GUIDELINES FOR
IMPLEMENTING THE
INDIAN CHILD WELFARE ACT

Purpose of These Guidelines

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

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

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

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

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

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

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

Context for ICWA, the Regulations, and These Guidelines

Congress enacted ICWA in 1978 to address the Federal, State, and private agency policies and practices that resulted in the ''wholesale separation of Indian children from their families.''[2] Congress found ''that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions . . . . ''[3] Although the crisis flowed from multiple causes, Congress found that non-Tribal public and private agencies had played a significant role, and that State agencies and courts had often failed to recognize the essential Tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.[4] To address this failure, ICWA establishes minimum Federal standards for the removal of Indian children from their families and the placement of these children in foster or adoptive homes, and confirms Tribal jurisdiction over child-custody proceedings involving Indian children.[5]

Following ICWA's enactment, the Department issued regulations in July 1979 addressing notice procedures for involuntary child custody proceedings involving Indian children, as well as governing the provision of funding for and administration of Indian child and family service programs as authorized by ICWA.[6] Those regulations did not address the specific requirements and standards that ICWA imposes upon State court child custody proceedings, beyond the requirements for contents of the notice. Also, in 1979, the Department published guidelines for State courts to use in interpreting many of ICWA's requirements in Indian child custody proceedings.[7] In 2014, the Department invited public comments to determine whether to update its guidelines to address inconsistencies in State-level ICWA implementation that had arisen since 1979 and, if so, what changes should be made. The Department held several listening sessions, including sessions with representatives of federally recognized Indian Tribes, State-court representatives (e.g., the National Council of Juvenile and Family Court Judges (NCJFCJ) and the National Center for State Courts' Conference of Chief Justices Tribal Relations Committee), the National Indian Child Welfare Association, and the National Congress of American Indians. The Department received comments from those at the listening sessions and also received written comments, including comments from individuals and additional organizations. The Department considered these comments and subsequently published updated Guidelines (2015 Guidelines) in February 2015.[8]

Many commenters on the 2015 Guidelines requested not only that the Department update its ICWA guidelines but that the Department also issue binding regulations addressing the requirements and standards that ICWA provides for State-court child-custody proceedings. Recognizing the need for such regulations, the Department engaged in a notice-and-comment process to promulgate formal ICWA regulations. The Department issued a proposed rule on March 20, 2015.[9] After gathering and reviewing comments on the

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

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

The Department has found that, since ICWA's passage in 1978, implementation and interpretation of the Act has been inconsistent across States and sometimes can vary greatly even within a State. This has led to significant variation in applying ICWA's statutory terms and protections. This variation means that an Indian child and her parents in one State can receive different rights and protections under Federal law than an Indian child and her parents in another State. This disparate application of ICWA based on where the Indian child resides creates significant gaps in ICWA protections and is contrary to the uniform minimum Federal standards intended by Congress.

The need for consistent minimum Federal standards to protect Indian children, families, and Tribes still exists today. The special relationship between the United States and the Indian Tribes and their members upon which Congress based the statute continues in full force, as does the United States' direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian Tribe.[12] Native American children, however, are still disproportionately more likely to be removed from their homes and communities than other children.[13] In addition, some State court interpretations of ICWA have essentially voided Federal protections for groups of Indian children to whom ICWA clearly applies. And commenters provided numerous anecdotal accounts where Indian children were unnecessarily removed from their parents and extended families; where the rights of Indian children, their parents, or their Tribes were not protected; or where significant delays occurred in Indian child-custody proceedings due to disputes or uncertainty about the interpretation of the Federal law.

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

[10] 81 FR 38778 (June 14, 2016).
[11] Id. at 38780.
[12] 25 U.S.C. 1901, 1901(2).
[13] See, e.g., Attorney General's Advisory Committee on American Indian and Alaska Native Children Exposed to Violence, Ending Violence So Children Can Thrive 87 (Nov. 2014); National Council of Juvenile and Family Court Judges, Disproportionality Rates for Children of Color in Foster Care, Fiscal Year 2013 (June 2015).

A. General Provisions

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

Regulation:

§ 23.106 How does this subpart interact with State and Federal laws?

(a) The regulations in this subpart provide minimum Federal standards to ensure compliance with ICWA.

(b) Under section 1921 of ICWA, where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires the State or Federal court to apply the higher State or Federal standard.

Guidelines:

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

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

A.2 Tribal-State ICWA agreements

Regulation:

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

Guidelines:

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

[14] *See, e.g., In re Adoption of M.T.S., 489 N.W. 2d 285, 288 (Minn. Ct. App. 1992) (ICWA preempted Minnesota State law because State law did not provide higher standard of protection to the rights of the parent or Indian custodian of Indian child).*

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

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

Regulation:

§ 23.133 Should courts allow participation by alternative methods?

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

Guidelines:

Section 23.133 encourages State courts to permit alternative means of participation in Indian child-custody proceedings, such as by phone or video. This enables the court to receive all relevant information regarding the child's circumstances, and also minimizes burdens on Tribes and other parties. Several State court systems permit the use of video-conferencing in various types of proceedings.[15] The Department notes that requesting statements under oath, even by teleconference, as to who is present may provide sufficient safeguards to maintain control over who is present on the teleconference for the purposes of confidentiality. A service such as Skype would be included in "other methods."

This issue may be particularly relevant to a Tribe's participation in a case. A Tribe's members may live far from the Tribal reservation or headquarters and the Indian child's Tribe may not necessarily be located near the State court Indian child custody proceeding. As such, it may be difficult for many Tribes to participate in State court proceedings, particularly where those actions take place outside of the Tribe's State. Allowing alternative methods of participation in a court proceeding can help alleviate that burden.

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

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

[16] *See, e.g., J.P.H. v. Fla. Dep't of Children & Families*, 39 So.3d 560 (Fla. Dist. Ct. App.2010)(per curiam); *State v. Jennifer M. (In re Elias L.)*, 767 N.W.2d 98, 104 (Neb. 2009); *In re N.N.E.*, 752 N.W. 2d 1, 12 (Iowa 2008); *State ex rel. Juvenile Dep't of Lane Cty. v. Shuey*, 850 P.2d 378 (Or. Ct. App. 1993).

B. Applicability & Verification

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

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

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

Regulation:

§ 23.2 *Indian child* means any unmarried person who is under age 18 and either:

(1) Is a member or citizen of an Indian Tribe; or

(2) Is eligible for membership or citizenship in an Indian Tribe and is the biological child of a member/citizen of an Indian Tribe.

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

(a) State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record. State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.

(b) If there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an "Indian child," the court must:

(1) Confirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership); and

(2) Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an "Indian child" in this part.

(c) A court, upon conducting the inquiry required in paragraph (a) of this section, has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if:

(1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;

(2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;

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

(4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;

(5) The court is informed that the child is or has been a ward of a Tribal court; or

(6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.

(d) In seeking verification of the child's status in a voluntary proceeding where a consenting parent evidences, by written request or statement in the record, a desire for anonymity, the court must keep relevant documents pertaining to the inquiry required under this section confidential and under seal. A request for anonymity does not relieve the court, agency, or other party from any duty of compliance with ICWA, including the obligation to verify whether the child is an "Indian child." A Tribe receiving information related to this inquiry must keep documents and information confidential.

Guidelines:

Definition of "Indian child"

The rule reflects the statutory definition of "Indian child," which is based on the child's political ties to a federally recognized Indian Tribe, either by virtue of the child's own citizenship in the Tribe, or through a biological parent's citizenship and the child's eligibility for citizenship. ICWA does not apply simply based on a child or parent's Indian ancestry. Instead, there must be a political relationship to the Tribe.

Most Tribes require that individuals apply for citizenship and demonstrate how they meet that Tribe's membership criteria. Congress recognized that there may not have been an opportunity for an infant or minor child to become a citizen of a Tribe prior to the child-custody proceeding, and found that Congress had the power to act for those children's protection given the political tie to the Tribe through parental citizenship and the child's own eligibility.[17]

[17] *See, e.g., H.R. Rep. No. 95-1386, at 17. This is consistent with other contexts in which the citizenship of a parent is relevant to the child's political affiliation to that sovereign. See, e.g., 8 U.S.C. 1401 (providing for U.S. citizenship for persons born outside of the United States when one or both parents are citizens and certain other conditions are met); id. 1431 (child born outside the United States automatically becomes a citizen when at least one parent of the child is a citizen of the United States and certain other conditions are met).*

Inquiry

Even if a party fails to assert that ICWA may apply, the court has a duty to inquire as to ICWA's applicability to the proceeding.

Timing of inquiry. The applicability of ICWA to a child-custody proceeding turns on the threshold question of whether the child in the case is an "Indian child." It is, therefore, critically important that there be inquiry into that threshold issue by courts, State agencies, and participants to the proceedings as soon as possible. If this inquiry is not timely, a child-custody proceeding may not comply with ICWA and thus may deny ICWA protections to Indian children and their families or, at the very least, cause inefficiencies. The failure to timely determine if ICWA applies also can generate unnecessary delays, as the court and the parties may need to redo certain processes or findings under the correct standard. This is inefficient for courts and parties, and can create delays and instability in placements for the Indian child.

Subsequent discovery of information. Recognizing that facts change during the course of a child-custody proceeding, courts must instruct the participants to inform the court if they subsequently learn information that provides "reason to know" the child is an "Indian child." Thus, if the State agency subsequently discovers that the child is an Indian child, for example, or if a parent enrolls the child in an Indian Tribe, they will need to inform the court so that the proceeding can move forward in compliance with the requirements of ICWA.

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

Reason to Know

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

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

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

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

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

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

Due Diligence to Work with Tribes to Verify

The determination of whether a child is an "Indian child" turns on Tribal citizenship or eligibility for citizenship. The rule recognizes that these determinations are ones that Tribes make in their sovereign capacity and requires courts to defer to those determinations. The best source for a court to use to conclude that a child or parent is a citizen of a Tribe (or that a child is eligible for citizenship)[19] is a contemporaneous communication from the Tribe documenting the determination.

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

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

This requirement (triggered by a "reason to know" the child is an "Indian child") ensures that ICWA's requirements are followed from the early stages of a case and that harmful delays and duplication resulting from the potential late application of ICWA are avoided. For example, it makes sense to place a child that the court has reason to know is an Indian child in a placement that complies with ICWA's placement preferences from the start of a proceeding, rather than having to consider a change a placement later in the proceeding once the court confirms that the child actually is an Indian child. Notably, the early application of ICWA's requirements—which are designed to keep children, when possible, with their parents, family, or Tribal community—should benefit children regardless of whether it turns out that they are Indian children as defined by the statute. If, based on feedback from the relevant Tribe(s) or other information, the court determines that the child is not an "Indian child," then the State may proceed under its usual standards.

B.2 Determining whether ICWA applies

Regulation:

§ 23.103 When does ICWA apply?

(a) ICWA includes requirements that apply whenever an Indian child is the subject of:

(1) A child-custody proceeding, including:

(i) An involuntary proceeding;

(ii) A voluntary proceeding that could prohibit the parent or Indian custodian from regaining custody of the child upon demand; and

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

(iii) A proceeding involving status offenses if any part of the proceeding results in the need for out-of-home placement of the child, including a foster-care, preadoptive, or adoptive placement, or termination of parental rights.

(2) An emergency proceeding.

(b) ICWA does not apply to:

(1) A Tribal court proceeding;

(2) A proceeding regarding a criminal act that is not a status offense;

(3) An award of custody of the Indian child to one of the parents including, but not limited to, an award in a divorce proceeding; or

(4) A voluntary placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, chosen for the Indian child and that does not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand.

(c) If a proceeding listed in paragraph (a) of this section concerns a child who meets the statutory definition of "Indian child," then ICWA will apply to that proceeding. In determining whether ICWA applies to a proceeding, the State court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum.

(d) If ICWA applies at the commencement of a proceeding, it will not cease to apply simply because the child reaches age 18 during the pendency of the proceeding.

Guidelines:

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

Involuntary Proceedings

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

Voluntary Proceedings

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

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

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

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

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

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

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

Placements Resulting from a Child's Status Offense

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

Guardianships/Conservatorships

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

Intra-Family Custody Disputes

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

Placement with Parent

Placement with a parent is generally not an "Indian child-custody proceeding" because it is not included as a "foster-care placement." While the Act specifically exempts from ICWA's applicability awards of custody to one of the parents "in divorce proceedings," the exemption necessarily includes awards of custody to one of the parents in other types of proceedings as well. However, if a proceeding seeks to terminate the parental rights of one parent, that proceeding falls within ICWA's definition of "child-custody proceeding" even if the child will remain in the custody of the other parent or a step-parent.

Factors that May Not Be Considered

If a child-custody proceeding concerns a child who meets the statutory definition of "Indian child," then the court may not determine that ICWA does not apply based on factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum (sometimes known as the "Existing Indian Family" exception). These factors are not relevant to the inquiry of whether the statute applies. Rather, ICWA applies whenever an "Indian child" is the subject of a "child-custody proceeding," as those terms are defined in the statute. In addition, Congress expressly recognized that State courts and agencies often failed to recognize the essential Tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. A standard that requires the evaluation of the strength of these social or cultural ties frustrates ICWA's purpose to provide more objective standards for Indian child-custody proceedings.[20]

Application Even if Child Reaches Age 18

Where State and/or Federal law provides for a child-custody proceeding to extend beyond an Indian child's 18th birthday, ICWA would not stop applying to the proceeding simply because of the child's age. This is to ensure that a set of laws apply consistently throughout a proceeding, and also to discourage strategic behavior or delays in ICWA compliance in circumstances where a child's 18th birthday is near.

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

Regulation:

§ 23.104 What [rule] provisions…apply to each type of child-custody proceeding?

The following table lists what sections of this subpart apply to each type of child-custody proceeding identified in § 23.103(a):

Regulatory Section	Type of Proceeding
23.101 - 23.106 (General Provisions)	Emergency, Involuntary, Voluntary
Pretrial Requirements	
23.107 (How should a State court determine if there is reason to know the child is an Indian child?)	Emergency, Involuntary, Voluntary
23.108 (Who makes the determination as to whether a child is a member whether a child is eligible for membership, or whether a biological parent is a member of a Tribe?)	Emergency, Involuntary, Voluntary
23.109 (How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?)	Emergency, Involuntary, Voluntary
23.110 (When must a State court dismiss an action?)	Involuntary,

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

	Voluntary
23.111 (What are the notice requirements for a child-custody proceeding involving an Indian child?)	Involuntary (foster-care placement and TPR)
23.112 (What time limits and extensions apply?)	Involuntary (foster-care placement and TPR)
23.113 (What are the standards for emergency proceedings involving an Indian child?)	Emergency
23.114 (What are the requirements for determining improper removal?)	Involuntary
Petitions to Transfer to Tribal Court	
23.115 (How are petitions for transfer of a proceeding made?)	Involuntary, Voluntary (foster-care placement and TPR)
23.116 (What happens after a petition for transfer is made?)	Involuntary, Voluntary (foster-care placement and TPR)
23.117 (What are the criteria for ruling on transfer petitions?)	Involuntary, Voluntary (foster-care placement and TPR)
23.118 (How is a determination of "good cause" to deny transfer made?)	Involuntary, Voluntary (foster-care placement and TPR)
23.119 (What happens after a petition for transfer is granted?)	Involuntary, Voluntary (foster-care placement and TPR)
Adjudication of Involuntary Proceedings	
23.120 (How does the State court ensure that active efforts have been made?)	Involuntary (foster-care placement and TPR)
23.121 (What are the applicable standards of evidence?)	Involuntary (foster-care placement and TPR)
23.122 (Who may serve as a qualified expert witness?)	Involuntary (foster-care placement and TPR)
23.123 Reserved.	N/A
Voluntary Proceedings	
23.124 (What actions must a State court undertake in voluntary proceedings?)	Voluntary
23.125 (How is consent obtained?)	Voluntary
23.126 (What information must a consent document contain?)	Voluntary
23.127 (How is withdrawal of consent to a foster-care placement achieved?)	Voluntary
23.128 (How is withdrawal of consent to a termination of parental rights or adoption achieved?)	Voluntary
Dispositions	
23.129 (When do the placement preferences apply?)	Involuntary, Voluntary
23.130 (What placement preferences apply in adoptive placements?)	Involuntary, Voluntary
23.131 (What placement preferences apply in foster-care or preadoptive placements?)	Involuntary, Voluntary

23.132 (How is a determination of "good cause" to depart from the placement preferences made?)	Involuntary, Voluntary
Access	
23.133 (Should courts allow participation by alternative methods?)	Emergency, Involuntary
23.134 (Who has access to reports and records during a proceeding?)	Emergency, Involuntary
23.135 Reserved.	N/A
Post-Trial Rights & Responsibilities	
23.136 (What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?)	Involuntary (if consent given under threat of removal), Voluntary
23.137 (Who can petition to invalidate an action for certain ICWA violations?)	Emergency (to extent it involved a specified violation), Involuntary, Voluntary
23.138 (What are the rights to information about adoptees' Tribal affiliations?)	Emergency, Involuntary, Voluntary
23.139 (Must notice be given of a change in an adopted Indian child's status?)	Involuntary, Voluntary
Recordkeeping	
23.140 (What information must States furnish to the Bureau of Indian Affairs?)	Involuntary, Voluntary
23.141 (What records must the State maintain?)	Involuntary, Voluntary
23.142 (How does the Paperwork Reduction Act affect this subpart?)	Emergency, Involuntary, Voluntary
Effective Date	
23.143 (How does this rule apply to pending proceedings?)	Emergency, Involuntary, Voluntary
Severability	
23.144 (What happens if some portion of this rule is held to be invalid by a court of competent jurisdiction?)	Emergency, Involuntary, Voluntary

Note: For purposes of this table, status-offense child-custody proceedings are included as a type of involuntary proceeding.

Guidelines:

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

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

B.4 Identifying the Tribe

Guidelines:

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

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

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

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

Regulation:

§ 23.109 How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?

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

(b) If the Indian child meets the definition of "Indian child" through more than one Tribe, deference should be given to the Tribe in which the Indian child is already a member, unless otherwise agreed to by the Tribes.

(c) If an Indian child meets the definition of "Indian child" through more than one Tribe because the child is a member in more than one Tribe or the child is not a member of but is eligible for membership in more than one Tribe, the court must provide the opportunity in any involuntary child-custody proceeding for the Tribes to determine which should be designated as the Indian child's Tribe.

(1) If the Tribes are able to reach an agreement, the agreed-upon Tribe should be designated as the Indian child's Tribe.

(2) If the Tribes are unable to reach an agreement, the State court designates, for the purposes of ICWA, the Indian Tribe with which the Indian child has the more significant contacts as the Indian child's Tribe, taking into consideration:

(i) Preference of the parents for membership of the child;

(ii) Length of past domicile or residence on or near the reservation of each Tribe;

(iii) Tribal membership of the child's custodial parent or Indian custodian; and

(iv) Interest asserted by each Tribe in the child-custody proceeding;

(v) Whether there has been a previous adjudication with respect to the child by a court of one of the Tribes; and

(vi) Self-identification by the child, if the child is of sufficient age and capacity to meaningfully self-identify.

(3) A determination of the Indian child's Tribe for purposes of ICWA and the regulations in this subpart do not constitute a determination for any other purpose.

Guidelines:

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

B.6 Contacting the Tribe

Regulation:

§ 23.105 How do I contact a Tribe under the regulations in this subpart?

To contact a Tribe to provide notice or obtain information or verification under the regulations in this subpart, you should direct the notice or inquiry as follows:

(a) Many Tribes designate an agent for receipt of ICWA notices. The BIA publishes a list of Tribes' designated Tribal agents for service of ICWA notice in the Federal Register each year and makes the list available on its website at www.bia.gov.

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

(c) If you do not have accurate contact information for a Tribe, or the Tribe contacted fails to respond to written inquiries, you should seek assistance in contacting the Indian Tribe from the BIA local or regional office or the BIA's Central Office in Washington, D.C. (see www.bia.gov).

Guidelines:

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

B.7 Verifying Tribal membership

Regulation:

§ 23.108 Who makes the determination as to whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member of a Tribe?

(a) The Indian Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) determines whether the child is a member of the Tribe, or whether the child is eligible for membership in the Tribe and a biological parent of the child is a member of the Tribe, except as otherwise provided by Federal or Tribal law.

(b) The determination by a Tribe of whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member, is solely within the jurisdiction and authority of the Tribe, except as otherwise provided by Federal or Tribal law. The State court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe.

(c) The State court may rely on facts or documentation indicating a Tribal determination of membership or eligibility for membership in making a judicial determination as to whether the child is an "Indian child." An example of documentation indicating membership is a document issued by the Tribe, such as Tribal enrollment documentation.

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

Guidelines:

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

If the court has "reason to know" the child is an "Indian child" (*see* section B.1 of these guidelines, above), agencies must use due diligence to work with the relevant Tribe(s) to obtain verification regarding whether the child is a citizen or a biological parent is a citizen and the child is eligible for citizenship. The Department encourages agencies to contact Tribes informally, in addition to providing written notice, to seek such verification. The regulation requires that the agency's efforts to identify and work with those Tribes be documented in the court record. It is a best practice for these efforts to be maintained in agency files as well.

Form of Verification

While written verification from the Tribe(s) is an appropriate method for such verification, other methods may be appropriate. A Tribal representative's testimony at a hearing regarding whether the child is a citizen (or a biological parent is a citizen and the child is eligible for citizenship) is an appropriate method of verification by the Tribe.

Information in Request for Tribe's Verification

The Department encourages State courts and agencies to include enough information in the requests for verification to allow the Tribes to readily determine whether the child is a Tribal citizen (or whether the parent is a Tribal citizen and the child is eligible for citizenship). The request for verification is a meaningful request only if it provides sufficient information to the Tribe to make the determination as to whether the child is a citizen (or the parent is a citizen and the child is eligible for citizenship). Providing as much information as possible facilitates earlier identification of an Indian child and helps prevents delays and disruptions. Section 23.111(d) includes categories of information that must be provided in the notice to a Tribe in involuntary foster-care placement or TPR proceedings. Such information may be helpful to provide a Tribe to assist in verification of whether the child an Indian child. It is also important that names, birthdates, and other relevant information be reported accurately to the Tribe, as misspellings or other incorrect information can generate inaccurate or delayed responses.

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

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

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

Court's Determination

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

The Department encourages prompt responses by Tribes, but if a Tribe fails to respond to multiple requests for verification regarding whether a child is in fact a citizen (or a biological parent is a citizen and the child is eligible for citizenship), and the agency has sought the assistance of the Bureau of Indian Affairs (BIA) in contacting the Tribe, a court may make a determination regarding whether the child is an Indian child for purposes of the child-custody proceeding based on the information it has available. A finding that a child is an "Indian child" applies only for the purposes of the application of ICWA to that proceeding, and does not establish that child's membership in a Tribe or eligibility for any Federal programs or benefits for any other purpose. If new evidence later arises, the court will need to consider it and should alter the original determination if appropriate.

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

BIA Assistance

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

B.8 Facilitating Tribal membership

Guidelines:

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

C. Emergency Proceedings

C.1 Emergency proceedings in the ICWA context

Regulation:

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

Guidelines:

The statute and regulations recognize that emergency proceedings may need to proceed differently from other proceedings under ICWA.[21] Specifically, section 1922 of ICWA was designed to "permit, under applicable State law, the emergency removal of an Indian child from his parent or Indian custodian or emergency placement of such child in order to prevent imminent physical harm to the child notwithstanding the provisions of" ICWA.[22] While States use different terminology (e.g., preliminary protective hearing, shelter hearing) for emergency hearings, the regulatory definition of emergency proceedings is intended to cover such proceedings as may be necessary to prevent imminent physical damage or harm to the child.

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

C.2 Threshold for removal on an emergency basis

Regulation:

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

Guidelines:

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

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

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

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

C.3 Standards and processes for emergency proceedings

Regulation:

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

(a) Any emergency removal or placement of an Indian child under State law must terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(b) The State court must:

(1) Make a finding on the record that the emergency removal or placement is necessary to prevent imminent physical damage or harm to the child;

(2) Promptly hold a hearing on whether the emergency removal or placement continues to be necessary whenever new information indicates that the emergency situation has ended; and

(3) At any court hearing during the emergency proceeding, determine whether the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(4) Immediately terminate (or ensure that the agency immediately terminates) the emergency proceeding once the court or agency possesses sufficient evidence to determine that the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(c) An emergency proceeding can be terminated by one or more of the following actions:

(1) Initiation of a child-custody proceeding subject to the provisions of ICWA;

(2) Transfer of the child to the jurisdiction of the appropriate Indian Tribe; or

(3) Restoring the child to the parent or Indian custodian.

…

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

Guidelines:

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

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

- **Restoring the child to the parent or Indian custodian.** If the agency determines the emergency has ended, State procedures will dictate whether the agency may return the child without the need for a hearing. A safety plan may be a solution to mitigate the situation that gave rise to the need for emergency removal and placement and allow the State to terminate the emergency proceeding. If the State court finds that the implementation of a safety plan means that emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child, the child should be returned to the parent or custodian. The State may still choose to initiate a child-custody proceeding, or may transfer the case to the jurisdiction of the Tribe.

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

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

Termination of the emergency proceeding does not necessarily mean that the actual placement of the child must change. If an Indian child cannot be safely returned to the parents or custodian, the child must either be transferred to the jurisdiction of the appropriate Indian Tribe, or the State must initiate a child-custody proceeding to which the full set of ICWA protections would apply. Under this scenario, the child may end up staying in the same placement, but such placement will not be under the emergency proceeding provisions authorized by section 1922. Instead, that placement would need to be pursuant to Tribal law (if the child is

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

transferred to the jurisdiction of the Tribe) or comply with the relevant ICWA statutory and rule provisions for a child-custody proceeding (if the State retains jurisdiction)

ICWA and the rule emphasize that an emergency proceeding under ICWA section 1922 needs to be as short as possible and include provisions that are designed to achieve that result. ICWA requires that State officials "insure" that Indian children are returned home (or transferred to their Tribe's jurisdiction) as soon as the threat of imminent physical damage or harm has ended, or that State officials "expeditiously" initiate a child-custody proceeding subject to all ICWA protections.[28] The rule requires that an emergency removal or placement of an Indian child must "terminate immediately" when it is no longer necessary to prevent imminent physical damage or harm to the child.

C.4 Contents of petition for emergency removal

Regulation:

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

…(d) A petition for a court order authorizing the emergency removal or continued emergency placement, or its accompanying documents, should contain a statement of the risk of imminent physical damage or harm to the Indian child and any evidence that the emergency removal or placement continues to be necessary to prevent such imminent physical damage or harm to the child. The petition or its accompanying documents should also contain the following information:

(1) The name, age, and last known address of the Indian child;

(2) The name and address of the child's parents and Indian custodians, if any;

(3) The steps taken to provide notice to the child's parents, custodians, and Tribe about the emergency proceeding;

(4) If the child's parents and Indian custodians are unknown, a detailed explanation of what efforts have been made to locate and contact them, including contact with the appropriate BIA Regional Director (see www.bia.gov);

(5) The residence and the domicile of the Indian child;

(6) If either the residence or the domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the Tribe affiliated with that reservation or village;

(7) The Tribal affiliation of the child and of the parents or Indian custodians;

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

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

(9) If the child is believed to reside or be domiciled on a reservation where the Tribe exercises exclusive jurisdiction over child-custody matters, a statement of efforts that have been made and are being made to contact the Tribe and transfer the child to the Tribe's jurisdiction; and

(10) A statement of the efforts that have been taken to assist the parents or Indian custodians so the Indian child may safely be returned to their custody.

…

Guidelines:

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

C.5 Outer limit on length of emergency removal

Regulation:

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

…(e) An emergency proceeding regarding an Indian child should not be continued for more than 30 days unless the court makes the following determinations:

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

(2) The court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian Tribe; and

(3) It has not been possible to initiate a "child-custody proceeding" as defined in § 23.2.

Guidelines:

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

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

Should the court need the emergency proceeding of an Indian child to last longer than 30 days, however, it may extend the emergency proceeding if it makes all three of the specific findings listed at § 23.113(e). Allowing a court to extend an emergency proceeding if it makes those findings provides appropriate flexibility for a court that finds itself facing unusual circumstances.[29]

C.6 Emergency placements

Regulation:

See § 23.113, above.

Guidelines:

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

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

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

C.7 Identifying Indian children in emergency situations

Regulation:

See § 23.113, above.

Guidelines:

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

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

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

C.8 Active efforts in emergency situations

Guidelines:

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

C.9 Notice in emergency situations

Regulation:

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

Guidelines:

Neither the statute nor rule requires notice prior to an emergency removal because of the short timeframe in which emergency proceedings are conducted to secure the safety of the child (although there may be relevant State or due process requirements). In order to protect the parents', Indian custodians', and Tribes' due process and other rights in these situations, however, it is a recommended practice for the agency to take all practical steps to contact them. This likely includes contact by telephone or in person and may include email or other written forms of contact.

D. Notice

D.1 Requirement for notice

Regulation:

§ 23.11 Notice.

(a) In any involuntary proceeding in a State court where the court knows or has reason to know that an Indian child is involved, and where the identity and location of the child's parent or Indian custodian or Tribe is known, the party seeking the foster-care placement of, or termination of parental rights to, an Indian child must directly notify the parents, the Indian custodians, and the child's Tribe by registered or certified mail with return receipt requested, of the pending child-custody proceedings and their right of intervention. Notice must include the requisite information identified in § 23.111, consistent with the confidentiality requirement in § 23.111(d)(6)(ix). Copies of these notices must be sent to the appropriate Regional Director listed in paragraphs (b)(1) through (12) of this section by registered or certified mail with return receipt requested or by personal delivery and must include the information required by § 23.111.

(b) [See Appendix 1]

(c) Upon receipt of the notice, the Secretary will make reasonable documented efforts to locate and notify the child's Tribe and the child's parent or Indian custodian. The Secretary will have 15 days, after receipt of the notice, to notify the child's Tribe and parents or Indian custodians and to send a copy of the notice to the court. If within the 15-day period the Secretary is unable to verify that the child meets the criteria of an Indian child as defined in § 23.2, or is unable to locate the parents or Indian custodians, the Secretary will so inform the court and state how much more time, if any, will be needed to complete the verification or the search. The Secretary will complete all research efforts, even if those efforts cannot be completed before the child-custody proceeding begins.

(d) Upon request from a party to an Indian child-custody proceeding, the Secretary will make a reasonable attempt to identify and locate the child's Tribe, parents, or Indian custodians to assist the party seeking the information.

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

(a) When a court knows or has reason to know that the subject of an involuntary foster-care-placement or termination-of-parental-rights proceeding is an Indian child, the court must ensure that:

> (1) The party seeking placement promptly sends notice of each such child-custody proceeding (including, but not limited to, any foster-care placement or any termination of parental or custodial rights) in accordance with this section; and

(2) An original or a copy of each notice sent under this section is filed with the court together with any return receipts or other proof of service.

(b) Notice must be sent to:

(1) Each Tribe where the child may be a member (or eligible for membership if a biological parent is a member) (see § 23.105 for information on how to contact a Tribe);

(2) The child's parents; and

(3) If applicable, the child's Indian custodian.

Guidelines:

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

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

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

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

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

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

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

- Each individual hearing within a proceeding;
- Any change in placement – the statute provides rights to parents, Indian custodians and Tribes (e.g., right to intervene) and a change in circumstances resulting from a change in placement may prompt an individual or Tribe to invoke those rights, even though they did not do so before;
- Any change to the child's permanency plan or concurrent plan – a change in the ultimate goal may prompt an individual or Tribe to invoke their rights, even though they did not do so before;
- Any transfer of jurisdiction to another State or receipt of jurisdiction from another State.

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

Regulation:

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

…(c) Notice must be sent by registered or certified mail with return receipt requested. Notice may also be sent via personal service or electronically, but such alternative methods do not replace the requirement for notice to be sent by registered or certified mail with return receipt requested.

Guidelines:

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

If State law requires actual notice or personal service, that may be a higher standard for protection of the rights of the parent or Indian custodian of an Indian child than is provided for in ICWA. In that case, meeting that higher standard would be required.[31] Even in this case, it is a best practice to also provide notice by registered or certified mail, return receipt requested, because the return receipt provides documentation for the record that notice was received.

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

The statute and regulations require notice to the parents; a "parent" includes an unwed father that has established or acknowledged paternity. If, at any point, it is discovered that someone is a "parent," as that term is defined in the regulations, that parent would be entitled to notice.

D.3 Contents of notice

Regulation:

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

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

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

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

(2) All names known (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and Tribal enrollment numbers if known;

(3) If known, the names, birthdates, birthplaces, and Tribal enrollment information of other direct lineal ancestors of the child, such as grandparents;

(4) The name of each Indian Tribe in which the child is a member (or may be eligible for membership if a biological parent is a member);

(5) A copy of the petition, complaint, or other document by which the child-custody proceeding was initiated and, if a hearing has been scheduled, information on the date, time, and location of the hearing;

(6) Statements setting out:

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

(ii) The right of any parent or Indian custodian of the child, if not already a party to the child-custody proceeding, to intervene in the proceedings.

(iii) The Indian Tribe's right to intervene at any time in a State-court proceeding for the foster-care placement of or termination of parental rights to an Indian child.

(iv) That, if the child's parent or Indian custodian is unable to afford counsel based on a determination of indigency by the court, the parent or Indian custodian has the right to court-appointed counsel.

(v) The right to be granted, upon request, up to 20 additional days to prepare for the child-custody proceedings.

(vi) The right of the parent or Indian custodian and the Indian child's Tribe to petition the court for transfer of the foster-care-placement or termination-of-parental-rights proceeding to Tribal court as provided by 25 U.S.C. 1911 and § 23.115.

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

(viii) The potential legal consequences of the child-custody proceedings on the future parental and custodial rights of the parent or Indian custodian.

(ix) That all parties notified must keep confidential the information contained in the notice and the notice should not be handled by anyone not needing the information to exercise rights under ICWA.

Guidelines:

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

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

Confidentiality

While a petition may contain confidential information, providing a copy of the petition with notice to Tribes is a government-to-government exchange of information necessary for the government agencies' performance of duties. *See* 81 FR 38811. The petition is necessary to provide sufficient information to allow the parents, Indian custodian and Tribes to effectively participate in the proceeding.

D.4 Notice to the Bureau of Indian Affairs

Regulation:

§ 23.11 Notice

(a)…. Copies of these notices must be sent to the appropriate Regional Director listed in paragraphs (b)(1) through (12) of this section by registered or certified mail with return receipt requested or by personal delivery and must include the information required by § 23.111.

Guidelines:

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

D.5 Documenting the notice with the court

Regulation:

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

(a)….

…(2) An original or a copy of each notice sent under this section is filed with the court together with any return receipts or other proof of service.

Guidelines:

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

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

Regulation:

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

…(e) If the identity or location of the child's parents, the child's Indian custodian, or the Tribes in which the Indian child is a member or eligible for membership cannot be ascertained, but there is reason to know the child is an Indian child, notice of the child-custody proceeding must be sent to the appropriate Bureau of Indian Affairs Regional Director (see www.bia.gov). To establish Tribal identity, as much information as is known regarding the child's direct lineal ancestors should be provided. The Bureau of Indian Affairs will not make a determination of Tribal membership but may, in some instances, be able to identify Tribes to contact.

§ 23.11 Notice.

…(c) Upon receipt of the notice, the Secretary will make reasonable documented efforts to locate and notify the child's Tribe and the child's parent or Indian custodian. The Secretary will have 15 days, after receipt of the notice, to notify the child's Tribe and parents or Indian custodians and to send a copy of the notice to the court. If within the 15-day period the Secretary is unable to verify that the child meets the criteria of an Indian child as defined in § 23.2, or is unable to locate the parents or Indian custodians, the Secretary will so inform the court and state how much more time, if any, will be needed to complete the verification or the search. The Secretary will complete all research efforts, even if those efforts cannot be completed before the child-custody proceeding begins.

(d) Upon request from a party to an Indian child-custody proceeding, the Secretary will make a reasonable attempt to identify and locate the child's Tribe, parents, or Indian custodians to assist the party seeking the information.

Guidelines:

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

D.7 Time limits for notice

Regulation:

§ 23.112 What time limits and extensions apply?

(a) No foster-care-placement or termination-of-parental-rights proceeding may be held until at least 10 days after receipt of the notice by the parent (or Indian custodian) and by the Tribe (or the Secretary). The parent, Indian custodian, and Tribe each have a right, upon request, to be granted up to 20 additional days from the date upon which notice was received to prepare for participation in the proceeding.

(b) Except as provided in 25 U.S.C. 1922 and § 23.113, no child-custody proceeding for foster-care placement or termination of parental rights may be held until the waiting periods to which the parents or Indian custodians and to which the Indian child's Tribe are entitled have expired, as follows:

(1) 10 days after each parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111;

(2) 10 days after the Indian child's Tribe (or the Secretary if the Indian child's Tribe is unknown to the party seeking placement) has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111;

(3) Up to 30 days after the parent or Indian custodian has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111, if the parent or Indian custodian has requested up to 20 additional days to prepare for the child-custody proceeding as provided in 25 U.S.C. 1912(a) and § 23.111; and

(4) Up to 30 days after the Indian child's Tribe has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111, if the Indian child's Tribe has requested up to 20 additional days to prepare for the child-custody proceeding.

(c) Additional time beyond the minimum required by 25 U.S.C. 1912 and § 23.111 may also be available under State law or pursuant to extensions granted by the court.

Guidelines:

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

Minimum time limit. As the rule states, no foster-care-placement or termination-of-parental-rights proceeding may be held until at least 10 days after receipt of the notice by the parent (or Indian custodian) and by the Tribe (or the Secretary).

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

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

D.8 Translation or interpretation

Regulation:

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

…(f) If there is a reason to know that a parent or Indian custodian possesses limited English proficiency and is therefore not likely to understand the contents of the notice, the court must provide language access services as required by Title VI of the Civil Rights Act and other Federal laws. To secure such translation or interpretation support, a court may contact or direct a party to contact the Indian child's Tribe or the local BIA office for assistance in locating and obtaining the name of a qualified translator or interpreter.

Guidelines:

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

D.9 Right to an attorney

Regulation:

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

…(g) If a parent or Indian custodian of an Indian child appears in court without an attorney, the court must inform him or her of his or her rights, including any applicable right to appointed counsel, right to request that the child-custody proceeding be transferred to Tribal court, right to object to such transfer, right to request additional time to prepare for the child-custody proceeding as provided in § 23.112, and right (if the parent or Indian custodian is not already a party) to intervene in the child-custody proceedings.

Guidelines:

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

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

D.10 Lack of response to notice

Regulation:

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

Guidelines:

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

E. Active Efforts

E.1 Meaning of "active efforts"

Regulation:

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

Guidelines:

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

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

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

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

Active efforts should be:
- Affirmative;
- Active;

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

- Thorough; and
- Timely.

E.2 Active efforts and the case plan

Regulation:

§ 23.2 … Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan.

Guidelines:

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

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

Regulation:

§ 23.2… To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe.

Guidelines:

The rule indicates that, to the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions of the Indian child's Tribe, and in partnership with the child, parents, extended family, and Tribe. This is consistent with congressional direction in ICWA to conduct Indian child-custody proceedings in a way that reflects the cultural and social standards prevailing in Indian communities and families. There is also evidence that services that are adapted to the client's cultural backgrounds are better.[36]

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

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

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

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

E.4 Examples of active efforts

Regulation:

§ 23.2… Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

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

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

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

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

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

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

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

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

(9) Monitoring progress and participation in services;

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

(11) Providing post-reunification services and monitoring.

Guidelines:

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

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

E.5 Providing active efforts

Regulation:

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

(a) Prior to ordering an involuntary foster-care placement or termination of parental rights, the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful.…

Guidelines:

The statute and rule provide that the State court must conclude that active efforts were provided and were unsuccessful prior to ordering an involuntary foster-care placement or TPR.[37] Thus, if a detention, jurisdiction, or disposition hearing in an involuntary child-custody proceeding includes a judicial determination that the Indian child must be placed in or remain in foster care, the court must first be satisfied that the active-efforts requirement has been met. In order to satisfy this requirement, active efforts should be provided at the earliest point possible.

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

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

Active efforts are required to prevent the breakup of the Indian child's family, regardless of whether individual members of the family are themselves Indian. The child's family is an "Indian family" because the child meets the definition of an "Indian child."

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

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

Applying for Tribal membership. There is no requirement to conduct active efforts to apply for Tribal citizenship for the child. In any particular case, however, it may be appropriate to assist the child or parents in obtaining Tribal citizenship for the child, as this may make more services and programs available to the child. Securing Tribal citizenship may have long-term benefits for an Indian child, including access to programs, services, benefits, cultural connections, and political rights in the Tribe. It may be appropriate, for example, to assist in obtaining Tribal citizenship where it is apparent that the child or its biological parent would become enrolled in the Tribe during the course of the proceedings, thereby aiding in ICWA's efficient administration.

E.6 Documenting active efforts

Regulation:

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

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

[38] *See* 25 CFR § 23.120.

Guidelines:

The active-efforts requirement is a key protection provided by ICWA, and it is important that compliance with the requirement is documented in the court record. The rule therefore requires the court to document active efforts in detail in the record.

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

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

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

involving Tribal children. It is also consistent with section 1911(d)'s requirement that States afford full faith and credit to public acts, records, and judicial proceedings of Tribes to the same extent as any other entity.

Socioeconomic conditions within the Tribe or reservation. The regulations prohibit consideration of the perceived socioeconomic conditions within a Tribe or reservation. Congress found that misplaced concerns about low incomes, substandard housing, and similar factors on reservations resulted in the unwarranted removal of Indian children from their families and Tribes. These factors can introduce bias into decision-making and should not come into play in considering whether transfer is appropriate.

State courts retain the ability to determine "good cause" based on the specific facts of a particular case, so long as they do not base their good cause finding on one or more of these prohibited considerations. If a State court considers the distance of the parties from the Tribal court, it must also weigh any available accommodations that may address the potential hardships caused by the distance.

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

F.6 Transferring to Tribal court.

Regulation:

§ 23.119 What happens after a petition for transfer is granted?

(a) If the Tribal court accepts the transfer, the State court should expeditiously provide the Tribal court with all records related to the proceeding, including, but not limited to, the pleadings and any court record.

(b) The State court should work with the Tribal court to ensure that the transfer of the custody of the Indian child and of the proceeding is accomplished smoothly and in a way that minimizes the disruption of services to the family.

Guidelines:

Once the State court determines that it must transfer to Tribal court, the State court and Tribal court should communicate to agree to procedures for the transfer to ensure that the transfer of the proceeding minimizes disruptions to the child and to services provided to the family.

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

G. Adjudication of Involuntary Proceedings

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

Regulation:

§ 23.121 What are the applicable standards of evidence?

(a) The court must not order a foster-care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(b) The court must not order a termination of parental rights for an Indian child unless evidence beyond a reasonable doubt is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(c) For a foster-care placement or termination of parental rights, the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding.

(d) Without a causal relationship identified in paragraph (c) of this section, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.

Guidelines:

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

The rule requires there be a causal relationship between the particular conditions in the home and risk of serious emotional or physical damage to the child. Put differently, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding.

The rule prohibits relying on **any one** of the factors listed in paragraph (d), **absent the causal connection** identified in (c), **as the sole basis** for determining that clear and convincing evidence or evidence beyond a reasonable doubt support a conclusion that continued custody is likely to result in serious emotional or physical damage to the child. This provision addresses the types of situations identified in the statute's legislative history where Indian children are removed from their home based on subjective assessments of home conditions that, in fact, are not likely to cause the child serious emotional or physical damage.

"Nonconforming social behavior" may include behaviors that do not comply with society's norms, such as dressing in a manner that others perceive as strange, an unusual or disruptive manner of speech, or discomfort in or avoidance of social situations.

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

G.2 Qualified expert witness

Regulation:

§ 23.122 Who may serve as a qualified expert witness?

(a) A qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. A person may be designated by the Indian child's Tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.

(b) The court or any party may request the assistance of the Indian child's Tribe or the BIA office serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses.

(c) The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child-custody proceedings concerning the child.

Guidelines:

Qualified expert witnesses must have particular expertise. The rule requires that the qualified expert witness must be qualified to testify regarding whether the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. This requirement flows from the language of the statute requiring a determination, supported by evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in

serious emotional or physical damage to the child.[50] Congress noted that "[t]he phrase 'qualified expert witness' is meant to apply to expertise beyond normal social worker qualifications."[51]

Qualified expert witness should have knowledge of prevailing social and cultural standards of the Tribe. In addition, the qualified expert witness should have specific knowledge of the prevailing social and cultural standards of the Indian child's Tribe. In passing ICWA, Congress wanted to make sure that Indian child-welfare determinations are not based on "a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family."[52] Congress recognized that States have failed to recognize the essential Tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.[53] Accordingly, expert testimony presented to State courts should reflect and be informed by those cultural and social standards. This ensures that relevant cultural information is provided to the court and that the expert testimony is contextualized within the Tribe's social and cultural standards. Thus, the question of whether the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child is one that should be examined in the context of the prevailing cultural and social standards of the Indian child's Tribe.

The rule does not, however, strictly limit who may serve as a qualified expert witness to only those individuals who have particular Tribal social and cultural knowledge. The rule recognizes that there may be certain circumstances where a qualified expert witness need not have specific knowledge of the prevailing social and cultural standards of the Indian child's Tribe in order to meet the statutory standard. For example, a leading expert on issues regarding sexual abuse of children may not need to know about specific Tribal social and cultural standards in order to testify as a qualified expert witness regarding whether return of a child to a parent who has a history of sexually abusing the child is likely to result in serious emotional or physical damage to the child. Thus, while a qualified expert witness should normally be required to have knowledge of Tribal social and cultural standards, that may not be necessary if such knowledge is plainly irrelevant to the particular circumstances at issue in the proceeding. A more stringent standard may, of course, be set by State law.

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

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

Assistance in locating a qualified expert witness. The rule encourages the court or any party to request the assistance of the Indian child's Tribe or the BIA office serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses. The rule also allows a Tribe to designate a person as being qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe.

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

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

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

Citizen of Tribe. There is no requirement that the qualified expert witness be a citizen of the child's Tribe. The witness should be able to demonstrate knowledge of the prevailing social and cultural standards of the Indian child's Tribe or be designated by a Tribe as having such knowledge. In some instances, it may be appropriate to accept an expert with knowledge of the customs and standards of closely related Tribes. Parties may also contact the BIA for assistance.

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

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

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

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

H. Placement Preferences

H.1 Adoptive placement preferences

Regulation:

§ 23.130 What placement preferences apply in adoptive placements?

(a) In any adoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (b) of this section, preference must be given in descending order, as listed below, to placement of the child with:

(1) A member of the Indian child's extended family;

(2) Other members of the Indian child's Tribe; or

(3) Other Indian families.

(b) If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply.

(c) The court must, where appropriate, also consider the placement preference of the Indian child or Indian child's parent.

Guidelines:

In ICWA, Congress expressed a strong Federal policy in favor of keeping Indian children with their families and Tribes whenever possible, and established preferred placements that it believed would help protect the needs and long-term welfare of Indian children and families, while providing the flexibility to ensure that the particular circumstances faced by individual Indian children can be addressed by courts.

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

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

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

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

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

H.2. Foster-care placement preferences

Regulation:

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

(a) In any foster-care or preadoptive placement of an Indian child under State law, including changes in foster-care or preadoptive placements, the child must be placed in the least-restrictive setting that:

(1) Most approximates a family, taking into consideration sibling attachment;

(2) Allows the Indian child's special needs (if any) to be met; and

(3) Is in reasonable proximity to the Indian child's home, extended family, or siblings.

(b) In any foster-care or preadoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (c) of this section, preference must be given, in descending order as listed below, to placement of the child with:

(1) A member of the Indian child's extended family;

(2) A foster home that is licensed, approved, or specified by the Indian child's Tribe;

(3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(4) An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

(c) If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply, so long as the placement is the least-restrictive setting appropriate to the particular needs of the Indian child, as provided in paragraph (a) of this section.

(d) The court must, where appropriate, also consider the preference of the Indian child or the Indian child's parent.

Guidelines:

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

factors leading to the passage of ICWA was the failure of non-Indian child welfare workers to understand the role of the extended family in Indian society. In many cases, the placement preferences have special force and effect for Indian children, since, as Congress recognized, there are harms to individual children and parents caused by disconnection with their Tribal communities and culture, and also harms to Tribes caused by the loss of their children.

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

Least restrictive setting. The foster-care placement includes the additional requirement that the placement be the least restrictive setting, which means the setting that most approximates a family. The placement decision must take into consideration sibling attachment and the proximity to the child's home, extended family, and/or siblings. If for some reason it is not possible to place the siblings together, then the Indian child should be placed, if possible, in a setting that is within a reasonable proximity to the sibling. In addition, if the sibling is age 18 or older, that sibling is extended family and would qualify as a preferred placement. The placement should also be one that allows the Indian child's special needs, if any, to be met.

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

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

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

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

H.3 Finding preferred placements

Regulation:

[*See* §§ 23.130 and 23.131, above].

Guidelines:

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

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

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

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

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

Availability of preferred placements. The Department encourages States and Tribes to collaborate to increase the availability of Indian foster homes. Organizations such as the National Resource Center for Diligent Recruitment at AdoptUSKids provide tools and resources for recruiting Indian homes. See, e.g., National Resource Center for Diligent Recruitment, For Tribes: Tool and Resources (last visited Apr. 27, 2016), www.nrcdr.org/for-tribes/tools-and-resources.

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

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

H.4 Good cause to depart from the placement preferences

Regulation:

§ 23.129 When do the placement preferences apply?

…(c) The placement preferences must be applied in any foster-care, preadoptive, or adoptive placement unless there is a determination on the record that good cause under § 23.132 exists to not apply those placement preferences.

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

(a) If any party asserts that good cause not to follow the placement preferences exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties to the child-custody proceeding and the court.

(b) The party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is "good cause" to depart from the placement preferences.

(c) A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and should be based on one or more of the following considerations:

(1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;

(2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;

(3) The presence of a sibling attachment that can be maintained only through a particular placement;

(4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;

(5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

Guidelines:

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

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

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

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

Standard of evidence for "good cause" determination. While not mandatory, it is recommended that the documentation meet the "clear and convincing" standard of proof. Courts that have grappled with the issue have almost universally concluded that application of the clear and convincing evidence standard is required as it is most consistent with Congress's intent in ICWA to maintain Indian families and Tribes intact. Widespread application of this standard will promote uniformity of the application of ICWA. It will also prevent delays in permanency that would otherwise result from protracted litigation over what the correct burden of proof should be.

A court evidentiary hearing may not be required to effect a placement that departs for good cause from the placement preferences, if such a hearing is not required under State law and if the requirements of 25 U.S.C. 1912(d)-(e) have been met. Regardless of the level of court involvement in the placement, however, the basis for an assertion of good cause must be stated in the record or in writing and a record of the placement must be maintained.

Where a party to the proceeding objects to the placement, however, the rule establishes the parameters for a court's review of whether there is good cause to deviate from the placement preferences and requires the basis for that determination to be on the record. While the agency may place a child prior to or without any determination by the court, the agency does so knowing that the court reviews the placement to ensure compliance with the statute.

Congress established preferred placements in ICWA that it believed would help protect the long-term health and welfare of Indian children, parents, families, and Tribes. ICWA must be interpreted as providing meaningful limits on the discretion of agencies and courts to remove Indian children from their families and Tribes, since this is the very problem that ICWA was intended to address. Accordingly, the rule identifies specific factors that should provide the basis for a finding of good cause to deviate from the placement preferences.

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

Factors that may form the basis for good cause. The rule's list of is not exhaustive. The State court has the ultimate authority to consider evidence provided by the parties and make its own judgment as to whether the moving party has met the statutory "good cause" standard. In this way, the rule recognizes that there may be extraordinary circumstances where there is good cause to deviate from the placement preferences based on some reason outside of the five specifically-listed factors. The rule thereby retains discretion for courts and agencies to consider any unique needs of a particular Indian child in making a good cause determination.

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

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

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

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

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

Sibling attachment. The rules governing placement preferences recognize the importance of maintaining biological sibling connections. The sibling placement preference makes clear that good cause can appropriately be found to depart from ICWA's placement preferences where doing so allows the "Indian child" to remain with his or her sibling. This allows biological siblings to remain together, even if only one is an "Indian child" under the Act.

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

Unavailability of suitable placement. The rule provides that the unavailability of a suitable placement may be the basis for a good cause determination. It also requires that, in order to determine that there is good cause to deviate from the placement preferences based on unavailability of a suitable placement, the court must determine that a diligent search was conducted to find placements meeting the preference criteria. This provision is required because the Department understands ICWA to require proactive efforts to determine if there are extended family or Tribal community placements available. It is also consistent with the Federal policy for all children—not just Indian children—that States are to exercise "due diligence" to identify, locate, and notify relatives when children enter the foster care system. *See* 81 FR 38839 (June 14, 2016) for additional explanation for why the State must provide documented efforts to comply with the preferences. *See* section H.3 of these guidelines for additional guidance on what a diligent search involves.

The rule requires that, if the agency relies on unavailability of placement preferences as good cause for deviating from the placement preferences, it must be able to demonstrate to the court on the record that it conducted a diligent search. This showing would occur at the hearing in which the court determines whether a placement or change in placement is appropriate.

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

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

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

H.5 Limits on good cause

Regulation:

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

…(d) A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement.

(e) A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

Guidelines:

The rule identifies certain factors that may not be the basis for a finding of good cause to depart from the preferences. These limits focus on those factors that there is evidence Congress did not wish to be considered, or that have been shown to frustrated the application of 25 U.S.C. 1911(b). State courts retain discretion to determine "good cause," so long as they do not base their good cause finding on one or more of these prohibited considerations.

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

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

A placement is "made in violation of ICWA" if the placement was based on a failure to comply with specific statutory or regulatory mandates. The determination of whether there was a violation of ICWA will be fact-specific and tied to the requirements of the statute and this rule. For example, failure to provide the required notice to the Indian child's Tribe for a year, despite the Tribe having been identified earlier in the proceeding, would be a violation of ICWA. By comparison, placing a child in a non-preferred placement would not be a violation of ICWA if the State agency and court followed the statute and applicable rules in making the placement, including by properly determining that there was good cause to deviate from the placement preferences.

As a best practice, in all cases, State agencies and courts should carefully consider whether the fact that an Indian child has developed a relationship with a non-preferred placement outweighs the long-term benefits to a child that can arise from maintaining connections to family and the Tribal community. Where a child is in a non-preferred placement, it is a best practice to facilitate connections between the Indian child and extended family and other potential preferred placements. For example, if a child is in a non-preferred placement due to geographic considerations and to promote reunification with the parent, the agency or court should promote connections and bonding with extended family or other preferred placements who may live further away. In this way, the child has the opportunity to develop additional bonds with these preferred placements that could ease a transition to that placement.