneys who broker adoptions without formal adoption agency involvement. Many adoptions are coordinated by legal practitioners who personally arrange for the adoption without the use of a private state-licensed agency. *See,* Melinda Lucas, *Distinguishing Between Grey Market and Black Market Adoptions*, 34 Fam. L. Q. 553 (2000). These practitioners and adoptions are not outside the purview of ICWA or these regulations. Therefore, attorneys licensed by the state who participate in private adoptions should be included in the definition of agency. *See, e.g., In the Matter of Baby Girl B.*, 67 P.3d 359 (Okla. 2003) ("Every attorney involved in matters concerning Indian children subject to the Indian Child Welfare Act is under an affirmative duty to insure full and complete compliance with these Acts.")

Section 23.103 *When does ICWA apply?*

Subsection (a) of Section 23.103 in the Proposed Rule states that “ICWA applies whenever an Indian child is the subject of a State child custody proceeding as defined by the Act. ICWA also applies to proceedings involving status offense or juvenile delinquency proceedings if any part of those proceedings results in the need for placement of the child in a foster care, preadoptive or adoptive placement, or termination of parental rights.” 80 Fed. Reg. at 14886-87.

We recommend the following change:

— Clarify that once it has been determined that a child welfare (dependency) or juvenile justice (delinquency) proceeding requires the application of ICWA, ICWA applies throughout the duration of the case, regardless of the age of the child. Our comments discuss this issue in the section on the definition of "Indian child;" we reiterate those comments here. Clarification would be appropriate at both locations

Subsection (b) of this Section 23.103 in the Proposed Rule states: “There is no exception to application of ICWA based on the so-called ‘existing Indian family doctrine’ and the following non-exhaustive list of factors that have been used by courts in applying the existing Indian family doctrine may not be considered in determine whether ICWA is applicable.” The list provided includes factors such as parent/child participation in tribal customs, voting, religious, social, cultural, or political events; the relationship between the parent and child; the ties the parent/child has to the tribe; participation of tribe; and blood quantum. 80 Fed. Reg. at 14887.

We enthusiastically support the inclusion of this provision in the final rule. The majority of state courts—19—have affirmatively rejected application of the existing Indian family (“EIF”) doctrine. *In re Adoption of T.N.F.,* 781 P.2d 973 (Alaska 1989); *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960 (Ariz. Ct. App. 2000); *In re N.B.*, 199 P.3d 16 (Colo. App. 2007); *In re Baby Boy Doe*, 849 P.2d 925 (Idaho 1993); *In re Adoption of S.S.*, 622 N.E.2d 832 (Ill. App. Ct. 1993), *rev’d on other grounds*, 657 N.E.2d 935 (111. 1995); *In re A.J.S.*, 204 P.3d 543 (Kan. 2009); *In re Elliott*, 554 N.W.2d 32 (Mich. Ct. App. 1996); *In re Adoption of Riffle*, 922 P.2d 510, 514 (Mont. 1996); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re Baby Boy C.*, 805 N.Y.S.2d 313 (N.Y. App. Div. 2005); *In re A.B.*, 663 N.W.2d 625 (N.D. 2003); *Quinn v. Walters*, 845 P.2d 206 (Or. Ct. App. 1993), *rev’d on other grounds*, 881 P.2d 795 (Or. 1994); *In re Adoption of Baade*, 462 N.W.2d 485 (S.D. 1990); *In the Interest of D.A.C.*, 933 P.2d 993 (Utah Ct. App. 1997); See Cal. Welf. & Inst. Code § 224(c) (2014); Iowa Code § 232B.5 (1999); Minn. Stat. § 260.771 (2010); Okla. Stat. 10, § 40.1 (2010); Wash. Rev. Code § 13.34.040(3) (2011); Wis. Stat. § 938.028(3)(a) (2011). Only seven jurisdictions continue to follow this doctrine. *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 (Ind. 1988); *Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996); *Hampton v. J.A.L.,* 658 So. 2d 331 (La. Ct. App. 1995); *In the Interest of S.A.M.*, 703 S.W.2d 603 (Mo. Ct. App. 1986); *In re N.J.*, 221 P.3d 1255 (Nev. 2009); *In re Morgan*, 1997 WL 716880 (Tenn. Ct. App. 1997).

Although presented with the opportunity, the Supreme Court did not adopt the EIF doctrine. *See Baby Girl,* 123 S. Ct. 2552. *Baby Girl* held that two specific sections of ICWA, 25 U.S.C. § 1912(d) and (f), do not apply in a voluntary adoption proceeding when the father has not had previous legal or physical custody of the child, and that for § 1912(d) to apply, the father must also have abandoned the child. *Id.*

This holding is much narrower than the EIF doctrine, which precludes application of ICWA *in its entirety*. In fact, the majority opinion noted the dissent's observation that "'numerous ICWA provisions not at issue here afford 'meaningful' protections to biological fathers regardless of whether they ever had custody." *Id.* at 2561, 2573-2575. The provisions of the Act that the dissent indicated would continue to apply to fathers similarly situated to the biological father in *Baby Girl* are: 25 U.S.C. § 1911(b) (right to request transfer to tribal court); 25 U.S.C. §§ 1913(a) and (c) (heightened protection and procedures for voluntary consent to adoption); 25 U.S.C. § 1912(a) (right to notice); 25 U.S.C. §1912(b) (right to counsel); and 25 U.S.C. § 1912(c) (access to court documents). 123 S. Ct. at 2574-75 (Sotomayor, J., dissenting) (listing these same rights). The majority implicitly accepted the dissent's position on this point: that these protections continue to apply to biological fathers, even in the absence of a "previously existing Indian family." *Id.* at n.6.

This reading of *Baby Girl* is also supported by the Court's confirmation of the holding in *Holyfield*. In *Holyfield*, the Court held that the statute as a whole is triggered when an "Indian child," as defined by ICWA, is the subject of "a child custody proceeding." *Holyfield*, 490 U.S. at 42. *Baby Girl* referenced this holding and noted that it was "undisputed" that both elements were present in this case. *Baby Girl*, 133 S. Ct. at 2556 n.1. In doing so, the Court implicitly affirmed the proposition that ICWA as a whole necessarily applies to a "child custody proceeding" involving an "Indian child," even if a father without custody is denied certain rights under two of its provisions. This is the antithesis of the EIF doctrine, which precludes the application of *all* provisions of ICWA where a court has determined that there was not a previous Indian family, even if the child is an "Indian child" according to the statute.

This provision's rejection of the EIF doctrine is thus consistent with the Supreme Court's opinions in *Holyfield* and *Baby Girl*, with the majority of state courts, and with the intent of ICWA, we applaud its inclusion.

Subsection (d) of this section in the Proposed Rule states "If there is any reason to believe the child is an Indian child, the agency and State court must treat the child as an Indian child, unless and until it is determined that the child is not a member or is not eligible for membership in an Indian tribe." 80 Fed. Reg. at 14,887.

We enthusiastically support the inclusion of this provision in the final rule. ICWA provides many important protections to children and families early in the case that are lost if not provided as specified. The National Council for Juvenile and Family Court Judges' *ICWA Training Module II* states:

> The National Council of Juvenile and Family Court Judges recommends that it is best to treat a case as an ICWA proceeding whenever it is suspected that an Indian child as defined by ICWA is involved. This practice avoids revisiting decisions and determinations months down the road if it is determined to be an ICWA proceeding because revisiting placement or jurisdiction decisions may impact the best interests of the Indian child and delay permanency.

National Council of Juvenile and Family Court Judges, *Public Comment Notice of Proposed Rulemaking—Regulations for State Courts and Agencies in Indian Child Custody Proceedings*, 3-4 (2015).

ICWA has been deemed the "gold standard of child welfare practice" by mainstream organizations. *See* Brief of Casey Family Programs, Child Welfare League of America, Children's Defense Fund, Donaldson Adoption Institute, North American Council on Adoptable Children, Voice for Adoption, and twelve other national child welfare organizations as *Amici Curiae* in Support of Respondent Birth Father at 2, *Adoptive Couple v. Baby Girl,* No. 12-399 (emphasis added) ("Amici are united in their view that, in the Indian Child Welfare Act, Congress adopted *the gold standard* for child welfare policies and practices that should be afforded to all children, and that it would work serious harm to child welfare programs nationwide for this Court to curtail the Act's protections and standards,"); Casey Family Programs, *Public Comment Notice of Proposed Rulemaking—Regulations for State Courts and Agencies in Indian Child Custody Proceedings*, 1 (2015). There is, therefore, no harm in providing the protections of ICWA to children who are later determined not to be "Indian children." But, where ICWA is erroneously not applied at the outset of the case, the remedy to reverse and re-hear the case is itself inconsistent with child welfare best practices. 25 U.S.C. § 1914; *See In re Morris*, 815 N.W.2d 62 (Mich. 2012) (remedy for no notice is conditional reversal until notice is completed successfully); *In re Justin S.,* 150 Cal.App.4th 1426 (Cal. Dist. Ct. App. 2007) (listing cases approving of conditional reversals in ICWA notice cases). This provision, therefore, is a necessary protection for all children.

We recommend the following technical change:

— Clarify that it is never appropriate for a state court to make a determination that a child involved in the proceeding before it is not Indian, without providing notice to the tribe if there is reason to believe the child may be Indian. In many instances the tribe is able to take immediate administrative action to ensure ICWA's applicability, such as assisting the parent in becoming a member of the tribe, and a lack of notice would interfere in the tribe's ability to take such action and ensure the child is protected by ICWA.

Subsection (f) of this section in the Proposed Rule states: "Voluntary placements that do not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand are not covered by ICWA. Such placements should state explicitly the right of the parent or Indian custodian to regain custody of the child upon demand." 80 Fed. Reg. at 14,887.

We recommend the following changes:

— Clarify that because of their informal nature, these voluntary proceedings are separate and distinct from those described in section 23.103(g) (which provides that "[v]oluntary placements in which a parent consents to a foster care placement or seeks to permanently terminate his or her rights or to place the child in a preadoptive or adoptive placement are covered by ICWA"). The proceedings described in (f) are those that operate outside of both the court and child welfare systems.

— Clarify that it is not appropriate for an involuntary proceeding to be commenced based upon an assertion that a parent's previous voluntary placement of the child is proof of abandonment of the child. This language will protect parents that enter into voluntary placements from having that placement used as evidence against them in another child custody proceeding which could prevent parents from seeking services and put children at risk. Voluntary placements covered by ICWA (as

described in Section 23.103(g)) should also be prohibited from being the basis for an involuntary proceeding.

Subsection (g) of this section in the Proposed Rule states, "Voluntary placements in which a parent consents to a foster care placement or seeks to permanently terminate his or her rights or to place the child in a preadoptive or adoptive placement are covered by ICWA." 80 Fed. Reg. at 14,887.

We recommend the following changes:

— Clarify that voluntary third-party guardianships are included under this provision. We incorporate our earlier comments on the definition of "voluntary placement" here. This provision should specify that it includes third-party guardianships, including those initiated by family members.

— Clarify that it is not appropriate for an involuntary proceeding to be commenced based upon an assertion that a parent's consent to a previous voluntary placement of the child is proof of abandonment of the child. This language will give protection to parents that enter into voluntary placements, from having that placement used as evidence against them in another child custody proceeding. Voluntary placements not covered by ICWA (as described in Section 23.103(f)) should also be prohibited from being the basis for an involuntary proceeding.

23.105 *How does this subpart interact with State Laws?*

Subsection (b) of this section closely tracks the language of ICWA, 25 U.S.C. § 1921, stating: "In any child custody proceeding where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires that the State court must apply the higher standard." 80 Fed. Reg. at 14,887.

We recommend the following changes:

— In accordance with the intent and purpose of ICWA, with the trust responsibility recognized in 25 U.S.C. § 1901(3), and with the express policy that ICWA is the "*minimum* federal standard for the removal of Indian children" (25 U.S.C. § 1902), clarify that state and federal laws that provide a higher standard of protection for *tribes* must also be applied in addition to ICWA. *Cherokee Nation v. Nomura*, 160 P.3d 967 (Okla. 2007) (using 25 U.S.C. § 1922 to justify heightened protections for tribes).

— Clarify that "where state laws, regulations, policies, or tribal-state agreements provide higher protections for parents and tribes than those provided in these regulations, those higher standards should be applied." This provision, complementary to the provision in the Act, will ensure that, in line with the intent and language of the act, parents and tribes receive the highest protection possible and the Act and its corresponding regulations remain the "minimal federal standard."

— Include a provision that states that ICWA's minimum federal standards preempt any state laws in *direct conflict* that do not provided *heightened* protections. After taking into consideration the fact that family law is an area typically reserved to the states, Congress found that the abusive practices of

state courts and social service providers working with Indian children and families required federal intervention via ICWA:

> "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 (1978). This intent should be reflected in a clear statement in the proposed rule.

23.106 *When does the requirement for "active efforts" begin?*

This section states: "a) The requirement to engage in 'active efforts' begins from the moment the possibility arises that an agency case or investigation may result in the need for the Indian child to be placed outside the custody of either parent or Indian custodian in order to prevent removal. (b) Active efforts to prevent removal of the child must be conducted while investigating whether the child is a member of the tribe, is eligible for membership in the tribe, or whether a biological parent of the child is or is not a member of a tribe." 80 Fed. Reg. at 14,887.

We enthusiastically support the inclusion of this section and recommend the following:

- Include language that further clarifies that "active efforts" are required when intervention has occurred and placement in foster care *may* occur (for example, in voluntary service agreements and differential or alternative response programs). Per the language of the statute, "any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that "active efforts" *have been made* to provide remedial services and rehabilitative programs designed *to prevent* the breakup of the Indian family and that these have proved unsuccessful." 25 U.S.C. § 1912(d) (emphasis added). Thus, whenever there is possibility that actions on the part of the agency may lead to the removal of a Indian child, "active efforts" to "prevent removal" should be provided, even if a child remains or is returned to the home. *State ex rel. Juv. Dept. v. Cooke*, 744 P.2d 596 (Or. Ct. App. 1987) (holding that there must be compliance with ICWA throughout a juvenile proceeding, including the adjudication stage, even though the actual court order did not place the Indian child in foster care); In re Interest of J.R.H.,358 N.W.2d 311 (Iowa 1984) (finding that a proceeding to determine whether a child is in need of assistance due to parental unfitness could result in potential foster care placement of the Indian child and, therefore, clearly fell under ICWA); In re Interest of Shalya H. 846 N.W.2d 668 (2014) 22 Neb. App. 1 (requiring "active efforts" because "[a]lthough the children were returned to the home prior to the adjudication and disposition hearing, there remains the possibility that removal could occur again, since the case has not been dismissed and DHHS remains the legal custodian of these children).

  We suggest the following language: "Agencies and state courts, in every child custody proceeding where removal may occur, must provide, or ensure, the provision of "active efforts". This includes when an agency opens an investigation or the court orders the family to engage in services to keep

the child in the home as part of a diversion, differential, alternative response, voluntary service agreement or other program."

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

Provision (a) of this section states "agencies must ask whether there is reason to believe a child that is subject to a child custody proceeding is an Indian child. If there is reason to believe that the child is an Indian child, the agency must obtain verification, in writing, from all tribes in which it is believed that the child is a member or eligible for membership, as to whether the child is an Indian child." 80 Fed. Reg. at 14,887.

We recommend the following change:

- The term "obtain" should be changed to "seek." Using the term "obtain" puts an undue requirement on both the state and tribe.
- Include detailed requirements for the inquiries agencies must make. We recommend including who must be asked (child, parents, other relatives, custodians), what should be asked (any potential Indian heritage that could mean that the child is a member or eligible for membership in a tribe), and when these questions should be asked (at a minimum, the onset of each new "child custody proceeding").

Provision (b)(1) of this section states, "State courts must ask, as a threshold question at the start of any State court child custody proceeding, whether there is reason to believe the child who is the subject of the proceeding is an Indian child by asking each party to the case, including the guardian ad litem and the agency representative, to certify on the record whether they have discovered or know of any information that suggests or indicates the child is an Indian child. (1) In requiring this certification, courts may wish to consider requiring the agency to provide: (i) Genograms or ancestry charts for both parents, including all names known (maiden, married and former names or aliases); current and former addresses of the child's parents, maternal and paternal grandparents and great grandparents or Indian custodians; birthdates; places of birth and death; tribal affiliation including all known Indian ancestry for individuals listed on the charts, and/or other identifying information; and/or (ii) The addresses for the domicile and residence of the child, his or her parents, or the Indian custodian and whether either parent or Indian custodian is domiciled on or a resident of an Indian reservation or in a predominantly Indian community." *Id.*

We recommend the following change:

- Change the language from "may wish to" to "should" regarding genograms, domicile information, and information concerning whether a child is a ward of a tribal court. When asking parties and other individuals (including guardians ad litem and agency representatives) in the courtroom to certify if there is reason to believe that a child may be an Indian child, these tools are necessary for an accurate and meaningful inquiry.

  Further, without detailed ancestry information, tribal verification of a child's Indian status is not always immediately possible. It may require follow-up, and delays can occur. To avoid such delays, the

NCJFCJ State Court Judge checklist states: "Was proper notice and inquiry mailed to all tribes in which the child may be eligible for membership, including a family chart or genogram to facilitate the tribe's membership determination?" National Council of Juvenile and Family Court Judges, *ICWA Benchcard Checklist*, 12 (2003). We would also note that other federal child welfare law also contains strong language regarding identification of adult relatives of children in substitute care and notice to all adult relatives of these children of their placement in out of home care which would require similar inquiries. 42 U.S.C. § 679(29).

Provision (b)(2) of this section states: "(2) If there is reason to believe the child is an Indian child, the court must confirm that the agency used active efforts to work with all tribes of which the child may be a member to verify whether the child is in fact a member or eligible for membership in any tribe, under paragraph (a) of this section." 80 Fed. Reg. at 14,887.

We recommend the following change:

— In order to avoid confusion, this provision should require that "due diligence" and "continuing efforts" be made to verify tribal membership or eligibility for membership as opposed to "active efforts." The term "active efforts" is a specific and important term of art used to describe those services required by a state to preserve or reunify a family, 25 U.S.C. § 19012(d). Additionally, the definition of "active efforts" provided by Proposed Rule § 23.2 has little relevance to this use of the term and provides little guidance on the efforts required to verify whether the child is in fact a member or eligible for membership in any tribe.

Provision (c) of this section states: "An agency or court has reason to believe that a child involved in a child custody proceeding is an Indian child if: (1) Any party to the proceeding, Indian tribe, Indian organization or public or private agency informs the agency or court that the child is an Indian child; (2) Any agency involved in child protection services or family support has discovered information suggesting that the child is an Indian child; (3) The child who is the subject of the proceeding gives the agency or court reason to believe he or she is an Indian child; (4) The domicile or residence of the child, parents, or the Indian custodian is known by the agency or court to be, or is shown to be, on an Indian reservation or in a predominantly Indian community; or (5) An employee of the agency or officer of the court involved in the proceeding has knowledge that the child may be an Indian child." 80 Fed. Reg. at 14,887-88.

We recommend the following change:

— Insert an additional provision (6) which states "The child is or has been a ward of a tribal court." A child's wardship in tribal court indicates potential Indian status and is information the court and agency should be collecting to effectively determine jurisdiction. This information should be verified early in the case to allow for appropriate application of ICWA.

23.108 *Who makes the determination as to whether a child is a member of a tribe?*
We enthusiastically support the inclusion of this entire section in the final rule.

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

is a member of the tribe(s), is eligible for membership in the tribe(s), or whether a biological parent of the child is a member of the tribe(s)." 80 Fed. Reg. at 14,888.

We recommend the following change:

- Include language that states that nothing in this provision prevents a tribe that has previously made a determination of membership or eligibility from revisiting said decision or correcting said decision for any purpose, and any new decision supersedes the previous decision. For ICWA purposes, the tribe or Alaskan Native village has the sole power to decide membership. *In re A.G.*, 109 P.3d 756 (Mont. 2005); *In re A.L.W.*, 32 P.3d 297 (Wash. Ct. App. 2001); *see also, Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (A foundational precept of federal Indian law is the tribal nation's right to determine its own membership). Often because of inadequate information, incorrect information, or because of a change in tribal laws or policies, a child's eligibility or a tribe's determination of eligibility can change. Including this language will further protect a tribe's right to determine a child's membership. It will also ensure that ICWA protects all eligible children.

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?*

We enthusiastically support the inclusion of this entire section in the final rule. It effectively recognizes tribal self-determination.

Provision (d) of this section states "the tribe designated as the Indian child's tribe may authorize another tribe to act as a representative for the tribe in a child custody case." 80 Fed. Reg. at 14,888.

We recommend the following change:

- The term "child custody case" should be changed to "child custody proceeding" to keep this provision consistent with language of the Act and the other sections and provisions of the Proposed Rule.

23.111 *What are the notice requirements for a child custody proceeding involving an Indian child?*
Provision (a) of this section of the Proposed Rule states: "When an agency or court knows or has reason to believe that the subject of a voluntary or involuntary child custody proceeding is an Indian child, the agency or court must send notice of each such proceeding (including but not limited to a temporary custody proceeding, any removal or foster care placement, any adoptive placement, or any termination of parental or custodial rights) by registered mail with return receipt requested to: (1) Each tribe where the child may be a member or eligible for membership; (2) The child's parent; and (3) If applicable, the Indian custodian." 80 Fed. Reg. at 14,888.

We support the inclusion of notice in voluntary proceedings in the final rule. ICWA must be followed in both voluntary (25 U.S.C. § 1913) and involuntary (25 U.S.C. § 1912) proceedings that involve an "Indian child." *Holyfield,* 490 US at 50. To ensure ICWA's application in such proceedings, agencies and state courts must verify whether or not a child is an "Indian child." A foundational precept of federal Indian law is the tribal nation's right to determine its own membership. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); BIA Guidelines, 80 Fed. Reg. at 10,153. Determining status and notifying the tribe are

fundamentally intertwined, since only the tribal nation can confirm that a child is, or is eligible to be, a tribal member. While a court may have reason to believe that a child is a citizen of a tribal nation based on evidence provided by the child's parent or Indian custodian, until the court receives confirmation of that child's membership or eligibility from the tribe, the court cannot be certain of the child's status and whether or not ICWA applies to the case at hand. Tribal verification is always needed. A showing of—or failure to show—citizenship by any other party is insufficient. It is the right of the tribe to determine its membership, and the child's right to her relationship with the tribe must be confirmed by the tribe. Notice is thus essential for a proper determination of whether a child is an "Indian child" and whether ICWA applies in both voluntary and involuntary proceedings. *In re C.H.*, 79 P.3d 822, 828 (Mont. 2003)("[N]otice [in a voluntary proceeding] must be given to the Northern Cheyenne so that it may determine whether or not D.H. is or is not an Indian child").

Additionally, ICWA as a whole was intended to protect tribes as well as children and parents, and this purpose cannot be met without notice to the tribe.

> Congress intended the protections of the Federal Act to extend not only to Indian children and families, but also to the tribes themselves. Although notice to the tribe was not the main issue [in *Holyfield*], the Supreme Court recognized Congress intended the Federal Act to promote uniformity and the protection of individual Indians *and* the Tribes…Neither the purpose of the Federal Act nor the Oklahoma Act can be achieved without notice to the tribe or consideration of the placement preferences.

Cherokee Nation v. Nomura, 160 P.3d 967 (Okla. 2007). ICWA expressly protects tribes' rights. "Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians." *Holyfield*, 490 US at 49; *see, also,* 25 U.S.C. § 1911(c) (establishing a tribe's right to intervene in state court termination of parental rights proceedings); 25 U.S.C. § 1911 (a) & (b) (establishing a tribe's right to exclusive jurisdiction and transfer, respectively); 25 U.S.C. § 1915 (b) (establishing the right of tribes to approve of appropriate placement preferences). These rights are further emphasized by the fact that tribes' involvement in state child welfare proceedings, is not based solely on the requirements of ICWA, but also on tribes' inherent *parens patriae* authority. *See State of Alaska, Dep't of Health and Social Services v. Native Village of Curyung*, 151 P.3d 388, 402 (Alaska 2006) (recognizing that Indian tribes have a right to bring suit "as *parens patriae* to prevent future violations" of ICWA); *see also Native Village of Venetie IRA Council v. Alaska*, 155 F.3d 1150, 1152 (9th Cir. 1998) (same); *State v. Native Village of Tanana*, 249 P.3d 734, 736 (Alaska 2011) (same).

In accord with due process, a tribe's right to intervene in a voluntary termination of parental rights proceeding must necessarily include the right to notice; otherwise, the tribe will not have the opportunity to assert its rights under ICWA. *In re Baby Girl Doe*, 865 P.2d 1090, 1095 (Mont. 1993)("[T]he Tribe's rights [to intervene] would be hollow indeed if they were lost by failure of the State to timely notify it of foster placement.").

We recommend the following change:

— Include language regarding the necessity of notice where child welfare intervention has occurred and placement in foster care *may* occur (for example, in voluntary service agreements and differential or alternative response programs). If the child is an Indian child and removal may occur, the "active efforts" requirement is triggered; notice to the tribe is, therefore, necessary to determine whether the child is an Indian child and whether "active efforts" to prevent removal are necessary. To know whether "active efforts" are necessary requires that the Indian status of the child be determined. Verification of Indian status requires that notice be sent to the relevant tribe or tribes.

  Provision of "active efforts" also requires efforts to engage the tribe and utilize tribal services. 25 C.F.R. § 23.2; *see also,* Oregon Judicial Dept., *Active Efforts Principals and Expectations* (2010), *Available at* http://courts.oregon.gov/OJD/docs/OSCA/cpsd/citizenreview/ActiveEffortsPrinciplesandExpectation s.pdf; Wisc. Dept. of Children & Families, Active Efforts: A Child Welfare Practitioner's Guide for Meeting the WICWA Active Efforts Requirement (2013), *available at* http://dcf.wisconsin.gov/publications/ pdf/464.pdf. In order to engage the tribe in the case planning and ensure that "active efforts" are provided, notice must be sent to the tribe when service provision begins.

  We suggest adding the following language: "Even in those cases in which the child is not removed from the home, such as when an agency opens an investigation or the court orders the family to engage in services to keep the child in the home as part of a diversion, differential, alternative response or other program, agencies and courts should follow the verification and notice provision." BIA Guidelines, A.3(c).

Provision (h) of this section of the Proposed Rule states, "[n]o substantive proceedings, rulings or decisions on the merits related to the involuntary placement of the child or termination of parental rights may occur until the notice and waiting periods in this section have elapsed." 80 Fed. Reg. at 14,889.

We recommend the following change:

— Add language to this section ensuring the parents' rights to judicial review of an emergency removal of an Indian child that was not approved by a judicial officer. In some jurisdictions, hearings occur between 24 and 48 hours after the removal of the child. At those emergency hearings, decisions are made about continuing the out-of-home placement of the child. Because these hearings occur and are decided within such a short period of time, it is impossible to notify a tribe by registered mail, return receipt requested, and give them adequate time to intervene or transfer. Due to the rapid decisions rendered in these cases, when the Court has not provided notice to a tribe, these decisions should not be binding on the tribe or party who was not notified of the hearing and decision.

  We suggest adding: "…except when State law provides an earlier hearing for the parents or Indian custodians. In that case, the State court must attempt to ensure compliance with notice requirements of the law. A State may notify a tribe of an emergency hearing via telephone or email in addition to the legally required registered mail notice. When notice cannot be provided as required at an emergency removal hearing, no finding of the State court made at the hearing shall be binding upon the tribe or other party who was not notified of said hearing."

Provision (i) of this section of the Proposed Rule states: "If the child is transferred interstate, regardless of whether the Interstate Compact on the Placement of Children (ICPC) applies, both the originating State court and receiving State court must provide notice to the tribe(s) and seek to verify whether the child is an Indian child." 80 Fed. Reg. at 14,889.

We enthusiastically support the inclusion of this provision in the final rule. In the ICPC process, notice is often overlooked or each state involved in the welfare of the child assumes the other to have sent notice. This rule, which clarifies the responsibilities of both the sending and receiving state, will ensure that a child is not placed across state lines without notice to the tribe. This effectuates the notice provisions of ICWA in a manner consistent with the intent of the statute and protects parents' and tribes' rights under ICWA.

We recommend the following changes:

- The ICPC process does not involve a transfer of jurisdiction, just the placement of a child across jurisdictions. Association of Administrators of the ICPC, *ICPC FAQ* (2015) http://www.aphsa.org/content/AAICPC/en/resources/ICPCFAQ.html ("The Compact ensures prospective placements are safe and suitable before approval, and it ensures that the individual or entity placing the child remains legally and financially responsible for the child following placement"). This provision should, therefore, reference the responsibility of the sending and receiving state ICPC *administrators* to send notice to the relevant tribe when a child is transported across state lines to ensure tribal notice when placement involving the ICPC occurs.

- Where a transfer between two state *jurisdictions* occurs in a child welfare proceeding (where ICPC therefore is not employed), this provision should clarify that it is the responsibility of both of the state agencies and courts involved to send notice to the tribe.

We recommend the following addition to this section:

- The Fostering Connections to Success and Increasing Adoptions Act, codified at 42 U.S.C. § 670 *et seq.,* requires that to receive certain federal funds, the State must identify and provide notice to all adult grandparents and other adult relatives within 30 days of the removal of a child. 42 U.S.C. § 671(a)(29). A subsection (j) should be added to the regulations clarifying that nothing herein is meant to lessen those notice requirements.

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

We strongly support the inclusion of this entire section in the final rule. Compliance with the law at the earliest possible stage in a case promotes family unity, ensures placement stability, and provides tribes the opportunity to intervene and transfer in a timely manner. This section promotes early compliance and each of these goals.

This regulation usefully clarifies that emergency removals must be as short as possible, terminate when the emergency has ended, and that ICWA-compliant proceedings must be expeditiously initiated in accord with the law. 25 U.S.C § 1922 (Nothing in this subchapter shall be construed to prevent the

emergency removal of an Indian child... or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.)

As this section makes clear, the requirements of § 1922 and the corresponding Proposed Rule apply to all Indian children, regardless of domicile or residence. *Oglala Sioux Tribe v. Van Hunnik* (D.S.D. 2015), *available at* Order Granting Motion for Partial Summary Judgment, Oglala Sioux Tribe v. Van Hunnik, No. 5:13-cv-05020-JLV (D.S.D. Mar. 30, 2015).; *Oglala Sioux Tribe v. Van Hunnik*, 993 F.Supp.2d 1017 (D.S.D. 2014) (order denying motion to dismiss). This section will ensure that courts provide the essential protections of ICWA at the earliest possible stages of a case, protections that have been historically overlooked or denied. *Id.*

We recommend a few technical changes to strengthen this section.

Provision (f) of this section of the Proposed Rule states: "Temporary emergency custody should not be continued for more than 30 days. Temporary emergency custody may be continued for more than 30 days only if: (1) A hearing, noticed in accordance with these regulations, is held and results in a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness, that custody of the child by the parent or Indian custodian is likely to result in imminent physical damage or harm to the child; or (2) Extraordinary circumstances exist." 80 Fed. Reg. at 14,890.

As currently drafted, this provision could be interpreted to allow a child to be removed for up to 30 days without an evidentiary hearing, notwithstanding the language in (a)(2). In the alternative, the provision could inadvertently interfere with the "normal" ICWA foster care hearing requirements. Accordingly, we suggest redrafting subsection (f) to include the following components:

— Clarify that the hearing required in order to continue temporary emergency custody for more than 30 days does not excuse the initial emergency hearing required under state law for all children. The timing of the hearing would be as provided by state law, provided that it is no longer than 72 hours after removal. At these hearings courts should accept and evaluate all relevant evidence.

  We suggest the following language: "[This provision indicates a requirement in addition to, not in lieu of a state's initial emergency removal or emergency placement proceeding, which must occur within 72 hours of the child's removal.] At any court hearing regarding the emergency removal or emergency placement of an Indian child, the court must determine whether the removal or placement is no longer necessary to prevent imminent physical [or emotional] damage or harm to the child. The court should accept and evaluate all information relevant to the agency's determination provided by the child, the

child's Indian custodians, the child's tribe or any participants in the hearing." BIA Guidelines, B.8(e) (bracketed language added).

— "Extraordinary circumstances" must be defined or the exception will swallow the rule. Emergency removals with families in crisis coupled with crowded dockets and overworked staff make "extraordinary circumstances" commonplace in the child welfare system. The definition should therefore clarify extraordinary circumstances.

Provision (g) of this section states: "The emergency removal or placement must terminate as soon as the imminent physical damage or harm to the child which resulted in the emergency removal or placement no longer exists, or, if applicable, as soon as the tribe exercises jurisdiction over the case, whichever is earlier." 80 Fed. Reg. at 14,890.

— Reword this section to provide that the placement must terminate as soon as the emergency no longer exists or as soon "as the tribal court issues an order that the placement terminate." Exercise of tribal jurisdiction by itself should not be the trigger to end a placement; the tribal court must be given the opportunity to make a decision about what should be done to protect to ensure the child's safety.

We recommend the following addition to this section:

— Include a provision (h) that states that ICWA's foster care placement preferences, 25 U.S.C. § 1915(b), apply at the emergency custody hearing. Where application of the foster care placement preferences is not possible, a review of the child's placement must occur within 30 days of removal and the placement preference shall be complied with at that time.

23.115 *How are petitions for [the] transfer of [a] proceeding made?*

We support the inclusion of this section in its entirety in the final rule and recommend the following change:

— Add a provision (e) making clear that tribal jurisdiction is presumed in all ICWA cases, including those where transfer is sought. The Supreme Court has stated that ICWA recognizes tribal courts' concurrent and presumptive jurisdiction over Indian child custody cases where the child is domiciled outside of a reservation. 25 U.S.C. § 1911(b); *Holyfield*, 490 U.S. at 36.

Provision (c) states that "the right to request a transfer is available at any stage of an Indian child custody proceeding, including during any period of emergency removal." 80 Fed. Reg. at 14,890.

We support the inclusion of this provision in the final rule. ICWA provides: "In 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, the court, in the absence of good cause to the contrary, *shall* transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such

transfer shall be subject to declination by the tribal court of such tribe." 25 U.S.C. § 1912(b) (emphasis added).

Although the statute's use of the word "shall" makes transfer mandatory, some courts have denied transfer when the proceedings are at an "advanced stage." This interpretation leaves state courts with wide latitude to deny transfer, including when the state court itself allowed the proceedings to reach an "advanced stage" through insufficient notice to the tribe. *In re J.J.*, 454 N.W.2d 317 (S.D. 1990); *In re A.L.*, 442 N.W.2d 233 (S.D. 1989); *but see*, *In re M.S.* 237 P.3d 161 (Okla. 2010).

There is a two-fold problem with permitting the denial of transfer at an "advanced stage" of the proceedings. First, ICWA defines four separate types of "proceedings": foster care, termination of parental rights, preadoptive placement, and adoptive placement. 25 U.S.C. § 1903 (1)(i-iv). Some courts treat each of these types of proceeding as an individual proceeding, even if they arise from the same incident of abuse or neglect. *In re Interest of Zylena R.*, 825 N.W.2d 173 (Neb. 2012); *In re A.B.*, 663 N.W.2d 625, 632 (N.D. 2003); *In re Welfare of Children of R.M.B.*, 735 N.W.2d 348, 352 (Minn. Ct. App. 2007). Other courts consider the entire set of proceedings arising from the same set of circumstances as a single proceeding. *In re M.H.*, 956 N.E.2d 510, 353 (Ill. App. Ct. 2011). Thus, what one state considers an "advanced stage" of a proceeding, another state may consider the initial stages of a separate proceeding.

Second, tribes may be in agreement with state proceedings prior to termination in order to work with the state for reunification of the family. However, if parental rights are terminated, the tribe may have a new reason to petition for transfer—to ensure the child stays within the community and connected to their family and culture. State courts have erroneously assumed that tribes are indifferent to transfer in such cases, when in fact the timing of such petitions for transfer reflects reasoned decision-making by the tribe and continuous efforts to ensure the child stays in the tribal community. *In re D.M.*, 685 N.W.2d 768, 772 (S.D. 2004). The "advanced stage" interpretation stymies such efforts. For example, in *In re E.S.*, the tribe's motion to intervene was granted. 964 P.2d 404 (Wash. App. 1998). However, the tribe did not move to transfer the case to tribal court until three months later, 13 days before the termination trial was set to begin. The state trial court held that this was an untimely motion to transfer jurisdiction and the Washington appellate court upheld the trial court, even though the tribe stated that it was tribal policy to follow the case in the state court until the "matter goes beyond foster care placement." *Id.* at 411. The right to transfer jurisdictions requires respecting the numerous considerations that cause tribes to transfer cases at different points in a proceeding or before or after specific proceedings as well as ultimately respecting the language and intent of ICWA and support transfer as an important provision in the effort to keep children connected to their culture and tribe.

Thus, this section of the Proposed Rule provides needed clarity concerning transfer and wisely forecloses the "advanced stage" interpretation of "good cause" to deny transfer.

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

Provision (a) in this section of the Proposed Rule states: "Upon receipt of a petition to transfer by a parent, Indian custodian or the Indian child's tribe, the State court must transfer the case unless any of

the following criteria are met: (1) Either parent objects to such transfer; (2) The tribal court declines the transfer; or (3) The court determines that good cause exists for denying the transfer." 80 Fed. Reg. at 14,890.

We recommend the following changes:

— Clarify that either parent has the right to object to a transfer provided that the objection is put into writing and the consequences of the objection have been described to the parent. This additional procedure will ensure that an objection is made only after parents have been afforded the opportunity to make an informed decision.

— Clarify that a parent whose parental rights have been terminated by tribal or state court order no longer has the right to object to transfer to tribal court. The right to object to a transfer is a right reserved for legal parents—parents whose rights are intact.

23.117 *How is a determination of "good cause" not to transfer made?*

Provision (d) states, "In addition, in determining whether there is good cause to deny the transfer, the court may not consider: (1) The Indian child's contacts with the tribe or reservation; (2) Socio-economic conditions or any perceived inadequacy of tribal or BIA social services or judicial systems; or (3) The tribal court's prospective placement for the Indian child." 80 Fed. Reg. at 14,890.

We enthusiastically support the inclusion of this provision in the final rule. ICWA itself states that state courts "shall transfer" absent "good cause." The mandatory "shall" indicates that "good cause" is best read as a narrow exception to an otherwise firm requirement. Further, the Supreme Court has stated that ICWA recognizes tribal courts' concurrent and *presumptive* jurisdiction over Indian child custody cases where the child is domiciled outside of Indian Country. 25 U.S.C. § 1911(b); *Holyfield,* 490 U.S. at 36.

According to the legislative history, the "good cause" provision of § 1911(b) of ICWA "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." H.R. Rep. No. 95-1386, at 21; *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 165 (Tex. Ct. App. 1995). The "good cause" provision should therefore be read with the primary consideration of protecting the child's, parents' and tribe's rights under ICWA, rather than circumventing the protections of the Act.

In spite of the Supreme Court interpretation in *Holyfield* and the legislative history, and partially because of the expansive definition of "good cause" offered by the 1979 ICWA guidelines, 44 Fed. Reg. 67,584, 67,591 (Nov. 26, 1979) state courts have misinterpreted ICWA and inconsistently limited tribes' rights to transfer under the Act for a variety of reasons and under a variety of analyses. *See, generally,* B.J. Jones, Mark Tilden, & Kelly Gaines-Stoner*, The Indian Child Welfare Act Handbook: A Legal Guide to the Custody and Adoption of Native American Children*, 59-69 (2008). The updated and now effective Guidelines, however, limit the appropriate considerations for a determination of "good cause," in line with legislative intent and Supreme Court precedent. BIA Guidelines, C.3. The Proposed Rule does the same. We strongly support the inclusion of this provision in the final rule.

We recommend the following change:

— Include a provision stating that the transfer of the proceeding pursuant to ICWA is does not allow for a determination with regard to the best interest of the Indian child. Some state courts have denied transfer to tribal court on the grounds that it is not in the best interests of the Indian child. *See, e.g.*, *Matter of Appeal in Maricopa Count*y, 667 P.2d 228 (Ariz. Ct. App. 1983) (best interest test used to avoid transfer); *Matter of Adoption T.R.M.*, 525 N.E.2d 298, 307-08 (Ind. 1988) (same). This interpretation of the law is counter to the intent of the transfer provision and the purpose of ICWA. As stated by the North Dakota Supreme Court:

> Although one of the goals of ICWA is to protect the best interests of an Indian child ... the issue here is the threshold question *regarding the proper forum for that decision*.... the best interest of the child is not a consideration for the threshold determination of whether there is good cause not to transfer jurisdiction to a tribal court.

In re A.B, 663 N.W.2d 625, 633-34 (N.D. 2003) (emphasis added). Stated differently by the Nebraska Supreme Court:

> For a court to use this standard when deciding a purely jurisdictional matter, alters the focus of the case, and the issue becomes not what judicial entity should decide custody, but the standard by which the decision itself is made. The utilization of the best interest standard and fact findings made on that basis reflects the Anglo-American legal system's distrust of Indian legal competence by its assuming that an Indian determination would be detrimental to the child.

In re Interest of Zylena R., 825 N.W.2d 173, 185 (Neb. 2012). Many courts have followed similar reasoning to hold that best interests should not be a factor in resolving the issue of whether there is "good cause" to deny a motion to transfer a case involving an Indian child from state court to tribal court. *People in Interest of J.L.P.*, 870 P.2d 1252 (Colo. App.1994); *Matter of Ashley Elizabeth R.*, 863 P.2d 451 (N.M. Ct. App.1993); *In re Armell*, 550 N.E.2d 1060 (Ill. App. Ct. 1990);*Yavapai-Apache Tribe v. Mejia,* 906 S.W.2d 152, 169 (Tex.App.1995). The final rule should clarify that best interest, should not be a reason to find "good cause" to deny transfer, and the best interest test should not be employed to determine if transfer is appropriate.

Provision (e) of this section of the Proposed Rule states, "The burden of establishing good cause not to transfer is on the party opposing transfer." 80 Fed. Reg. at 14,890.

We recommend the following change:

— Add "by clear and convincing evidence" to the end of this statement. Providing this standard of proof for the determination of "good cause" will give state courts much-needed guidance for evaluating whether "good cause" exists. In addition, establishing a federal standard will promote consistency and prevent state courts from adopting a lesser standard. Most courts have held that "good cause to" not to transfer must be shown by "clear and convincing 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). A high standard is consistent with the underlying philosophy of the ICWA that a tribal forum is preferred for such determinations. Nevertheless, some courts have used lower standards. *See, e.g.*, *In re J.L.P.*, 870 P.2d 1256 (Colo. Ct. App. 1994) (using abuse of

discretion standard). Interestingly, the Supreme Court of South Dakota previously adopted an abuse of discretion standard, but reversed that ruling and adopted the clear and convincing standard in *In re T.I* (707 N.W.2d 826, 833-34 (S.D. 2005)), concluding that mere discretion to override the presumption of tribal court jurisdiction is inconsistent with congressional intent. *Id.*

23.118 What happens when a petition for transfer is made?

Provision (a) of this section states: "Upon receipt of a transfer petition the State court must promptly notify the tribal court in writing of the transfer petition and request a response regarding whether the tribal court wishes to decline the transfer. The notice should specify how much time the tribal court has to make its decision; provided that the tribal court must be provided 20 days from receipt of notice of a transfer petition to decide whether to accept or decline the transfer." 80 Fed. Reg. at 14,890-91.

We recommend the following change:

— Current language should be changed to state, in accordance with 25 U.S.C. § 1911(b), that "the case *shall* be transferred *unless* the Tribal Court files a declination." ICWA does not require a response regarding declination prior to a transfer of a case to tribal court—the tribal court may decline jurisdiction, but it is not required to affirmatively accept jurisdiction before transfer. This provision should mirror the corresponding provision in the Act.

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

Provision (a) of this section of the Proposed Rule states: "Any party petitioning a State court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to, and until the commencement of, the proceeding, active efforts have been made to avoid the need to remove the Indian child from his or her parents or Indian custodians and show that those efforts have been unsuccessful." 80 Fed. Reg. at 14,891.

We recommend the following change:

— We incorporate our comments under Section 23.2, above, on the effects of the holding of *Baby Girl* on the active efforts requirement. We reiterate here that the final rule should make clear that *Baby Girl*'s holding is relevant only in private adoption cases when a parent has not had "continued custody" of the child and has abandoned the child.

Provision (b) of this section of the Proposed Rule states: "Active efforts must be documented in detail and, to the extent possible, should involve and use the available resources of the extended family, the child's Indian tribe, Indian social service agencies and individual Indian caregivers." 80 Fed. Reg. at 14,891.

We recommend the following change:

— Specify the standard of proof required to make a finding of "active efforts." The standard of proof that is to be used at each ICWA proceeding to determine whether "continued custody of the child...is likely

to result in serious physical or emotional harm" is clearly stated in the statute. 25 U.S.C. § 1912 (e) & (f). State courts have found that, as a result, the burden of proof of "active efforts" is the same as the burden of the underlying decision. *In re L.N.W.*, 457 N.W.2d 17 (Iowa Ct. App. 1990); *In re Morgan*, 364 N.W.2d 754 (Mich. Ct. App. 1985); *In re Kreft*, 384 N.W.2d 843 (Mich. Ct. App. 1986)**;** *In re M.S.S.*, 465 N.W.2d 412 (Minn. Ct. App. 1991); *In re G.S.*, 59 P.3d 1063 (Mont. 2002); *In re Enrique P.*, 709 N.W.2d 676 (Neb. Ct. App. 2006); *In re S.R.*, 323 N.W.2d 885 (S.D. 1982); *In re P.B.*, 371 N.W.2d 366 (S.D. 1985); *In re D.S.P.*, 480 N.W.2d 234 (Wis. 1992). Thus, for foster care proceedings, "active efforts" must be shown by clear and convincing evidence, and for termination of parental rights proceedings, "active efforts" must be shown beyond a reasonable doubt.

Clarity on this issue is incredibly important because there are some cases that find a lesser burden of proof when making a finding of "active efforts." *E.A. v. State*, 46 P.3d 986 (Alaska 2002); *In re Hannah S.*, 48 Cal. Rptr. 3d 605 (Ct. App. 2006); *In re Baby Boy Doe*, 902 P.2d 477 (Idaho 1995); *In re Cari B.*, 763 N.E.2d 917 (Ill. App. Ct. 2002); *In re A.P.,* 961 P.2d 706 (Kan. Ct. App. 1998); *In re Annette P.*, 589 A.2d 924 (Me. 1991); *In re M.S.*, 2001 ND 68, 624 N.W.2d 678; *In re Charles*, 688 P.2d 1354 (Or. Ct. App. 1984); *In re D.A.C.*, 933 P.2d 993 (Utah Ct. App. 1997); *In re A.M.*, 22 P.3d 828 (Wash. Ct. App. 2001).

Specifying the standard of proof will provide state courts with the evidentiary standard necessary to determine if "active efforts" have been made under the law. Establishing a federal standard will also promote consistency, ensuring that all parents and children are protected equally, regardless of their jurisdiction.

23.121 *What are the applicable standards of evidence?*
Provision (a) of this section of the Proposed Rule states: "The court may not issue an order effecting a foster care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody with the child's parents or Indian custodian is likely to result in serious physical damage or harm to the child." 80 Fed. Reg. at 14,891.

We recommend the following change:

— ICWA requires a finding by *clear and convincing* evidence at the foster care proceeding 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." This appears to be a clerical error; the language of this provision should match the language of the Act and include "emotional or" before physical damage to the child.

Provision (b) of this section of the Proposed Rule states: "The court may not order a termination of parental rights unless the court's order is supported by evidence beyond a reasonable doubt, supported by the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious physical damage or harm to the child." *Id.*

We recommend the following change:

— ICWA requires a finding beyond a reasonable doubt that at the termination of parental rights proceeding 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." This appears to be a clerical error; the language of this provision should match the language of the Act.

— Address the consequences of *Adoptive Couple v. Baby Girl* regarding evidentiary standards, and clarify that this heightened standard must be provided in all cases except those private adoption cases where a parent has not had continued custody of the Indian child being adopted.

Baby Girl held that in cases that involve an attempted *voluntary* adoption by a birth mother where a birth father has not had prior legal or physical custody, the protections of § 1912(f) will not apply. 133 S. Ct. 2552. *Baby Girl* focused on the specific language of "continued custody" used in this statutory provision. *Id*. at 2560-62. The Court interpreted this language with reference to the dictionary definitions of "continued" and concluded that a parent must have had either prior physical or legal custody of the child at some point before the termination of parental rights proceeding in order to invoke the protections of this section. *Id.* at 2560. In other words, the Court found that this provision should not apply "when the Indian parent *never* had custody of the Indian child." *Id.* (emphasis added).

In his concurrence, Justice Breyer limited his agreement, which was necessary to achieve the five vote majority. *Id.* at 2571 (Breyer, J., concurring). Breyer's concurrence limited the scope of the Court's holding to the factual circumstances in the case, insisting that the decision "decided no more than is necessary." *Id*. Further support for a narrow reading of the Court's ruling, limiting its application to termination petitions that are filed in the context of contested private adoption proceedings, can also be derived from the Court's overall analysis. The Court based its analysis almost entirely upon the factual circumstances of this case, i.e., a dispute that arose in the context of an attempted prior adoption, as opposed to the removal of a child by a non-Native governmental authority.

Additionally, Justice Breyer enumerated certain circumstances where the Act may apply that would not necessarily involve prior custody.[1] *Id.* Thus, whether § 1912(f) will still apply to some sub-segment of non-custodial parents even in a private adoption context, or will exclude all parents who have not had prior custody, will be a question for courts interpreting this decision in the future.

The final rule should, therefore, make clear that § 1912(f) applies to all terminations of parental rights outside of the narrow fact pattern of *Baby Girl*.

Provision (c) of this section of the proposed rule states: "Clear and convincing evidence must show a causal relationship between the existence of particular conditions in the home that are likely to result in

[1] In agreeing, he stated that this case does not involve "a father with visitation rights or who has paid 'all of his child support obligation,'" "special circumstances such as a father who was deceived about the existence of the child," or "a father who was prevented from supporting his child." 133 S. Ct. at 2571. (Breyer, J., concurring).

serious emotional or physical damage to the particular child who is the subject of the proceeding." 80 Fed. Reg. at 14,891.

We recommend the following change:

— The rules should require a causal relationship between the particular conditions and the risk of harm both under the clear and convincing evidence standard (used in foster care proceedings) as well as the beyond a reasonable doubt standard (used in termination of parental rights proceedings). The two evidentiary standards used in ICWA are put forward in mirroring provisions; although the standards are different, the requirement of a causal connection should apply to both. The same principles that require a causal connection for a finding by clear and convincing evidence, which is currently stated in the Proposed Rule, require this finding for the beyond a reasonable doubt standard under the Act. This was omitted from the Proposed Rule. If the lesser standard of proof—"clear and convincing"—requires a causal connection, the higher standard—"beyond a reasonable doubt"—surely does as well. This oversight should be corrected.

Provision (d) of this section of the Proposed Rule states: "Evidence that only shows the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child." 80 Fed. Reg. at 14,891.

We recommend the following change:

— We incorporate our comments on Provision (c) of this section here. The final rule should clarify that evidence that is insufficient to meet the "clear and convincing" standard is likewise insufficient to meet the "beyond a reasonable doubt" standard. Thus the evidence listed in provision (d) as insufficient for a finding of clear and convincing evidence should also be clarified as insufficient for findings beyond a reasonable doubt. This clerical error should be corrected.

23.122 Who may serve as a qualified expert witness?

Provision (c) of this section in the Proposed Rule states: "Persons with the following characteristics, in descending order, are presumed to meet the requirements for a qualified expert witness: (1) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices. (2) A member of another tribe who is recognized to be a qualified expert witness by the Indian child's tribe based on their knowledge of the delivery of child and family services to Indians and the Indian child's tribe. (3) A layperson who is recognized by the Indian child's tribe as having substantial experience in the delivery of child and family services to Indians, and knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe. (4) A professional person having substantial education and experience in the area of his or her specialty who can demonstrate knowledge of the prevailing social and cultural standards and childrearing practices within the Indian child's tribe." 80 Fed. Reg. at 14,891.

We recommend the following changes:

— The first sentence is unclear as drafted. A technical amendment to clarify its intent is necessary. If all of the persons listed are presumed to be qualified expert witnesses ("QEW"), the relevance of the order in which they are listed is uncertain. The section should either (depending on the intent of DOI) (1) say that the preferred QEW to testify in a case shall be determined pursuant to the following order, or (2) delete the words "in descending order."

— This provision should make the most preferred QEW, or one of the presumed QEWs, any individual designated by the tribe. The tribe will best know who is familiar with the child-rearing practices of its community, and a tribally-designated QEW will best fulfill the purposes of this provision.

— This provision should take into account who is the most appropriate witness for a child whose tribe has not yet been identified. Because the proposed rule requires that ICWA apply until it has been determined that a child is not an "Indian child," and that ICWA-compliant emergency proceedings occur no longer than 30 days after removal, hearings involving children whose tribal affiliation has not yet been confirmed are likely to occur. This should be considered in this provision.

We recommend the following changes to this section as a whole:

— Clarify that this section does not preclude state courts from hearing testimony from other expert witnesses in addition to the qualified expert witness required by ICWA. This will allay concerns arising from contrary interpretations of this section and allow for courts to hear testimony from any expert who may help the court make the best possible decisions with regard to children and families. These additional experts, however, cannot replace, but will only supplement the qualified expert witness required by ICWA.

— This section should include a provision (d) that clarifies the purpose of QEWs—specifically, that testimony from at least one expert that understands the Indian tribe's culture and customs as they pertain to child-rearing practices is essential before a foster care placement is made, or an order terminating parental rights is entered.

— Clarify that the failure to use an expert witness deprives a court of authority to find that the statutory burden of proof in § 1912(e) and (f) has been met, and is grounds for a reversal under § 1914. *In re N.L.*, 754 P.2d 863 (Okla. 1988); *In re M.H.*, 691 N.W.2d 622 (S.D. 2005).

23.123 What actions must an agency and state court undertake in a voluntary proceeding?

This section of the proposed rule states: "(a) Agencies and State courts must ask whether a child is an Indian child in any voluntary proceeding under § 23.107 of these regulations. (b) Agencies and State courts must provide the Indian tribe with notice of the voluntary child custody proceedings, including applicable pleadings or executed consents, and their right to intervene under § 23.111 of this part." 80 Fed. Reg. at 14,891.

We enthusiastically support the inclusion of a voluntary notice requirement in the final rule. We incorporate our comments above on § 23.111(a) of the Proposed Rule and reiterate that notice in all proceedings is essential to determine whether a child is an "Indian child," as well as to achieve the purpose of ICWA to protect the rights of tribes along with those of parents and children.

23.124 How is consent obtained?

Provision (b) of this section of the Proposed Rule states: "Prior to accepting the consent, the court must explain the consequences of the consent in detail, such as any conditions or timing limitations for withdrawal of consent and if applicable, the point at which such consent is irrevocable." 80 Fed. Reg. at 14,891.

We recommend the following change:

— Include a requirement that "rights as a parent under ICWA," as well as consequences of consent, be explained at the point of consent. This addition will guarantee that parents are able to make a fully informed decision regarding relinquishment.

23.125 What information should a consent document contain?

We recommend the following changes:

— Add an additional provision (c) to this section, providing that any consent not executed as described in this section is not binding. This will clarify that these provisions are mandatory, not suggested, and will guarantee that Indian parents and families are fully protected when voluntary proceedings occur.

— Clarify that the right to withdraw consent cannot be waived, as this is a guaranteed statutory right that should be protected. Congress was very concerned about voluntary proceedings and parents' rights when it enacted ICWA. As the sponsor of the ICWA (Senator Abourezk) observed, "[p]artly because of the decreasing numbers of Anglo children available for adoption and changing attitudes about interracial adoptions, the demand for Indian children has increased dramatically." 123 Cong. Rec. 21043 (1977). *See also* 1974 Senate Hearing at 146 ("[Indian] Infants under 1 year old are adopted at [a] rate . . . 139 percent greater than the rate of non-Indians in the state of Minnesota.")

Senator Abourezk's statement was an accurate reflection of the hearings which were replete with testimony about public and private agencies and private attorneys and their sometimes overzealous pursuit of Indian children for adoption by non-Indians. *See*, *e.g.*, 1974 Senate Hearing at 70 (referring to the adoption system as a "grey market" because "there's tremendous pressure to adopt Indian children, or have Indian children adopted out") (testimony of Bertram Hirsch for AAIA), *id*. at 161 (calling for "an investigation of agencies who deal with the Indian adoptions and make them accountable for the methods they use for transporting Indian children across the state lines and the Canadian borders") (testimony of Esther Mays, Native American Child Protection Council); 1977 Senate Hearing at 359.

> Private adoption . . . process involves doctors and private attorneys who arrange for adoptions of their Indian client's children to a non-Indian through their attorney directly through a court . . . All

> of us are aware of the adoption black market that has blossomed due to the effects of modern family planning efforts. Some people will pay thousands of dollars for a child. It is also well-known that Indian children have always been a prize catch in the field of adoption.

Statement of Don Milligan, State of Washington, Department of Social and Health Services). Moreover, many "voluntary" consents are not truly voluntary. House Report 95-1386 at 11. Consents in voluntary adoption cases were sometimes “coerced” or induced by “trickery.” *See*, *e.g.*, 1974 Senate Hearing at 23 and 222-23 (testimony about woman who was tricked into signing a form which she was told would allow two non-Indian women to take her child for a short visit, but which in reality was a consent to adoption, and a discussion of parents who have been “induced to waive their parental rights voluntarily without understanding the implications.”) As Senator Abourezk summarized, it was asserted that “in many cases they [parents] were lied to, they were given documents to sign and they were deceived about the contents of the documents.” 1974 Senate Hearing at 463. Many of these practices continue today.

For these reasons, the right to withdraw consent must be protected and cannot be waived.

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

Provision (a) of this section of the Proposed Rule states: “A consent to termination of parental rights may be withdrawn by the parent at any time prior to entry of a final decree of voluntary termination or adoption, whichever occurs later. To withdraw consent, the parent must file, in the court where the consent is filed, an instrument executed under oath asserting his or her intention to withdraw such consent.” 80 Fed. Reg. at 14,892.

We enthusiastically support the inclusion of the language “whichever occurs later.” This explicit inclusion, in line with previous interpretations of the statute and with the previous guidelines, ensures the protection of parents' rights in voluntary proceedings under the Act. Under § 1913(c), a parent may withdraw voluntary consent to termination of parental rights for any reason and at any time prior to the entry of a final decree of termination of parental rights. The time between when the consent is given and a final decree of termination of parental rights is entered varies from state to state. In some states, voluntary termination of parental rights is a separate proceeding, and a decree terminating parental rights is entered soon after the consent is given. In other states, parental rights are terminated at the same time an adoption decree is entered, and some time may pass between the execution of a consent to an entry of a decree terminating parental rights. Making clear that consent can be withdrawn any time before the *later* of these two events ensures that parents’ rights are consistent across all states.

Once a termination decree has been entered, the consent to termination can no longer be withdrawn. Some states have laws that provide that a consent to termination of parental rights becomes irrevocable before the entry of a termination decree when executed according to specific procedures. Such consents are preempted by the express language of § 1913(c) of ICWA; the parent of an Indian child can withdraw their consent to termination any time before a decree terminating parental rights is entered by a court. *Quinn v. Walters*, 845 P.2d 206 (Or. Ct. App. 1993), *rev'd on other grounds*, 881 P.2d 795 (Or. 1994).

23.128 When do the placement preferences apply?

Provision (b) of this section of the Proposed Rule states: "The agency seeking a preadoptive, adoptive or foster care placement of an Indian child must always follow the placement preferences. If the agency determines that any of the preferences cannot be met, the agency must demonstrate through clear and convincing evidence that a diligent search has been conducted to seek out and identify placement options that would satisfy the placement preferences specified in §§ 23.129 and 23.130 of these regulations, and explain why the preferences could not be met. A search should include notification about the placement proceeding and an explanation of the actions that must be taken to propose an alternative placement to: (1) The Indian child's parents or Indian custodians; (2) All of the known, or reasonably identifiable, members of the Indian child's extended family members; (3) The Indian child's tribe; (4) In the case of a foster care or preadoptive placement: (i) All foster homes licensed, approved, or specified by the Indian child's tribe; and (ii) All Indian foster homes located in the Indian child's State of domicile that are licensed or approved by any authorized non-Indian licensing authority." 80 Fed. Reg. at 14,892.

We recommend the following changes:

- Modify the language in (b)(2) to read: "All of the known, or reasonably identifiable, adult members of the Indian child's extended family" to ensure that notice is sent only to adult family members—those who would be suitable placements for a child.

- Clarify that provision (b)(2) reflects the requirements of the Fostering Connections to Success Act, and should include an exception similar to the one in that act, specifically that exceptions to notice are possible in the case of family or domestic violence. 42 U.S.C. § 671(a)(29) (provides 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), *subject to exceptions due to family or domestic violence*").

- Clarify in provision (b)(4)(i) that notice need only to be sent to those families/foster homes *identified by the tribe* as available for placements; this will avoid unnecessary or inappropriate notice.

- Change provision (b)(4)(ii) to require that notice be sent to the homes of "All Indian foster homes located within reasonable proximity to the child's home that are authorized or approved by any authorized non-Indian licensing authority." This change recognizes the statutory preference to place children in proximity to their parents, which promotes reunification. This addition will also eliminate the artificial limitation that the placement home be located within the same state. *See* 25 U.S.C. § 1915(b) ("The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child.")

We also recommend the following additions:

— Add a provision (f) specifically addressing *Baby Girl*'s limitation on the application of the placement preferences. *Baby Girl* held that the placement preferences provision is inapplicable "if no alternative party that is eligible to be preferred under § 1915(a) has come forward." *Baby Girl,* 133 S.Ct. at 2564. This additional provision should define what a person needs to do to demonstrate that he or she is willing to adopt/has come forward to adopt—which was left undefined by *Baby Girl*. This will help to clarify the ambiguities in the Court's decision. Leaving it unaddressed will invite courts to misinterpret the decision through an expansive reading that keeps children from placements with family and community. *See, e.g.*, *Native Village of Tununak v. State of Alaska*, 334 P.3d 165 (Alaska, 2014) ("*Native Village of Tununak II*").

We suggest the following language: "For the purposes of triggering application of the placement preferences in an adoption proceeding, a party shall be deemed as having demonstrated that he or she is willing to adopt a particular child if (1) the individual so informs the court orally during a court proceeding or in writing or (2) an agency or tribe informs the court orally in a court proceeding or in writing that a specific individual or individuals has indicated to the agency or tribe that they are willing to adopt the child. An agency must inform the court whenever it has been so notified." *See* Alaska Admin. Code tit. 7, § 54.600.

Baby Girl did not bar requiring a search for eligible preferred placement who can then demonstrate a willingness to adopt as required to trigger the placement preferences. The regulations should clarify that requiring a diligent search for eligible preferred placements, as currently included, is permitted and necessary after *Baby Girl* in all adoption proceedings.

Finally, *Baby Girl* involved the narrow fact pattern: a difference of opinion between two parents as to whether to put a child up for adoption, not an adoption after a state agency terminated parental rights. 133 S. Ct. at 2558. This provision should, therefore, be limited to only those situations with similar fact patterns and clarify that the *Baby Girl* holding has no effect on public child welfare adoptions. In the alternative, this provision should clarify that public child welfare systems are obligated to support the efforts of all adoptive parties to show their "willingness to adopt"—even if this means supporting multiple potential adoptive families. For example, the state must support both a foster home interested in adopting and a family member who has indicated interest but was not previously a placement resource because of their distance from the child. This may require the state to provide or pay for an attorney for both families, to provide an opportunity for both parties to establish a desire to adopt on the record, and/or to formally inform the court itself of both parties' desires to adopt.

23.129 What placement preferences apply in adoptive placements?

This section of the Proposed Rule states: "Preference must be given in descending order, as listed below, to placement of the child with (1) A member of the child's extended family; (2) Other members of the Indian child's tribe; or (3) Other Indian families, including families of unwed individuals." In addition, the court should, where appropriate, "also consider the preference of the Indian child or parent." 80 Fed. Reg. at 14,892.

We recommend the following change:

— Include a provision that allows consideration of a tribe's recommended placement for an Indian child. By adding the "Tribe's recommended placement" to this provision, the ICWA regulations will take into consideration tribal placement preferences as required by ICWA. 25 U.S.C. § 1915(c). ICWA provides

that, an “Indian child’s tribe [may] establish a different order of preference by resolution.” 25 U.S.C. § 1915(c). By adding the “Tribe’s recommended placement” to this provision, the regulations will take into consideration Tribal custom, law, and practice when determining the welfare of Tribal children, in accordance with the requirements of the statute.

Section 23.130: *What placement preferences apply in foster care or preadoptive placements?*

This section in the Proposed Rule states: “In any foster care or preadoptive placement of an Indian child, preference is given to a member of the Indian child’s extended family; a foster home, licensed, approved or specified by the Indian child's tribe, whether on or off the reservation; an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or 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.” 80 Fed. Reg. at 14,892.

We recommend the following change:

— Include a provision that allows consideration of the tribe’s recommended placement for an Indian child. We incorporate our comments concerning Section 23.129 and reiterate the importance of recognizing the tribe’s ability to establish unique placement preference schemes under ICWA.

23.131 *How is a determination for “good cause” to depart from the placement preferences made?*

Provision (b) of this section states: “The party seeking departure from the preferences bears the burden of proving by clear and convincing evidence the existence of ‘good cause’ to deviate from the placement preferences.” 80 Fed. Reg. at 14,892.

We enthusiastically support the inclusion of this provision. This burden must be met by clear and convincing evidence in order to effectuate the intent of the statute and the importance of the placement preferences. *In re S.E.G.*, 507 N.W.2d 872, 878 (Minn. Ct. App. 1993), *rev’d on other grounds*, 521 N.W.2d 357 (Minn. 1994).

Provision (c) of this section of the Proposed Rule states: “A determination of good cause to depart from the placement preferences must be based on one or more of the following considerations: (1) The request of the parents, if both parents attest that they have reviewed the placement options that comply with the order of preference. (2) The request of the child, if the child is able to understand and comprehend the decision that is being made. (3) The extraordinary physical or emotional needs of the child, such as specialized treatment services that may be unavailable in the community where families who meet the criteria live, as established by testimony of a qualified expert witness; provided that extraordinary physical or emotional needs of the child does not include ordinary bonding or attachment that may have occurred as a result of a placement or the fact that the child has, for an extended amount of time, been in another placement that does not comply with ICWA. (4) The unavailability of a placement after a showing by the applicable agency in accordance with § 23.128(b) of this subpart, and a determination by the court that active efforts have been made to find placements meeting the preference criteria, but none have been located. For purposes of this analysis, a placement may not be considered

unavailable if the placement conforms to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties." 80 Fed. Reg. at 14,892.

We enthusiastically support the inclusion of this provision in the final rule. We believe that it is vitally important that "good cause" to deviate from the placement preferences be defined and limited. Currently, nearly 56% of all native children live in non-Native adoptive homes, contrary to the placement preferences of ICWA. Rose M. Kreider, *Nat'l Council for Adoption, Interracial Adoptive Families and Their Children: 2008* in Adoption Factbook V, 109 (2011), *available at* https://www.adoptioncouncil.org/publications/ adoption-factbook.html .

We specifically applaud the inclusion of subsection (c)(3). There are strong reasons to retain this provision. The proposed section acts as a preventive measure to encourage compliance with ICWA. Without this provision, those advocating for departure from the placement preferences may be rewarded for the attachment or bonding that occurs from intentional or unintentional noncompliance with ICWA.

Under ICWA, "[i]n any adoptive placement of an Indian child under State law, a preference *shall be given*, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a) (emphasis added). Further, when a court applies the preference requirements under the ICWA, "the standards to be applied…*shall be* the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties." 25 U.S.C. § 1915(d) (emphasis added).

An initial placement may not be ICWA compliant for a number of reasons (e.g., emergency, determination of tribal citizenship has not yet happened, no available Native homes, no initial diligent search for family), but that initial non-compliant placement should not automatically become a permanent placement merely because of the mistake of practitioners or the emergency nature of the circumstances. *See In re C.H.*, 997 P.2d 776, 783-4 (Mont. 2000) (finding that to allow normal emotional bonding to be considered good cause would "negate the ICWA presumption" that the statutory preferences are in the Indian child's best interests). Where it is not "*certain* that a child will experience trauma from a transfer of custody or develop an attachment disorder, [t]he risk that a child might develop such problems in the future is simply too nebulous and speculative a standard on which to determine that good cause exists to avoid the ICWA placement preferences." *In re MB*, 204 P. 3d 1242 (Mont. 2009) (citing *In re C.H.*, 997 P.2d at 783-4); *see also*, *In Matter of S.E.G.*, 521 N.W.2d 357, 363 (Minn. 1994) (finding that a child's need for permanence may be considered in determining the child's extraordinary emotional needs, but does not alone constitute "good cause" to deviate from the adoption placement preferences).

This provision ensures that the harm caused by departure from ICWA's requirements, whether that departure is intentional or unintentional, can be corrected rather than compounded. Congress has determined that placing Indian children with their families, with tribal members, or with other Indian families is presumptively in their best interests. If more Indian children are placed in preferred placements by reason of this proposal, then more children will have been placed consistent with their best interests.

Two key considerations further justify inclusion of this provision in the final rule:

- Attachment theory, which is the underlying basis for the bonding/attachment criteria used by courts, is based squarely on Western (i.e., Euro-American) cultural norms. *See, generally,* John W. Berry et al., *Cross-Cultural Psychology: Research and Applications* (1992). The viability of its application outside that context, particularly in the context of indigenous cultures, has been questioned by a number of researchers and social scientists. See, e.g., Raymond Neckoway et al., Rethinking the Role of Attachment Theory in Child Welfare Practice with Aboriginal People, 20 Canadian Social Work Review 105.

- There has been increasing criticism of the use of bonding and attachment in child custody proceedings and serious questions raised about how probative such evaluations are for all children, not just Indian children. See, generally, David. E. Arrendondo & Leonard P. Edwards, *Attachment, Bonding, and Reciprocal Connectedness: Limitations of Attachment Theory in the Juvenile and Family Court*, 2 J. Center Families, Children & Courts 109, 122-3 (2000)(discussing at length the difficulty with using bonding and attachment theory in family courts).

Details of these considerations can be found in a research memo completed by the Association of American Indian Affairs ("AAIA") and supported by Casey Family Programs, attached as an appendix to AAIA's comments and Casey Family Programs' comments. We incorporate in entirety the contents of this memo in our comments.

We recommend the following changes:

— Provision (c)(1) should be modified to provide that the request of both parents should be considered where appropriate, and that parents' desire for a placement outside the preferences *may* constitute "good cause," but is not automatically a reason to place outside the placement preferences. Rather, a court should *consider* such a request, per the language of ICWA. 25 U.S.C. § 1915(d) ("Where appropriate, the preference of the Indian child or parent *shall be considered*"). The court should weigh the parents' request with the impact it will have on the child to be placed outside the placement preferences to determine whether "good cause" exists.

— Provision (c)(2) should be modified to include an additional requirement that the child be mature enough to understand the weight and consequences of her or his decision. Certainly children's decisions and opinions should always be heard and considered. However, because of ICWA's clear statement on where children should be placed, for a child's decision to be considered "good cause," the maturity to understand the weight and consequences of the decision must be present. Twelve year-olds may be the most appropriate age to ensure maturity and an understanding of consequences. To determine an appropriate age, we suggest that the literature be reviewed (both legal and social science) and a specific age be included in the final rule.

— Include a provision providing that if the child's tribe approves of the placement, "good cause" exists to depart from the preferences. Tribes sometimes decide that a placement with a non-preferred placement is in the child's best interests, and these regulations should defer to such determinations

by a tribe who is acting as *parens patriae*. *See State of Alaska, Dep't of Health and Social Services v. Native Village of Curyung*, 151 P.3d 388, 402 (Alaska 2006) (recognizing that Indian tribes have a right to bring suit "as *parens patriae* to prevent future violations" of ICWA); *see also Native Village of Venetie IRA Council v. Alaska*, 155 F.3d 1150, 1152 (9th Cir. 1998) (same); *State v. Native Village of Tanana*, 249 P.3d 734, 736 (Alaska 2011) (same).

— Clarify that ICWA's placement preferences represent the presumptive best interest of the child. "While the best interests of the child is an appropriate and significant factor in custody cases under state law, it is improper to apply a best interests standard when determining whether good cause exists to avoid the ICWA placement preferences, because the ICWA expresses the presumption that it is in an Indian child's best interests to be placed in conformance with the preferences." *In re C.H.,* 997 P.2d 776, 783-4 (Mont. 2000).

— While the best interest of the child standard has long been used by courts and workers to determine what should be done with a child in the court's care, "[t]he best interests of the child standard, by its very nature, requires a subjective evaluation of a multitude of factors, many, if not all of which are imbued with the values of majority culture." *In re S.E.G*., 521 N.W.2d at 363. An Indian child's best interests will include different interests and needs than a non-Indian child. This does not mean that an Indian child's best interests are ignored in ICWA proceedings. It does mean that an analysis of an Indian child's best interests is necessarily broader than a standard best interest analysis, and includes the Indian child's connection to her tribal identity and citizenry. Evelyn Blanchard, *The Question of Best Interest in* The Destruction of American Indian Families 60 (Steven Ungar ed. 1977); *In re C.H.* 997 P.2d 776 (Mont. 2000).

— "Congress, in conjunction with numerous Indian tribal governments and the Bureau of Indian Affairs, has carefully and thoughtfully set out the nation's policy to prevent the destruction of Indian families and Indian tribes and to protect the best interests of Indian children by preventing their removal from their communities." *In re S.E.G.*, 521 N.W.2d at 366. The Indian Child Welfare Act represents Congress's determination of the presumptive best interests of Indian children, and its application to a case attempts to ensure the best interests of the child, including the child's connection to her family, tribe, and culture. "[T]he conclusion seems justified that, as one state court has put it, '[t]he Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected.'" *Holyfield* at 50 n.24 (quoting *In re Appeal in Pima County Juvenile Action No. S-903*, 635 P.2d at 189).
    - We suggest the following language: "The good cause determination does not include an independent consideration of the best interest of the [child] because the preferences reflect the best interests of an Indian child in light of the purposes of the act" BIA Guidelines, F.4 (bracketed language added by NICWA).

— If a consideration of best interest is to be included or allowed, the regulations should make clear that the proper consideration is of the "best interest of the Indian child," in accordance with the definition of that term which we have suggested above.

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

Provision (a) of this section states: "Within two years after a final decree of adoption of any child by a State court, or within any longer period of time permitted by the law of the State, a parent who executed a consent to termination of parental rights or adoption of that child may petition the court in which the final adoption decree was entered to vacate the decree and revoke the consent on the grounds that consent was obtained by fraud or duress, or that the proceeding failed to comply with ICWA." 80 Fed. Reg. at 14,893.

We recommend the following change:

— State statute of limitation should not be incorporated into this provision and the timelines set forward by the Act should be reflected in this provision. There is no time limit set forth in 25 U.S.C. § 1914 in which to file a petition to invalidate a proceeding that was not ICWA-compliant. The United States Supreme Court invalidated the adoption of an Indian child that had been final for many years when it determined that the state court was without jurisdiction to grant the adoption to begin with. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). The result of using state statutes of limitation where ICWA is not followed is uncertainty and inconsistency. The use of these statutes is contrary to the intent of Congress to provide a uniform federal standard under the ICWA in terms of the basic applicability of the statute. *See, Id.* (holding ICWA intended to create minimum federal standards and thus domicile must be defined by federal law, not individual state laws). This provision provides a time limitation where the Act does not, this will impede upon the rights of children, parents and tribes, and could further incentivize ICWA compliance.

  A time limit for challenging adoptions where ICWA has been followed but fraud or duress has occurred is included in the Act. 25 U.S.C. § 1913(d) (provides a two year window to invalidate adoptions where fraud or duress has occurred). This time limit is accurately reflected in this provision.

23.134 What are the rights of adult adoptees?

Section 23.134 of the Proposed Rule states: "(a) Upon application by an Indian individual who has reached age 18 who was the subject of an adoptive placement, the court that entered the final decree must inform such individual of the tribal affiliations, if any, of the individual's biological parents and provide such other information necessary to protect any rights, which may include tribal membership, resulting from the individual's tribal relationship. (b) Where State law prohibits revelation of the identity of the biological parent, assistance of the BIA should be sought to help an adoptee who is eligible for membership in a tribe to become a tribal member without breaching the Privacy Act or confidentiality of the record. (c) In States where adoptions remain closed, the relevant agency should communicate directly with the tribe's enrollment office and provide the information necessary to facilitate the establishment of the adoptee's tribal membership. (d) Agencies should work with the tribe to identify at least one tribal designee familiar with 25 U.S.C. § 1917 to assist adult adoptees statewide with the process of

reconnecting with their tribes and to provide information to State judges about this provision on an annual basis." 80 Fed. Reg. at 14,893.

We recommend the following change:

— As written, this section of the Proposed Rule narrows the scope of the relevant provisions of ICWA, and could disrupt more than three decades of practice in some states, during which many adoptees have obtained full access to their adoption records and/or reconnected with their original families successfully. Further, federal guidance is necessary because laws and court rules vary state-to-state and currently so do the rights of ICWA adult adoptees. Without federal guidance, in many states an adult adoptee cannot get information directly as intended by the statute. ICWA states:

> Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship. 25 U.S.C. § 1917.

It further states:

> Disclosure of information for enrollment of Indian child in tribe or for determination of member rights or benefits; certification of entitlement to enrollment Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe. 25 U.S.C. § 1951(b).

Both the legislative history and language of the statute mandate that the information about the adoption be provided directly to the adoptee, not to the tribe or other third parties, and that any confidentiality provisions in state law are preempted to the extent that they interfere with the adoptee's rights to a relationship with the tribe. The legislative history of this section indicates that it was the intent of this section to release only such information "as is necessary to establish the child's rights as an Indian person." S. Rep. 95-597, 95th Congress, 1st Sess. (November 3, 1977) (discussing a nearly identical version in the Senate ICWA bill). The Senate stated further, "Upon a proper showing to a court that knowledge of the names and addresses of his or her natural parent or parents is needed, only then shall *the child* be entitled to the information under the provision of this section." *Id.* Provisions (b) and (c) should be modified to reflect this legislative intent.

Limiting access of records to the tribe or BIA may thwart the ability of some adoptees to establish their relationship with their tribe. Records are often incomplete. The BIA and agencies may not have

the resources or motivation to take the information provided and conduct additional research to establish a tribal right or even to identify the correct tribe. Likewise, tribes may not have the capacity to fill in the gaps in information provided to determine membership. Adult adoptees are those who have the motivation to take the limited information and find the additional facts necessary to secure their tribal rights.

We recommend the following proposed language: "Notwithstanding any state law to the contrary, when knowledge of the names and addresses of biological parents is needed by any Indian individual who has reached the age of 18, and who was adopted, to protect any rights flowing from the individual's tribal relationship, the court must provide this information to such individual. If necessary, the court must also issue a court order authorizing the individual to obtain such records from an agency or officer of the court that possesses the records."

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

Section 23.136 in the Proposed Rule states: "(a) Any state entering a final adoption decree or order must furnish a copy of the decree or order to the Bureau of Indian Affairs, Chief, Division of Human Services, 1849 C Street NW, Mail Stop 4513 MIB, Washington, D.C. 20240, along with the following information: (1) Birth name of the child, tribal affiliation and name of the child after adoption; (2) Names and addresses of the biological parents; (3) Names and addresses of the adoptive parents; (4) Name and contact information for any agency having files or information relating to the adoption; (5) Any affidavit signed by the biological parent or parents asking that their identity remain confidential; and (6) Any information relating to tribal membership or eligibility for tribal membership of the adopted child. (b) Confidentiality of such information must be maintained and is not subject to the Freedom of Information Act, 5 U.S.C. § 552, as amended." 80 Fed. Reg. at 14,893.

We enthusiastically support enhanced reporting and record maintenance requirements contained in this section. As the statute indicates, ICWA requires data collection and accountability. U.S.C. §§ 1915(e), 1951. Data pertaining to placements of Indian children has always been inadequate and enforcing the data collection and storage requirements of the ICWA can help to rectify this shortcoming. United States Government Accountability Office, *Report to Congressional Requesters: Indian Child Welfare Act, Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States*, GAO-05-290 (April 2005), *available at* http://www.nicwa.org/policy/law/icwa/GAO_report.pdf [*hereinafter,* "GAO Report"].

§ 23.137 How must the State maintain records?

Section 23.137 in the Proposed Rule states: "(a) The State must establish a single location where all records of every voluntary or involuntary foster care, preadoptive placement and adoptive placement of Indian children by courts of that State will be available within seven days of a request by an Indian child's tribe or the Secretary. (b) The records must contain, at a minimum, the petition or complaint, all substantive orders entered in the proceeding, and the complete record of the placement determination

(including, but not limited to the findings in the court record and social worker's statement)." 80 Fed. Reg. at 14,893.

We enthusiastically support enhanced reporting and record maintenance requirements. Our comments on Section 23.126 apply here as well.

Additional specific considerations

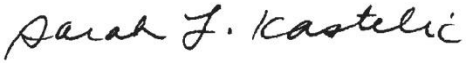
Save Haven Laws
We recommend including a provision that specifies how ICWA, as a federal law, preempts state Safe Haven laws.

— Safe Haven laws are state laws that generally allow the parent, or an agent of the parent, to remain anonymous and to be shielded from prosecution for abandonment or neglect in exchange for surrendering the baby to a safe haven location. See, generally, Child Welfare Information Gateway, Infant Safe Haven Laws (2013), https://www.childwelfare.gov/pubPDFs/safehaven.pdf. When the child relinquished is an Indian child, the provisions of ICWA should still apply to the extent that they do not obstruct the purpose of the Safe Haven law. This should be accounted for in the Final Rule as it is necessary to ensure that Indian children relinquished are not denied access to their culture and heritage, and that safe haven provisions are not used as a loophole to avoid application of ICWA.

  We suggest the following language: "Upon relinquishment, individuals who receive a child as employees or volunteers of a Safe Haven facility shall ask the parent or individual relinquishing the child to provide information regarding any tribal affiliation of the child's parents, but the individual relinquishing the child is not required to provide any identifying information other than what is necessary to identify a child's Indian ancestry. Any information regarding tribal affiliation brings the child within the jurisdiction of the ICWA." This reflects the statutory interpretation in three jurisdictions: New Mexico (Ann. Stat. §; 24-22-4), Montana (Ann. Code §§ 40-6-405); and South Dakota (Law Ann. 25-5A-36). *See* Child Welfare Information Gateway, *Infant Safe Haven Laws* (Feb. 2013), *available at* https://www.childwelfare. gov/pubPDFs/safehavent.pdf .

Conclusion
We would like to commend DOI for the issuance of this NPRM. Substantive regulations that provide rules for ICWA's implementation in state courts and by state and public agencies have never been issued. Without guiding regulations, ICWA has been misunderstood and misapplied for decades. This has, in turn, led to the unnecessary break up of Native families and placement instability for Native children. Native children and families need and deserve the clarity that these regulations can and will provide.

Sincerely,



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