

Comment: A commenter objected to the language in PR § 23.131(c)(4) stating that a placement is not “unavailable” (as a basis for good cause to depart from the placement preferences) if the placement conforms to the prevailing social and cultural standards of the Indian community. The commenter stated that this language is not in ICWA and may lead to argument that good cause does not exist even where the placement does not pass a background check, potentially violating ASFA, which disqualifies people convicted of certain crimes from serving as a placement. This commenter asserted that inability to pass ASFA or State background check requirements is per se good cause.

Response: ICWA requires that the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community. *See* 25 U.S.C. 1915(d). Nothing in the rule eliminates other requirements under State or Federal law for determining the safety of a placement.

f. Other Suggestions Regarding Good Cause to Depart from Placement Preferences

Comment: One commenter stated that the rule should provide that “good cause” to deviate from the placement preferences exists if serious emotional or physical damage to the child is likely to result, to follow the line of reasoning in § 1912(e) that uses that standard for continued custody.

Response: The final rule provides that the extraordinary physical, mental, or emotional needs of the child may be the basis for a good cause determination. *See* FR § 23.132(c)(4). In addition, the final rule provides that the unavailability of a suitable placement may be the basis for a good cause determination. *See* FR § 23.132(c)(5). Both of these provisions would allow a court to address the commenter’s concern about preventing serious emotional or physical

damage to a child. In addition, the final rule retains discretion for State courts to consider other factors when necessary.

6. Placement Preferences Presumed to be in the Child's Best Interest

Many commented on the intersection of a “best interests analysis” with ICWA’s placement preferences. A high-level summary of these comments is provided here. Several commenters stated that a “best interest of the child” analysis is not appropriate for Indian children, for the following reasons.

- ICWA compliance already presumptively furthers best interests of the child and represents best practices in child welfare generally.
- There is a movement in literature to replace the “best interest” consideration altogether in favor of the least detrimental among available alternatives for the child, to focus on causing no harm to the child, rather than an implication that courts or agencies are well-positioned to determine what is “best.”
- ICWA was passed to overcome the bias, often subconscious, and lack of knowledge about Tribes and Indian children, and leaving “best interests” to be argued by individuals opposing ICWA’s preferences evades ICWA’s purposes. The “best interests” analysis is inherently open to bias.
- The “best interests of the child” analysis permits courts and agencies to ignore the placement preferences at will.
- The “best interests of the child” analysis is necessarily broader and richer for Indian children because it includes connection to Tribal community, identity, language and cultural affiliation.

- The “best interests” analysis is not appropriate in any determination of “good cause” because “good cause” and “best interest” appear in different parts of the statute, meaning Congress carefully and expressly “cabined” each concept, and as such should be treated separately.

Several commenters suggested adding language drawn from the Michigan Indian Family Preservation Act on how to determine a child’s best interests.

Other commenters asked the Department to keep the focus on the best interests of the children and opposed having no independent consideration of the best interests of the Indian child for the following reasons:

- The presumption that ICWA compliance is in the child’s best interest is not always true.
- The “best interests of the child” analysis is of paramount importance.
- The “best interests of the child” analysis is compatible with ICWA and should be explicitly allowed because ICWA was not enacted to ignore the physical and emotional needs of children and that every child should have all factors considered for the best possible outcome because not doing so would be treating them as possessions.
- The “best interests of the child” analysis is not different for Indian children.
- Case law establishes that the child’s best interests must be considered and establishes that the child’s best interests should be considered in “good cause” determinations.
- Not considering the child’s best interest violates the constitutional rights of the children and parents.

Response: As discussed above, ICWA and this rule provide objective mandates that are designed to promote the welfare and short- and long-term interests of Indian children. Congress enacted ICWA to protect the best interests of Indian children. However, the regulations also

provide flexibility for courts to appropriately consider the particular circumstances of the individual children and to protect those children. For example, courts do not need to follow ICWA's placement preferences if there is "good cause" to deviate from those preferences. The "good cause" determination should not, however, simply devolve into a free-ranging "best interests" determination. Congress was skeptical of using "vague standards like 'the best interests of the child,'" H.R. Rep. No. 95-1386 at 19, and intended good cause to be a limited exception, rather than a broad category that could swallow the rule.

N. Post-Trial Rights and Recordkeeping

The final rule describes requirements and standards for vacating an adoption based on consent having been obtained by fraud or duress. It also provides clarification regarding the application of 25 U.S.C. 1914, and the rights to information about adoptee's Tribal affiliations, while removing certain obligations the proposed rule imposed on agencies. The final rule provides procedures for how notice of a change in an adopted Indian child's status is to be provided, including provisions for waiver of this right to notice. The final rule also contains provisions regarding the transmittal of certain adoption records to the BIA, and the maintenance of State records.

1. Petition to Vacate Adoption

Comment: Several commenters opposed PR § 23.132(a) allowing a final decree of adoption to be set aside if the proceeding failed to comply with ICWA. These commenters pointed out that § 1913(d) of the Act only allows a collateral attack on an adoption decree if consent to the adoption was obtained through fraud or duress, not if the proceeding failed to comply with ICWA, while § 1914 allows for invalidation only of a foster-care placement or termination of parental rights if the proceeding failed to comply with ICWA.

Response: The final rule deletes “the proceeding failed to comply with ICWA” as a basis for vacating an adoption decree because FR § 23.136 implements § 1913(d) of the Act, which is limited to invalidation based on the parent’s consent having been obtained through fraud or duress.

Comment: A commenter pointed out that PR § 23.133(a) refers generally to ICWA being violated, but the statute and PR § 23.133(b) both refer specifically to violations of Sections 1911, 1912, or 1913.

Response: The final rule specifies the appropriate sections of ICWA in FR § 23.137(a).

Comment: Several commenters stated that the two-year statute of limitations should not apply to § 1914 actions to invalidate foster-care placements and termination of parental rights. Some commenters asserted that State statutes of limitations should apply; others stated that State statutes of limitations should not apply because it would cause uncertainty and inconsistency. One commenter suggested adding a statute of limitation of 90 days. A few commenters suggested establishing a statute of limitations that allows minors three to five years after they turn age 18 to sue for violations of their rights under ICWA.

Response: The final rule clarifies that the two-year statute of limitations does not apply to actions to invalidate foster-care placements and terminations of parental rights, by clarifying that FR § 23.136 applies only to invalidation of adoptions based on parental consent having been obtained through fraud or duress. If a State’s statute of limitations exceeds two years, then the State statute of limitations may apply; the two-year statute of limitations is a minimum timeframe. *See* 25 U.S.C. 1913. The statute does not establish a statute of limitations for invalidation of foster-care placements and termination of parental rights under § 1914, and the Department declines to establish one at this time.

Comment: A few commenters noted that PR § 23.133 fails to provide the requirement in § 1916(a) that the best interests of the child be considered before determining whether to return the child if the court invalidates an adoption decree or adoptive couples voluntarily terminate their parental rights.

Response: Section 1916(a) addresses a narrow set of circumstances: when an adoption fails because the court invalidates the adoption decree or the adoptive couples voluntarily terminate their parental rights. The statute provides that, under this narrow set of circumstances, the best interests of the child must be considered in determining whether to return the child to biological parent or prior Indian custodian. The regulation does not address this narrow set of circumstances. FR § 23.136(b) requires notice to the parent or Indian custodian of the right to petition for return of the child, but the final rule does not set out the standard for determining whether to return the child to the parent's or Indian custodian's custody. FR § 23.136(c) implements § 1913(d) of the Act, which provides that the court "shall" return the child to the parent if it finds the parent's consent was obtained through fraud or duress.

2. Who Can Make a Petition to Invalidate an Action

Comment: A few commenters requested changing "the court must determine whether it is appropriate to invalidate the action" to "the court must invalidate the action" in PR § 23.133. These commenters stated that the plain language of § 1914 does not allow for court discretion. These commenters further asked how the court would determine appropriateness and under what standard of review.

Response: 25 U.S.C. 1914 does not require the court to invalidate an action, but allows certain parties to petition for invalidation. For this reason, the final rule states that the court must

determine whether it is appropriate to invalidate the action under the standard of review applicable under State law. *See* FR § 23.137.

Comment: A few commenters supported PR § 23.133(c) as clarifying that the Indian child, parents, or Tribe may seek to invalidate an action to uphold the political status and rights of each child. One commenter stated that PR § 23.133(c) is important in that it clarifies that certain provisions of ICWA cannot be waived because any party may challenge based on violations of another party's rights. A few other commenters stated that the rule purports to convey standing to those who do not have a personal stake in the controversy. These commenters claim there is no evidence Congress intended to grant the Department authority to rewrite constitutional standing requirements and the fundamental principle of American jurisprudence that someone seeking relief must have standing.

Response: The final rule does not dictate that a court must find that the listed parties have constitutional standing; rather, it recognizes the categories of those who may petition. The statutory scheme allows one party to assert violations of ICWA requirements that may have impacted other parties rights (e.g., a parent can assert a violation of the requirement for a Tribe to receive notice under § 1912(a)). There is no basis in the statute for the regulation to limit the parties' opportunities for redress for violations of ICWA. Through § 1914, ICWA makes clear that a violation of Sections 1911, 1912, or 1913 necessarily impacts the Indian child, Indian parent or custodian, and the Indian child's Tribe such that each is afforded a right to petition for invalidation of an action taken in violation of any of these provisions. The provision also makes clear that one party cannot waive another party's right to seek to invalidate such an action. Additionally, parties may have other appeal rights under State or other Federal law in addition to the rights established in ICWA.

Comment: A commenter requested deleting from PR § 23.133(a)(2) “from whose custody such child was removed” because it would prevent a noncustodial biological parent from petitioning to invalidate the action.

Response: The final rule continues to include the qualifying phrase “from whose custody such child was removed” because the statute includes this phrase, authorizing parents or Indian custodians “from whose custody such child was removed” the right to petition to invalidate an action. 25 U.S.C. 1914; FR § 23.137(a)(2).

Comment: A commenter requested adding a guardian ad litem to the list of persons in PR § 23.133(a) who may petition to invalidate an action. A commenter requested adding that the child must be a minimum age to petition to invalidate an action.

Response: The final rule does not add a guardian ad litem to the list of persons who may petition to invalidate an action because the statute does not list this category of persons. Nor does the final rule add a minimum age for a child to be able to petition to invalidate an action because the statute does not provide a minimum age. The statute allows an Indian child to petition, which necessarily means that someone with authority to act for the child may petition on the child’s behalf. *See* 25 U.S.C. 1914.

Comment: One commenter suggested adding “or was” to read “an Indian child who is or was the subject of any action” to account for actions that occurred in the past.

Response: The final rule adds the requested clarification because it can be inferred from the statute that the action for foster-care placement or termination of parental rights need not be in process at the time the child petitions to invalidate the action. *See* FR § 23.136(a)(1).

Comment: A State commenter requested clarification of whether the “court of competent jurisdiction” may be a Tribal court, district court, or different court from where the original proceedings occurred.

Response: The court of competent jurisdiction may be a different court from the court where the original proceedings occurred.

Comment: A State commenter requested clarification of whether the ability to challenge the proceeding applies to the proceeding at issue or a subsequent proceeding and stated that, as written, it appears the adoption proceeding could be undone due to failures to follow ICWA in the underlying termination case. This commenter requested clarification that only the proceeding currently before the court may be invalidated.

Response: The ability to petition to invalidate an action does not necessarily affect only the action that is currently before the court. For example, an action to invalidate a termination of parental rights may affect an adoption proceeding. *See, e.g., In re the Adoption of C.B.M.*, 992 N.E.2d 687 (Ind. 2013) (where termination of parental rights has been overturned on appeal, “letting the adoption stand would be an overreach of State power into family integrity”); *State ex rel. T.W. v. Ohmer*, 133 S.W.3d 41, 43 (Mo. 2004) (ordering lower court to set aside adoption decree where parent has appealed termination decision).

3. Rights of Adult Adoptees

Comment: A few commenters supported outlining post-trial rights to protect adopted Indian children, Tribes, parents, and family members. A few commenters opposed PR § 23.134(b) and (c) as undermining the established practice in some jurisdictions of opening adoption-related records for Indian adoptees when they would otherwise be closed. These

commenters expressed concern that PR § 23.134(b) and (c) could be interpreted to allow States to keep records sealed.

Response: The final rule addresses § 1917 of the Act at FR § 23.138 and addresses § 1951 at FR § 23.140. The rule clarifies that it is addressing certain specific rights of adult adoptees to information on Tribal affiliation, in accordance with the statute, rather than all rights of adult adoptees. States may provide additional rights. At FR § 23.71(b), the final rule replaces the proposed text with language restating the Secretary's duty under § 1951(b) of the Act.

Comment: A commenter suggested edits to PR § 23.134(b) and (c) to clarify that it is the court that must seek the assistance of BIA and communicate directly with the Tribe's enrollment office. A few commenters opposed PR § 23.134 to the extent it shifts responsibility to the States, particularly with regard to requiring agencies to communicate directly with Tribal enrollment offices. A few commenters stated that PR § 23.134(c) should include other offices designated by the Tribe, rather than just the Tribal enrollment office.

Response: The final rule deletes the provisions referenced by the commenters.

Comment: One commenter stated that the rule should require disclosure of information to allow adult adoptees to reunite with their siblings.

Response: The final rule does not add the requested requirement because it is beyond the scope of the statute; however, some States have registries that allow individuals to obtain information on siblings for purposes of reunification.

Comment: A few commenters stated that the final adoption decree should require adoptive parents to maintain ties to the Tribe for the benefit of the child or include Tribal affiliation in the adoption papers.

Response: The final rule does not include this requirement. The statute and the regulations, however, provide a range of provisions, including Sections 1917 and 1951, which are focused on promoting the relationship between the adoptee and the Tribe.

Comment: A few commenters noted that the Act provides for BIA to assist adult adoptees in securing information to establish their rights as Tribal citizens, and suggested the rule add a provision to this effect.

Response: The final rule includes a provision at FR § 23.71(b) that incorporates the statute's requirements for BIA assistance to adult adoptees.

4. Data Collection

Comment: A few commenters suggested minimizing non-preferred placements by saying the placement must be documented throughout the case.

Response: FR §§ 23.129(c) and 23.132(c) require that the court's good cause determination be on the record. FR § 23.141 also requires that the record of placement include information justifying the placement determination. This regulatory requirement ensures the statutory provision allowing the Department and Tribe to review State placement records for compliance with the placement preferences is fulfilled. *See* 25 U.S.C. 1915(e).

Comment: A State commenter requested clarification that the agency that places the child must maintain the records.

Response: FR § 23.141 clarifies that the State must maintain the records, but allows a State court or agency to fulfill that role.

Comment: A few commenters opposed PR § 23.136 to the extent it duplicates obligations already assigned to BIA under the current regulation at § 23.71.

Response: The commenters are correct that PR § 23.134 and PR § 23.136 duplicated the content in 25 CFR 23.71 to a large extent. The final rule addresses these comments by keeping those provisions that address BIA responsibilities in FR § 23.71, and moving those provisions that address State responsibilities to FR § 23.140. FR § 23.71 keeps provisions in former § 23.71(b) governing BIA, with minor modifications for readability and to replace the reference to the BIA “chief Tribal enrollment officer” with a general reference to BIA. Other provisions at former § 23.71(a) are contained in FR § 23.140.

Comment: Several commenters supported the proposed data-collection requirements as necessary to determine compliance with the Act. Some stated concern that the information is not currently being maintained and suggested BIA conduct mandatory compliance checks on each State to determine record maintenance and availability.

Response: The regulation is intended to strengthen the effectiveness of States’ implementation of this important provision.

Comment: One commenter noted that the first sentence of PR § 23.136(a) uses the term “child” rather than “Indian child.”

Response: The final rule specifies “Indian child.” See FR § 23.140(a).

Comment: A few commenters suggested adding that the documentation be sent to the child’s Tribe, in addition to BIA.

Response: The statute, at § 1951(a), requires only that the State provide the Secretary with this information.

Comment: A few commenters opposed PR § 23.137, stating that the requirements for a single repository in each State and the seven-day timeframe are beyond the requirements of § 1915(e) and would be an administrative and fiscal burden on States. A commenter stated that the

cost to courts in relocating the approximate 1,123 files throughout 58 counties to a single location would be significant and disruptive. Some claimed it would be an unfunded mandate. A few requested clarifications on how the records must be maintained in a single location. A commenter suggested a timeframe of 30 days would be more appropriate.

Response: The final rule deletes the requirement for storing records of placement in a single repository, but retains a timeframe. The statute provides that the State must make the record available at any time upon the request of the Secretary or the Indian child's Tribe. *See* 25 U.S.C. 1915(e). A timeframe is appropriate to ensure that the record is available upon request "at any time," but the final rule ensures States have the flexibility to determine the best way to maintain their records to ensure that they can comply with the timeframe. In response to comments about the reasonableness of the timeframe, the final rule extends the timeframe to 14 days, which will generally allow two full working weeks to provide the record. *See* FR § 23.141.

Comment: A commenter requested clarification of whether copies or the original files must be maintained and provided.

Response: The regulation does not clarify whether the files must be originals or may be copies because as long as the copies are true copies of the originals, there is no need to specify.

Comment: A commenter requested clarification as to whether only court records are within the regulation's scope or if the regulation covers State agencies or private adoption agencies.

Response: FR § 23.141 directly addresses only court records because the court records must include all evidence justifying the placement determination. *See* 25 U.S.C. 1915, FR § 23.132. States may require that additional records be maintained.

Comment: One commenter suggested requiring States to submit annual reports assessing compliance with the regulations. Other commenters suggested BIA work closely with the U.S. Department of Health and Human Services to encourage broader data collection in AFCARS reporting and enforcement. A Tribal commenter stated that there are currently no reliable data sources for information on Indian children in State care and, without accurate numbers, it is difficult to ascertain with any precision the needs of Indian children in any State.

Response: The final rule does not requiring annual reporting. The Department is working closely with the Department of Health and Human Services on data collection regarding ICWA. See AFCARS Proposed Rule at 81 FR 20283 (April 7, 2016).

Comment: A commenter suggested the rule should address the records filed with the Secretary, including who may access them, the procedure for gaining access, and the timeframe for the Secretary to respond to requests for access.

Response: BIA has maintained a central repository of adoption decrees and responds to requests for access. The final rule, at FR § 23.71(b), incorporates § 1951(b) of the Act, to clarify that someone can request the records from the Secretary.

Comment: A commenter suggested adding a mechanism for securing the information required by PR § 23.136(a) when a State court fails to comply, for example, by requiring them to provide the information to the Secretary.

Response: FR § 23.140(a) implements § 1951(a) of the Act which establishes a State court responsibility to provide information to the Secretary. This provision was formerly located at 25 CFR § 23.71(a).

Comment: A commenter suggested that the “good cause” basis stated on the record should be reported in the State database and reported to Tribes and adoptees.

Response: The regulation requires that the State record the basis for “good cause” to deviate from the preferred placements (*see* FR § 23.129(c)); this information and evidence must be included in the court record.

Comment: A commenter suggested that PR § 23.136 clarify that an affidavit requesting anonymity does not preclude disclosure of identifying information to the Tribe for the purpose of approving an application for Tribal membership, which the Tribe undertakes in its sovereign capacity. The commenter also suggested the rule clarify that all non-identifying information will still be disclosed, including for example, the name and Tribal affiliation of the Tribe and the identity of the court or agency with relevant information. The commenter also suggests the adoptive parents’ identities may be disclosed.

Response: FR § 23.71(a) implements § 1951(a) of the Act, providing a role for the Secretary to provide information as may be necessary for the enrollment of an Indian child in the Tribe.

Comment: A commenter suggested that one parent’s affidavit for anonymity should not extend anonymity to the other parent.

Response: An affidavit of one parent would not extend anonymity to the other parent.

Comment: A commenter suggested an affidavit requesting anonymity should not preclude disclosure of the adoptive parents’ identities.

Response: The Act only addresses an affidavit of anonymity for the biological parent or parents. *See* 25 U.S.C. 1951(a).

Comment: A commenter suggested PR § 23.136 should provide for notification of foster and adoptive parents of their right and the right of their adoptive child upon reaching age 18 to apply for the adoption records held by the Secretary.

Response: Neither the statute nor the final rule require the Secretary to proactively reach out to adoptive and foster parents and adopted children regarding their records; rather, the Act at § 1917 and the final rule provide that the State court provides such information upon application.

Comment: The commenter suggested that, when there is an affidavit for anonymity, the Secretary notify the biological parent of the request and allow them the opportunity to withdraw anonymity if desired.

Response: The parent may have the right to withdraw or rescind an affidavit for anonymity under State law; the parent should contact the State court or agency for directions.

Comment: A commenter suggested adding a section to authorize release of records maintained by the Secretary to any Indian child, parent or Indian custodian, or child's Tribe upon a showing that the records are needed as evidence in an action to invalidate a placement in violation of Sections 1911, 1912, 1913 or 1915.

Response: Section 1951 of the Act provides that the Secretary may release such information as may be necessary for the enrollment of an Indian child... or for determining any rights or benefits associated with that membership. To the extent a party seeks evidence in an action to invalidate a placement in violation of Sections 1911, 1912, 1913, or 1915, the party would be able to seek that information from the State and through discovery.

O. Effective Date and Severability

The final rule includes a new section, FR § 23.143, that provides that the provisions of this rule will not affect a proceeding under State law for foster-care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to 180 after the publication date of the rule, but will apply to any subsequent proceeding in

the same matter or subsequent proceedings affecting the custody or placement of the same child.

This is drawn from the language of 25 U.S.C. 1923.

This provision ensures that ongoing proceedings are not disrupted or delayed by the issuance of this rule and that there is an orderly phasing in of the effect of the rule. *See* H.R. Rep. No. 95-1386, at 25. Standards affecting pending proceedings should not be changed in midstream. This could create confusion, duplication, and delays in proceedings. And, by providing 180 days from the date of issuance for the rule to be fully effective, all parties affected—States courts, State agencies, Tribes, private agencies, and others—have ample time to adjust their practices, forms, and guidance as necessary.

FR § 23.144 states the Department's intent that if some portion of this rule is held to be invalid by a court of competent jurisdiction, the other portions of the rule should remain in effect. The Department has considered whether the provisions of the rule can stand alone, and has determined that they can. For example, the agency has considered whether particular provisions that are intended to be followed in both voluntary and involuntary proceedings should remain valid if a court finds the provision invalid as applied to one type of proceeding, and has concluded that they should. The Department has also considered whether the particular requirements of the rule (e.g., requirements for notice, active efforts, consent, transfer, placement preferences) may each function independently if other requirements were determined to be invalid. The Department has determined that they can.

Comment: One commenter stated that the ICWA regulations should be retroactive to include all Indian children currently involved in ICWA cases.

Response: As discussed above, the final rule includes a provision that mirrors 25 U.S.C. 1923, providing none of the provisions of this rule will affect a proceeding which was initiated or completed prior to 180 days from the date of issuance.

P. Miscellaneous

1. Purpose of Subpart

Comment: A few commenters supported PR § 23.101 and especially supported reiterating that the Indian canons of construction are to be used when interpreting ICWA. A few commenters suggested explaining in PR § 23.101, for the general public, that ICWA is not a race-based preference, but is a political decision because of the government-to-government relationship between Tribes and the Federal Government.

Response: The Department agrees that statutes are to be liberally construed to the benefit of Indians but determined it was not necessary to reiterate that canon here. Further, ICWA is based on an individual's political affiliation with a Tribe.

Comment: A few commenters suggested strengthening the provision stating that ICWA establishes minimum Federal standards. These commenters suggested adding reference to the national policy is that these standards define the best interests of Indian children.

Response: The statement that ICWA establishes minimum Federal standards is sufficient. Congress enacted ICWA to protect the best interests of Indian children.

2. Interaction with State Laws

Comment: A few commenters stated that PR § 23.105, providing that if applicable State law provides a higher standard of protection, then the State court must apply that standard, should specify that if the State imposes sanctions, that constitutes a higher standard of protection.

Response: It is unclear what the commenters mean by “sanctions.” ICWA provides that, where State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under [ICWA], the State or Federal court shall apply the State or Federal standard. 25 U.S.C. 1921. The final rule is designed to reflect that requirement.

Comment: One commenter stated that the regulation should emphasize that ICWA’s provisions in Sections 1911 through 1917 and Sections 1920 through 1922 are mandatory standards that supplant State law. Other commenters requested clarification that minimum Federal standards do not supplant State laws and regulations and Tribal-State agreements applying standards beyond the minimum Federal standards, and that State law and Tribal-State agreements may expand upon or clarify ICWA consistent with the statute. A commenter recommended stating that the minimum Federal Standards preempt State laws that directly conflict with the Federal standards and do not provide heightened protections.

Response: Congress established minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture. 25 U.S.C. 1902. Congress’s clear intent in ICWA is to displace State laws and procedures that are less protective. *See, e.g., In re Adoption of M.T.S.*, 489 N.W. 2d 285, 288 (Minn. Ct. App. 1992) (ICWA preempted Minnesota State law because State law did not provide higher standard of protection to the rights of the parent or Indian custodian of Indian child). By establishing “minimum” standards for removal and placement of Indian children, Congress made clear that it was not preempting the entire field of child-custody or adoption law as to Indian children, including all State laws that provide greater protection to such children than those established by ICWA. *See e.g.,* H.R. Rep. No. 95-1386, at

19. ICWA specifically provides that, where State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under ICWA, the State or Federal court shall apply the State or Federal standard.” 25 U.S.C. 1921.

Comment: A commenter suggested deleting “in which ICWA applies” from PR § 23.105(a) because ICWA is applicable to all child-custody proceedings, so this phrase is redundant and adds confusion.

Response: The final rule deletes the phrase “and are applicable in all child-custody proceedings...” because FR § 23.103 addresses applicability.

Comment: A few commenters stated that the new regulations conflict with various judicial decisions and asked whether the regulations will supersede existing case law.

Response: The regulations are intended to provide a binding, consistent, nationwide interpretation of the minimum requirements of ICWA. If State law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under ICWA, as interpreted by this rule, State law will still apply. *See* 25 U.S.C. 1921.

3. Time Limits and Extensions

Comment: One commenter stated that ICWA § 1912(a) allows “up to 20 days” whereas PR § 23.111(c)(4)(v) adds a burden of stating a specific number of days, and the regulation should mirror the Act because it is difficult to obtain continuances.

Response: FR § 23.111(c)(4)(v) deletes the requirement to specify a number of days and now reflects the statutory language allowing “up to 20 days.” Other provisions also now reflect that the extension may be “up to an additional 20 days.”

Comment: One commenter suggested imposing timeframes on States for providing notice to Tribes.

Response: To promote the statute's intent, FR § 23.111(a) adds that the State must "promptly" provide notice to Tribes.

Comment: A commenter suggested splitting PR § 23.111(h), regarding time periods, into two subsections, one to address involuntary placements and one to address termination of parental responsibilities, and adding that findings and orders at involuntary placement proceedings are not binding on parties who did not receive notice but should have, and that courts will make diligent efforts to ensure timely notice.

Response: The statute and regulation provide a mechanism for addressing instances where parties who did not receive notice but should have can seek to invalidate the action, by filing a petition under § 1914 of the Act. *See* FR § 23.137.

Comment: A few commenters suggested that timeframes longer than those set out in PR § 23.112 are appropriate in Alaska, where a majority of villages are remote and subject to extreme weather conditions.

Response: The timeframes in FR § 23.112 are established by statute in § 1912(a). The minimum timeframes are to ensure that the parents or Indian custodians, and Indian child's Tribe have sufficient advance notice and time to prepare for a proceeding. State courts have discretion to allow for more time.

Comment: A few commenters expressed their support for PR § 23.112's timeframes as key accountability mechanisms. One commenter stated that additional extensions of time should not be allowed in PR § 23.112(a) unless it is for good reason (e.g., deployment in the military). Another suggested a good reason would be to allow for a child's participation.

Response: The final rule does not impose restrictions on additional extensions because the Act does not provide any parameters for additional extensions, thereby leaving such additional extensions to the discretion of State courts.

Comment: One commenter requested clarification in PR § 23.112(b) as to how many times a party may ask for an additional 20 days to prepare, and whether this is for each “proceeding” or each “hearing.”

Response: The parent, Indian custodian, and Indian child’s Tribe are entitled to one extension of up to 20 days for each proceeding. As discussed above, any extension beyond the initial extension up to 20 days is subject to the judge’s discretion.

4. Participation by Alternative Methods (Telephone, Videoconferencing, etc.)

Comment: A few commenters suggested that the provision located throughout the proposed rule allowing for participation by alternative methods be moved into a separate section, applicable to all stages, instead of repeating the provision throughout the rule.

Response: The final rule consolidates provisions on alternative methods of participation into one section at FR § 23.133.

Comment: Many commenters supported the provisions throughout the regulations for the court to allow alternative methods of participation in State proceedings. Commenters noted that Tribes have citizens living in many States and allowing participation by phone or video allows Tribes and all stakeholders to participate when they are unable to travel or appear, whether due to financial constraints, distance, or otherwise. Several commenters suggested the rule require the court to allow alternative methods of participation, rather than making it discretionary, because the burden on States to allow such participation is low and the rights protected by

allowing alternative methods of participation are important. One suggested the court must allow it if it has the capability.

Response: The final rule retains the word “should” rather than making the provision mandatory.

Comment: One State commenter stated that alternative methods of participation should not be available for testimony because the witness must be in person for the court to make credibility determinations. This commenter also noted that the proceedings are closed, confidential proceedings and the court would be unable to monitor who was present if alternative methods were allowed.

Response: Several courts allow judges to determine credibility by phone or video, including in criminal proceedings. The Department notes that requesting statements under oath, even by teleconference, as to who is present may provide sufficient safeguards to maintain control over who is present on the teleconference for the purposes of confidentiality.

Comment: One commenter suggested adding Skype as an example of an alternative method.

Response: A service such as Skype would be included in “other methods.”

Comment: A few commenters requested adding parents, Indian custodians, presumed parents, Indian children, and qualified expert witnesses to the list of those who may participate by alternative methods.

Response: The final rule allows for participation by alternative methods generally, without specifying who may so participate.

Comment: A few commenters stated that the rule should specify that the State may not charge fees for participation by alternative methods, and noted that some courts are requiring

fees of as much as \$85 per hearing and continuing the hearing until the fees are paid. The commenters state that such fees are prohibitive for Tribes and families.

Response: This is not addressed in the proposed or final rule. However, in March 2016, the Department of Justice issued a Dear Colleague letter to State and local courts regarding their legal obligations (under the U.S. Constitution and/or other Federal Laws) with respect to the enforcement of fines and fees. States should review the letter as they consider the appropriateness of fees in this context.

5. Adoptive Couple v. Baby Girl and Tununak II

Comment: Many commented on how the rule should be interpreted in light of the Supreme Court's decision in *Adoptive Couple v. Baby Girl*. Some commenters stated that the regulations should explicitly address the *Adoptive Couple* holding in various ways. For example, several requested the rule clarify that the decision should not be applied outside of the private adoption context and to provide guidance on how it should be implemented to better serve Native children, families, and Tribes. A few commenters stated that, without such guidance, courts will use the ruling to evade ICWA. A few commenters stated that the rule should clarify that the *Adoptive Couple* ruling should not be applied as broadly as the Alaska Supreme Court applied it in *Tununak II*, in which the Alaska Supreme Court stated that the grandmother must have filed a formal adoption petition to enjoy the placement preference in an involuntary proceeding. Several commenters stated that the proposed rule is contrary to the Supreme Court's ruling in *Adoptive Couple*.

Response: *Adoptive Couple* addresses a specific individual factual scenario. The regulations do not explicitly address the *Adoptive Couple* holding because the regulation governs implementation of ICWA generally.

Comment: A few commenters suggested addressing the holding in *Tununak II*, to provide that in an involuntary proceeding, ICWA's placement preferences apply without regard to whether a preferred individual has come forward, sought to adopt, or filed a formal adoption petition. Commenters noted that, otherwise, the holding in *Tununak II* makes it harder for preferred parties to adopt by imposing procedural burdens. Another commenter stated the rule should expressly provide that preferred parties need not have sought to adopt the child in order to be eligible as a placement, because ICWA does not require formal attempts to adopt.

Response: The Department recommends that States provide clear guidance to preferred placements on how to assert their rights under ICWA and that States should work to eliminate obstacles to preferred placements doing so. For example, the State of Alaska issued an emergency regulation following the ruling in *Tununak* to consider certain actions a proxy for a formal petition for adoption. See Alaska Admin. Code tit. 7 § 54.600 (2015).

6. Enforcement

Comment: Multiple commenters asked how the regulations will be enforced or requested including an enforcement mechanism. Some suggested various enforcement mechanisms, such as imposing civil or criminal penalties or sanctions for agency and court noncompliance or tying compliance to State or Federal funding. Commenters stated that such penalties would better promote compliance with ICWA and the final rule. One commenter noted their experience in hearing excuses for noncompliance because there are no consequences for failure to comply with ICWA and, therefore, little incentive to comply. Commenters had several additional suggestions for improving monitoring and compliance with ICWA.

Response: The final rule clarifies the right of particular parties to seek to invalidate a foster-care placement or termination of parental rights based on certain violations of ICWA. FR

§ 23.137. The final rule does not expressly address other enforcement mechanisms that may be available to the Federal government or other parties.

7. Unrecognized Tribes

Comment: A few commenters noted that some Indian Tribes are not federally recognized and that the rules leave those Tribes in danger of losing their children by addressing only children of federally recognized Indian Tribes. These commenters assert that the rule should apply to children of non-federally recognized Tribes, including but not limited to State-recognized Tribes.

Response: The statute defines “Indian Tribe” as federally recognized Tribes; therefore, the regulations address children who are members of federally recognized Tribes, or who are eligible for membership in a federally recognized Indian Tribe and whose parent is a member of a federally recognized Indian Tribe. *See* 25 U.S.C. 1903(8).

8. Foster Homes

Comment: Several commenters had suggestions for increasing the availability of Indian foster homes, including comments that the rule should:

- Require States to work with Tribes and families to break down obstacles to make it easier and faster to license Indian foster homes and to facilitate funding of those homes;
- Require acceptance of Tribal licensure of foster homes;
- Exclude individuals who are preferred placements from requirements necessary to become a foster home because they create barriers for Indian families;
- Require each State social services agency to publish its criteria to become a licensed foster home;

- Require each State social services agency to maintain a centralized registry containing all rejected foster-home applications for periodic review by Federal officials;
- Eliminate State requirements that contradict traditional practices and cause problems for Indian foster homes, such as the requirement for each child to have a separate bedroom.

Response: ICWA establishes Indian foster homes as preferred placements, but does not elaborate on how to increase the availability of such placements. The Department nevertheless encourages States and Tribes to collaborate to increase the availability of Indian foster homes. Organizations such as the National Resource Center for Diligent Recruitment at AdoptUSKids provide tools and resources for recruiting Indian homes. *See, e.g.,* National Resource Center for Diligent Recruitment, *For Tribes: Tool and Resources* (last visited Apr. 27, 2016), <http://www.nrcdr.org/for-tribes/tools-and-resources>.

9. Other Miscellaneous

Comment: A commenter suggested adding “local” to PR § 23.104(c), so it states that assistance may be sought “from the BIA local, Regional Office and/or Central Office.”

Response: The final rule makes this addition for clarification at FR § 23.105(c).

Comment: A few commenters expressed concern that biological parents use ICWA as a tool to disrupt the child’s placement. One commenter stated that if a child has been in a home for six months or more, they should not be forced to leave unless abuse is a factor.

Response: ICWA is designed to prevent the breakup of the Indian family and thereby focuses on maintaining the biological parents (or Indian custodian) with the Indian child, rather than the bond between the foster parents and the Indian child. Biological parents may avail themselves of their rights under ICWA and reunification with the biological parents or a change

in placement may be appropriate even after many months or years, depending on the circumstances (as is true for non-Indian children as well).

Comment: One commenter suggested clarifying how immediate termination-of-parental-rights proceedings in cases involving shocking and heinous abuse or previous terminations as to other children should be handled to comply with ICWA.

Response: ICWA does not allow for “immediate termination of parental rights” because it requires certain timeframes for notice of the proceedings. *See* 25 U.S.C. 1912(a). Emergency removal and emergency placement may be appropriate for immediate action if the requirements of § 1922 of the Act are met, and the child may be placed in foster care pending the termination-of-parental-rights proceeding if the requirements of § 1912(e) of the Act are met.

Comment: A few commenters stated that Indian people should be removed from the State index for crimes if the crime was committed over five years ago, because States are refusing to place children with Indian relatives who are in the index.

Response: ICWA does not address restrictions on placements due to past criminal convictions.

Comment: A few commenters suggested the rule should provide for legal representation of Indian children through a guardian ad litem or equivalent to ensure the child’s viewpoint is considered.

Response: ICWA addresses legal representation of Indian children in § 1912(b).

Comment: Several commenters stated that attorneys should be appointed to represent parents and extended family members as a matter of indigenous rights.

Response: ICWA states that the parent or Indian custodian has the right to court-appointed counsel in an ICWA proceeding. *See* 25 U.S.C. 1912(b).

Comment: A commenter stated that the regulations impermissibly attempt to shift Federal responsibility to the State courts and agencies.

Response: ICWA establishes minimum standards to be applied in State child-custody proceedings. The final rule is consistent with ICWA, and elaborates on these minimum standards. It does not shift Federal responsibilities to State courts and agencies.

Comment: Several commenters suggested making all provisions of the rule mandatory, rather than using the word “should.”

Response: The final rule generally uses mandatory language, as it represents binding interpretations of Federal law. In a few instances, the Department did not use mandatory language, such as to indicate the best means of compliance with another statutory or regulatory requirement.

Comment: A commenter stated that the regulations should encourage States, in coordination with Tribes, to advance ICWA implementation beyond what is required by the regulations, to ensure that the “minimum Federal standards” do not become the maximum standards. One commenter suggested including standard forms to help guide States in which ICWA is less frequently used, to help familiarize States with ICWA and save time. The commenter suggested reviewing the forms at www.nd.gov/dhs/Triballiaison/forms.

Response: The Department underscores that these regulations are indeed minimum standards. The Department encourages States and Tribes to collaborate to advance ICWA implementation and suggests looking to some of the tools developed by States to aid in implementation of ICWA. For example:

- New York has published a State guide to ICWA (*see A Guide to Compliance with the Indian Child Welfare Act* published by the New York Office of Children and Family Services at <http://ocfs.ny.gov/main/publications/pub4757guidecompliance.pdf>);
- Washington has established a State evaluation of ICWA implementation, which it performs in partnership with Tribes (*see 2009 Washington State Indian Child Welfare Case Review* at <https://www.dshs.wa.gov/sites/default/files/SESA/oip/documents/Region%202%20ICW%20CR%20report.pdf>).
- Michigan has established a “bench card” as a tool for judges implementing ICWA and the State counterpart law (*see 2014 Michigan Indian Family Preservation Act (MIFPA) Bench Card* (last visited Apr. 27, 2016), http://courts.mi.gov/Administration/SCAO/OfficesPrograms/CWS/CWSToolkit/Documents/BC_ICWA_MIFPA.pdf).
- Several States have established State-Tribal forums to discuss child-welfare policy and practice issues (*see* Montana, North Dakota, Oklahoma, Oregon, Utah, and Washington).
- Several States have established State-Tribal court improvement forums where court system representatives meet regularly to improve cooperation between their jurisdictions (*see* California, Michigan, New Mexico, New York, and Wisconsin).

In addition, several non-governmental entities offer tools for ICWA implementation, such as the National Council of Juvenile and Family Court Justices, National Indian Child Welfare Association, and Native American Rights Fund.

Comment: A few commenters stated their concerns over comments provided by adoption lawyers, stating that they are primarily concerned with making money from private adoptions of

Indian children. These commenters noted that the private adoption industry profits in the billions of dollars annually and require fees for adopting Indian infants. A few other commenters stated their concern that Tribes are seeking more power through the regulations.

Response: The Department has considered the substance of each comment and without presuming the commenters' motivations.

Comment: A commenter suggested using "or" rather than "and/or" throughout the regulation.

Response: The final rule continues to use the term "and/or" in several places for clarity.

Comment: A commenter suggested Tribes and birth parents enter into "Contract After Adoption" agreements whereby non-Indian adoptive parents agree to register the child with the Tribe, stating that these agreements have been productive and protective of rights. Another commenter suggested requiring adoptive parents to enter a cultural outreach program as defined by the Tribe, to ensure continued connection that strengthens the culture.

Response: This is beyond the scope of this rule.

Comment: A commenter stated that State child-welfare agencies should include input from Tribes in their plans for implementing ICWA. Likewise, a commenter stated that States and Tribes should join forces to look at early intervention, prevention, and rehabilitative services to avoid ICWA situations, and work together for the good and welfare of our children.

Response: This is beyond the scope of this rule. The Department encourages States to collaborate with Tribes on implementation of ICWA.

Comment: A commenter suggested BIA ask Tribes whether State courts and agencies complied with ICWA because if BIA relies only on agency documentation, it will not receive the

whole picture. This commenter provided an example of one State that claimed compliance but the Tribes in the State disagree.

Response: This is beyond the scope of this rule.

Comment: A commenter stated that guardian ad litem should have significant understanding of indigenous cultures and traditions so they can better interface with the children.

Response: State law governs the standards and procedures for appointing guardian ad litem. The Department encourages appointment of guardian ad litem with significant understanding of the Indian child's culture.

Comment: A commenter asserted that one of the greatest challenges State courts face is reconciling the ICWA provisions with other Federal statutes governing child-welfare matters, such as Title IV-E of the Social Security Act and suggests BIA and HHS work together to ensure there is no conflict.

Response: Interior and the Department of Health and Human Services are committed to working together to ensure harmonious implementation of the various Federal statutory requirements.

Comment: Many commenters noted the dire need for additional funding to Tribes, preferred placements, and others to better support ICWA implementation. A few commenters stated that there should be enforcement to ensure any ICWA funding provided to Tribes is used for that purpose.

Response: While the final rule cannot affect funding levels, the Department notes the importance of funding in implementation.

Comment: Many commenters noted the dire need for ICWA training and suggested requiring State social workers, attorneys, and judges to undergo training on ICWA. One

commenter stated that education regarding legal, social, historical, and ethical components of ICWA would strengthen compliance. Other commenters suggested requiring non-Indian adoptive families to take certified training on the history of Native Americans and issues concerning Tribes today.

Response: ICWA does not establish requirements for training, but the Department notes the importance of training in implementation.

V. Summary of Final Rule and Changes from Proposed Rule to Final Rule

The following table summarizes changes made from the proposed rule to the final rule.

Proposed Rule	Final Rule	Summary of Changes from Proposed Rule to Final Rule	Summary of Final Rule (As Compared to Rule in Effect Before this Final Rule)
23.2 Definitions	23.2 Definitions	Added definitions for emergency proceeding, hearing, Indian foster home, involuntary proceeding, proceeding, and voluntary proceeding. Revised definitions of active efforts, child-custody proceeding, continued custody, domicile, Indian child, Indian child's Tribe, Indian custodian, and upon demand. Deleted definitions of imminent physical damage or harm and voluntary placement.	Added definitions for active efforts, continued custody, custody, domicile, emergency proceeding, hearing, Indian foster home, involuntary proceeding, proceeding, status offenses, upon demand, and voluntary proceeding. Revised definitions of child-custody proceeding, extended family member, Indian child, Indian child's Tribe, Indian custodian, parent, reservation, Secretary, and Tribal court.
23.11 Notice.	23.11 Notice.	Revises current (a) to delete requirement to send a copy of the notice to BIA Central Office. Clarifies that notice must include the information specified in 23.111. Clarifies that certain BIA duties remain. Replaces "certified mail" with "registered or certified mail." Specifies where notice should be sent.	Restates current 23.11, but deletes the requirement to send a copy of the notice that goes to the BIA Regional Director to the BIA Central Office, and replaces "certified mail" with "registered or certified mail." Updates information on where notice should be sent. Moves provisions from § 23.11(b), (d), (e) to FR § 23.111.
N/A	23.71 Recordkeeping and information availability.	Deletes provisions of current § 23.71(a) because duplicative of § 23.140. Moves current § 23.71(b) to (a) as part of non-material changes to restructure the section. Revises 23.71(b) to more closely	Revises current 23.71 to more closely match § 1951(b) of the Act.

		match § 1951(b) of the Act. Deletes reference to BIA Tribal enrollment officer because position no longer exists.	
23.101 What is the purpose of this subpart?	23.101 What is the purpose of this subpart?	Deletes sentence on when the regulations apply because FR § 23.103 addresses when ICWA applies.	New section. Establishes the purpose of the new subpart.
23.102 What terms do I need to know?	23.102 What terms do I need to know?	Revises definition of “agency.”	New section. Defines “agency” and “Indian organization” for the purposes of this subpart only.
23.103 When does ICWA apply?	23.103 When does ICWA apply?	Clarifies what types of proceedings ICWA does and does not apply to. Revises text addressing “existing Indian family” exception. Moves provisions regarding the requirement to ask whether ICWA applies to FR § 23.107. Moves provision requiring treatment of a child as an Indian child pending verification to § 23.107. Clarifies that if ICWA applies at the commencement of a proceeding, it continues to apply even if the child reaches age 18.	New section. Delineates when ICWA’s requirements may apply and do not apply. Establishes that there is no exception to the application of ICWA based on certain factors. Establishes that ICWA continues to apply even if the child reaches the age of 18.
N/A	23.104 What provisions of this subpart apply to each type of child-custody proceeding?	Adds a chart to clarify which type of proceeding each rule provision applies to.	New section. Delineates what type of proceeding the sections of the subpart apply to.
23.104 How do I contact a Tribe under the regulations in this subpart?	23.105 How do I contact a Tribe under the regulations in this subpart?	No significant changes.	New section. Establishes how to contact a Tribe to provide notice or obtain information or verification.
23.105 How does this subpart interact with State laws?	23.106 How does this subpart interact with State and Federal laws?	Deletes provision regarding ICWA applicability because applicability is addressed in 23.103.	New section. Specifies that the regulations provide minimum Federal standards, and that more protective State or Federal laws apply.
23.106 When does the requirement for active efforts begin?	N/A	Deletes section.	N/A
23.107 What	23.107 How	Limits provision to standards	New section. Establishes that State

actions must an agency and State court undertake to determine whether a child is an Indian child?	should a State court determine if there is a reason to know the child is an Indian child?	<p>applicable in State-court proceedings.</p> <p>Clarifies that inquiry is required in emergency, involuntary, and voluntary proceedings.</p> <p>Clarifies that if there is “reason to know” the child is an Indian child, this triggers certain obligations.</p> <p>Deletes list of information that the court may require the agency to provide.</p> <p>Replaces “active efforts” to identify Tribes with “due diligence” to identify Tribes.</p> <p>Moves provision requiring treatment of the child as an Indian child from proposed 23.103(d).</p> <p>Adds to the list of factors providing “reason to know” the child is an “Indian child” that the child is or has been a ward of Tribal court and that either parent or child possesses a Tribal identification card, but removes residency on an Indian reservation or in a predominantly Indian community.</p> <p>Adds that, where anonymity is requested in voluntary proceedings, the Tribe must keep the information confidential.</p>	<p>courts must ask as a threshold question at the start of a proceeding whether there is reason to know the child is an Indian child.</p> <p>Establishes that, if there is reason to know the child is an Indian child, the State court must confirm the agency used due diligence to identify and work with Tribes to obtain verification, and must treat the child as an Indian child unless and until it is determined otherwise.</p> <p>Establishes what factors indicate a “reason to know.”</p> <p>Establishes that a court and Tribe must keep documents confidential if a consenting parent requested anonymity in a voluntary proceeding.</p>
23.108 Who makes the determination as to whether a child is a member of a Tribe?	23.108 Who makes the determination as to whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member of a Tribe?	Adds that a Tribal determination of membership or eligibility may be reflected in facts of evidence, such as Tribal enrollment documentation.	New section. Establishes that only the Tribe may make determinations as to Tribal membership or eligibility, and that such determinations may be reflected in documentation issued by the Tribe.
23.109 What is the procedure for determining an Indian child’s tribe when the child is a	23.109 How should a State court determine an Indian child’s Tribe when the child may be a	<p>Deletes provision requiring notification by agencies.</p> <p>Clarifies process and considerations where more than one Tribe is involved.</p> <p>Deletes requirement for notifying all other Tribes that a particular</p>	<p>New section. Incorporates statutory provisions for establishing the child’s Tribe.</p> <p>Establishes that deference must be given to Tribe in which the child is already a member unless otherwise agreed to by the Tribes. Establishes</p>

member or eligible for membership in more than one Tribe?	member or eligible for membership in more than one Tribe?	Tribe was designated as the child's Tribe. Deletes statement that a Tribe can designate another Tribe to act as its representative.	that, where the child is a member in more than one Tribe or eligible for membership in more than one Tribe, the court must provide opportunity for the Tribes to determine which should be designated as the child's Tribe. Establishes what the State court should consider in determining which has "more significant contacts" if Tribes are unable to reach an agreement.
23.110 When must a State court dismiss an action?	23.110 When must a State court dismiss an action?	Adds that the provision is subject to agreements between States and Tribes pursuant to 25 U.S.C. 1919. Requires the Tribe be expeditiously notified of the pending dismissal and sent information regarding the child-custody proceeding.	New section. Establishes that a State court must determine its jurisdiction and when a State court must dismiss an action. Requires State court to ensure the Tribal court is expeditiously notified and sent information on the proceeding.
23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?	23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?	Limited to standards to be applied in State-court proceedings. Clarifies that provision applies to involuntary foster-care-placement and termination-of-parental-rights proceedings. Adds "certified mail" as an option. Incorporates additional information from current 23.11 (e.g., maiden names, requirement to keep confidential information in the notice). Deletes provision stating that counsel is appointed only if authorized by State law. Deletes provision requiring a specific amount of additional time to be included in the request. Clarifies language-access requirements. Removes provision addressing Interstate Compact on Placement of Children. Moves provision regarding no rulings occurring until the waiting period has elapsed to 23.112(a).	New section. Establishes required contents of the notice. Allows notice to be sent by certified or registered mail, as long as return receipt is requested. Incorporates provisions of current 23.11. Incorporates statutory provision requiring court to inform a parent or Indian custodian who appears in court without an attorney of certain rights. Requires a State court to provide language-access services as required by Federal law.
23.112 What time limits and extensions apply?	23.112 What time limits and extensions apply?	Reorganizes section. States that no proceeding can be held until at least 10 days after the required notice is provided.	New section. Incorporates statutory prohibition on foster care or termination-of-parental-rights proceedings being held until certain

		<p>Clarifies that extensions may be “up to” an additional 20 days.</p> <p>Moves provision regarding alternative methods of participation to 23.133.</p> <p>Clarifies that additional extensions of time may be granted.</p>	<p>timelines are passed.</p>
<p>23.113 What is the process for the emergency removal of an Indian child?</p>	<p>23.113 What are the standards for emergency proceedings involving an Indian child?</p>	<p>Adds that emergency removal/placement must terminate immediately when no longer necessary to prevent imminent physical damage or harm.</p> <p>Clarifies what standards state court should apply in emergency proceedings involving an Indian child.</p> <p>Changes standard from whether emergency removal/placement is “proper” to whether it is “necessary to prevent imminent physical damage or harm to the child.”</p> <p>Removes certain requirements on the agency.</p> <p>Clarifies that agency may terminate the emergency removal/placement.</p> <p>Requires additional statements in the petition or accompanying documents.</p> <p>Replaces provision requiring a hearing if emergency removal/placement is continued for more than 30 days with a requirement for a court determination that restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm, and the court cannot transfer jurisdiction to the Tribe, and that it is not possible to initiate a child-custody proceeding defined in § 23.2.</p> <p>Moves provision regarding alternative methods of participation to § 23.133.</p>	<p>New section. Incorporates statutory limitations on State emergency removals and emergency placements.</p> <p>Establishes what a petition, or accompanying documents, for emergency removal or emergency placement should include.</p> <p>Requires State court to determine at each hearing whether the emergency removal or emergency placement is no longer necessary.</p> <p>Establishes a 30-day deadline by which emergency removal and emergency placement should end unless the court determines that restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm, and the court cannot transfer jurisdiction to the Tribe, and that it is not possible to initiate a child-custody proceeding defined in § 23.2.</p>
<p>23.114 What are the procedures for determining</p>	<p>23.114 What are the requirements for determining</p>	<p>Changes “reason to believe” to “reason to know” of an improper removal.</p> <p>Changes “immediately stay the</p>	<p>New section. Establishes that the State court must expeditiously determine whether there was an improper removal or retention</p>

improper removal?	improper removal?	proceeding until a determination can be made on the question of improper removal..." to "expeditiously determine whether there was improper removal or retention." Changes standard from "imminent, physical damage or harm" to "substantial and immediate danger or threat of such danger."	under certain circumstances. Requires the child to be returned immediately to parents if there has been an improper removal or retention, unless it would subject the child to substantial and immediate danger or threat of such danger.
23.115 How are petitions for transfer of proceeding made?	23.115 How are petitions for transfer of a proceeding made?	Adds that a request for transfer may be made at any stage of each proceeding. Clarifies that provision applies to foster-care and termination-of-parental-rights proceedings. Moves provision regarding alternative methods of participation to § 23.133.	New section. Establishes how petitions for transfer may be made.
23.116 What are the criteria and procedures for ruling on transfer petitions?	23.117 What are the criteria for ruling on transfer petitions?	Changes "case" to "child-custody proceeding" Clarifies that a court must make a determination when transfer is not appropriate. Moves provision for court to provide records related to the proceeding to Tribal court to § 23.119.	New section. Establishes that a State court must transfer a proceeding unless one or more of the listed criteria are met.
23.117 How is a determination of "good cause" not to transfer made?	23.118 How is a determination of "good cause" to deny transfer made?	Clarifies that the court "must not" consider certain factors, rather than "may not." Combines the two separate lists of factors that must not be considered into one list. Clarifies when court must not consider whether the proceeding is at an advanced stage. Adds that the court must not consider whether there have been prior proceedings involving the child for which no petition to transfer was filed. Changes the factor on whether the transfer "would" result in a change in placement to whether the transfer "could" affect placement. Changes the factor on the Indian child's "contacts" to Indian child's "cultural connections." Eliminates language regarding	New section. Prohibits State court from considering certain factors in determining whether good cause to deny transfer exists. Requires the basis for denying transfer to be stated on the record or in a written opinion.

		burden of proof. Requires the basis for denying transfer to be stated on the record or in a written opinion.	
23.118 What happens when a petition for transfer is made?	23.116 What happens when a petition for transfer is made? 23.119 What happens after a petition for transfer is granted?	Splits the proposed section into two sections. Deletes provision stating the notice should specify how long the Tribal court has to make its decision and requiring at least 20 days for Tribal court to decide. Adds that the State court “may request a timely response” regarding whether the Tribe wishes to decline the transfer. Changes “promptly provide the Tribal court with all court records” to “expeditiously provide the Tribal court with all records related to the proceeding.” Adds language regarding coordination between State and Tribal courts.	New section. Establishes that the State court must ensure the Tribal court is promptly notified in writing of a transfer petition. New section. Establishes that State court should expeditiously provide the Tribal court with all records related to the proceeding if the Tribal court accepts transfer, and should coordinate the transfer with the Tribal court.
23.119 Who has access to reports or records?	23.134 Who has access to reports or records during a proceeding?	Deletes provision stating that decisions of the court must be based only upon what is in the record.	New section. Establishes rights of parties to examine records of proceedings.
23.120 What steps must a party take to petition a State court for certain actions involving an Indian child?	23.120 How does the State court ensure that active efforts have been made?	Deletes provision directly imposing requirements on any party petitioning for foster care or termination of parental rights; instead requires the court to conclude that active efforts have been made.	New section. Requires State court to conclude that active efforts to avoid the need to remove the Indian child from his or her parents or Indian custodian were made prior to ordering an involuntary foster-care placement or termination-of-parental-rights. Requires documentation of active efforts.
23.121 What are the applicable standards of evidence?	23.121 What are the applicable standards of evidence?	Clarifies that court “must not issue an order” absent the appropriate standard of evidence, rather than “may not issue an order.” Changes standard from “seriously physical damage or harm” to “serious emotional or physical damage.” Clarifies that a causal relationship is required for finding both clear and	New section. Establishes standards of evidence in foster-care placement proceedings and termination-of-parental-rights proceedings. Requires the existence of a causal relationship between the particular conditions in the home and risk of serious emotional or physical damage to the child. Establishes that, without the causal

		convincing evidence and evidence beyond a reasonable doubt. States that none of the listed factors may be the sole evidence without a causal relationship for both clear and convincing evidence and evidence beyond a reasonable doubt.	relationship, certain factors may not be the sole factor for meeting the standard of evidence.
23.122 Who may serve as a qualified expert witness?	23.122 Who may serve as a qualified expert witness?	Clarifies that expert witness must be able to testify regarding whether the Indian child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage, and should also have specific knowledge of the prevailing social and cultural standards of the Indian child's Tribe. Changes text from "specific knowledge of the child's Indian Tribe's culture and customs" to "knowledge of the prevailing social and cultural standards of the Indian child's Tribe." Eliminates the list of persons presumed to meet the requirements to two categories, and states instead that a person may be designated by the Indian child's Tribe as having knowledge of the prevailing social and cultural standards of that Tribe.	New section. Establishes that a qualified expert witness should have knowledge of the prevailing social and cultural standards of the Indian child's Tribe.
N/A	23.123	Reserved for numbering purposes.	Reserved for numbering purposes.
23.123 What actions must an agency and State court undertake in voluntary proceedings?	23.124 What actions must a State court undertake in voluntary proceedings?	Deletes requirements directed at agencies. Clarifies that courts must ensure the party seeking placement has taken all reasonable steps to verify the child's status. Adds that State courts must ensure that the placement complies 23.129-23.132.	New section. Requires State courts to ask whether the child is an "Indian child" in voluntary proceedings. Where there is reason to know that the child is an Indian child, requires State courts to ensure the party seeking placement has taken all reasonable steps to verify the child's status. Requires State courts to ensure that the placement complies 23.129-23.132.
23.124 How is consent obtained?	23.125 How is consent obtained?	Clarifies that the consent must be made before a judge, not necessarily in court. Clarifies what the court must explain to the parent/Indian	New section. Requires consent to voluntary termination of parental rights, foster-care placement, or adoption to be in writing and recorded before a court of

		<p>custodian prior to accepting consent, and separates out the limitations applicable to each type of proceeding.</p> <p>Clarifies that the court's explanation must be on the record and in English (unless English is not the primary language of the parent/Indian custodian).</p> <p>Clarifies that consent need not be executed in open court but still must be made before a court of competent jurisdiction.</p>	<p>competent jurisdiction.</p> <p>Requires court to explain the consequences of the consent in detail and certify that terms and consequences were explained in English or the language of the parent or Indian custodian.</p>
23.125 What information should the consent document contain?	23.126 What information must the consent document contain?	<p>Clarifies that the consent document must contain the identifying Tribal enrollment number "where known" rather than "if any."</p> <p>Adds that the parent or Indian custodian's identifying information must be included, rather than definitively requiring their addresses.</p>	New section. Establishes required contents of consent document.
23.126 How is withdrawal of consent achieved in a voluntary foster-care placement?	23.127 How is withdrawal of consent to a foster-care placement achieved?	<p>Clarifies that a parent or Indian custodian may withdraw consent to foster-care placement at any time.</p> <p>Removes requirement for the withdrawal to be filed in the same court where the consent document was executed.</p> <p>Adds that State law may provide additional methods of withdrawing.</p> <p>Clarifies that the court must ensure the child is returned as soon as practicable.</p>	New section. Establishes when and how consent of foster-care placement may be withdrawn. Establishes that the child must be returned to the parent or Indian custodian as soon as practicable.
23.127 How is withdrawal of consent to a voluntary adoption achieved?	23.128 How is withdrawal of consent to a termination of parental rights or adoption achieved?	<p>Separates out provisions for withdrawing consent to a termination of parental rights from provisions for withdrawing consent to an adoption.</p> <p>Adds that withdrawal may be accomplished by testimony before the court.</p> <p>Adds that State law may provide additional methods of withdrawing.</p> <p>Changes "clerk of the court" to "the court."</p>	New section. Establishes when and how consent to a termination of parental rights and an adoption may be withdrawn. Establishes that the child must be returned to the parent or Indian custodian as soon as practicable.
23.128 When do the placement	23.129 When do the placement	<p>Deletes provisions directed at agencies.</p> <p>Clarifies that the Tribe's placement</p>	New section. Establishes when placement preferences apply. Establishes that where a parent

preferences apply?	preferences apply?	preferences may apply. Clarifies that the court must consider requests for anonymity in voluntary proceedings. Moves provisions regarding documentation to 23.137 and 23.138.	requests anonymity in a voluntary proceeding, the court must give weight to this request. Establishes that the placement preferences must be followed unless a determination is made on the record that good cause exists not to apply those preferences.
23.129 What placement preferences apply in adoptive placements?	23.130 What placement preferences apply in adoptive placements?	Clarifies that the Tribe's placement preferences may apply. Clarifies that the court "must" consider, where appropriate, the preferences of the Indian child or parent.	New section. Lists the placement preferences in adoptive placements. Establishes that the Tribe may establish a different order of preference by resolution.
23.130 What placement preferences apply in foster care or preadoptive placements?	23.131 What placement preferences apply in foster-care or preadoptive placements?	Clarifies that preferences apply to changes in placements. Adds that sibling attachment as a consideration in whether the placement approximates a family. Clarifies that the Tribe's placement preferences may apply. Deletes the provision "whether on or off the reservation" as superfluous. Clarifies that the Tribe's placement preferences established by order or resolution apply, so long as the placement is the least restricted setting appropriate to the particular needs of the child. Requires the court to consider the preference of the Indian child or parent.	New section. Lists the placement preferences in foster-care and preadoptive placements. Establishes that the Tribe may establish a different order of preference by resolution. Requires the court to consider the preference of the Indian child or parent.
23.131 How is a determination for "good cause" to depart from the placement preferences made?	23.132 How is a determination for "good cause" to depart from the placement preferences made?	Clarifies that the court must ensure reasons for good cause are on the record and available to the parties. Clarifies that a determination of good cause must be justified on the record or in writing. Changes the requirement for the court to base good cause on the listed considerations to a statement that the court "should" base good cause on the listed considerations. Clarifies that the request of one or both parents may be a consideration for good cause. Adds the presence of a sibling attachment as a consideration for good cause. Adds "mental" needs of the child.	New section. Requires the court to ensure the reasons for good cause are on the record and available to parties. Establishes that the standard for proving good cause is clear and convincing evidence. Requires the good cause determination to be in writing. Establishes considerations that the good cause determination should be based on. Prohibits court from departing from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

		<p>Deletes the provision stating that extraordinary needs does not include ordinary bonding and attachment.</p> <p>Deletes requirement for qualified expert witness.</p> <p>Changes unavailability of placements to unavailability of “suitable” placements, and clarifies that a placement may not be considered “unavailable” if it conforms to prevailing social and cultural standards of the Indian community.</p> <p>Changes requirement for active efforts to find placements to a “diligent search” to find placements.</p> <p>Adds that the court 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.</p>	
N/A	23.133 Should courts allow participation by alternative methods?	New section, incorporating provisions previously at PR §§ 23.112, 23.113, and 23.115.	New section. Establishes that courts should allow, where they possess the capability, alternative methods of participation in proceedings.
23.132 What is the procedure for petitioning to vacate an adoption?	23.136 What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?	<p>Clarifies that this provision addresses vacating an adoption (deletes “termination of parental rights”).</p> <p>Deletes provision allowing an adoption decree to be vacated based on the proceeding failing to comply with ICWA.</p>	New section. Establishes the procedure for vacating an adoption based on consent having been obtained through fraud or duress.
23.133 Who can make a petition to invalidate an action?	23.137 Who can make a petition to invalidate an action for certain ICWA violations?	<p>Clarifies which sections of ICWA violations of may justify a petition to invalidate an action.</p> <p>Clarifies that an Indian child that was, in the past, the subject of an action for foster care or termination of parental rights may petition.</p> <p>Moves provision regarding alternative methods of participation to § 23.133.</p>	New section. Establishes who can make a petition to invalidate an action based on a violation of certain statutory provisions.

23.134 What are the rights of adult adoptees?	23.138 What are the rights to information about adoptees' Tribal affiliations?	Narrows section to apply only to rights to information about adult adoptees' Tribal affiliations. Deletes provision regarding BIA helping adoptee obtain information because an updated version of this provision is at § 23.71. Deletes provision about closed adoptions. Deletes provision about Tribes identifying a Tribal designee to assist adult adoptees.	New section. Establishes how adult adoptees may receive information on Tribal affiliations.
23.135 When must notice of a change in child's status be given?	23.139 Must notice be given of a change in an adopted Indian child's status?	Clarifies that notice is required for Indian children who have been adopted. Deletes provision regarding change in placement. Adds that the notice must include the current name and any former names of the Indian child, and must include sufficient information to allow the recipient to participate in any scheduled hearings. Adds provisions requiring the court to explain the consequences of a waiver of the right to notice and certify that the explanation was provided. Adds that a waiver need not be made in a session of court open to the public but must be before a court. Clarifies that a revocation of the right to receive notice does not affect completed proceedings.	New section. Requires notice to be given to the child's biological parents or prior Indian custodians and Tribe of certain actions affecting an Indian child that has been adopted. Establishes the required content for the notice. Establishes provisions allowing the parent or Indian custodian to waive notice.
23.136 What information must States furnish to the Bureau of Indian Affairs?	23.140 What information must State courts furnish to the Bureau of Indian Affairs?	Clarifies applicability to voluntary and involuntary adoptions. Adds time period from 23.71 to provide that State court must provide a copy of the adoptive decree or order within 30 days. Adds requirement from 23.71 that the child's birthdate must be included in the information State courts provide to BIA. Incorporates provisions from 23.71(a) regarding marking information "confidential" and regarding State agencies assuming reporting responsibilities.	Incorporates some of § 23.71(a) regarding State requirement to provide a copy of the adoptive placement decree or order to BIA within 30 days, along with certain information.
23.137 How	23.141 What	Deletes requirement for State to	New section. Requires States to

must the State maintain records?	records must the State maintain?	<p>establish a single location to maintain records.</p> <p>Increases the time in which the State must make the record available to the Tribe or Secretary from 7 days to 14 days.</p> <p>Adds requirement for the record to include document on efforts to comply with the placement preferences and the court order authorizing departure, if the placement departs from the placement preferences.</p> <p>Clarifies that records may be maintained by a State court or State agency.</p>	<p>maintain records of all placements made under the Act.</p> <p>Establishes a minimum of what each record must include.</p>
23.138 How does the Paperwork Reduction Act affect this subpart?	23.139 How does the Paperwork Reduction Act affect this subpart.	Adds the OMB Control number.	New section. Addresses information collection requirements in the subpart.
NA	23.143 How does this rule apply to pending proceedings?		New section. States that the provisions of the rule will not affect a child-custody proceeding initiated prior to 180 days after publication date of the rule.
NA	23.144 What happens if some portion of this rule is held to be invalid by a court of competent jurisdiction?		New section. States that if any portion of the rule is determined to be invalid by a court, the other portions of the rule remains in effect.

VI. Procedural Requirements

A. Regulatory Planning and Review (E.O. 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is not significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. The Department has developed this rule in a manner consistent with these requirements.

B. Regulatory Flexibility Act

This rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*). The rule directly affects courts that hear Indian child welfare proceedings, and indirectly affects public child welfare agencies and private placement agencies. All of these categories of affected entities likely include entities that qualify as small entities, so the Department has estimated that rule affects approximately 7,625 small entities in these categories. Therefore, the Department has determined that this rule will have an impact on a substantial number of small entities. However, the Department has determined that the impact on entities affected by the rule will not be

significant because of the total economic impact of this rule's requirements on any given entity is likely to be limited to an order of magnitude that is minimal in comparison to the entity's annual operating budget. The Department's detailed review of the potential economic effects resulting from new regulatory requirements is available upon request.

C. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The rule does not have an annual effect on the economy of \$100 million or more. The rule's requirements will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. As noted above, the rule's requirements on any given entity is a minimal order of magnitude compared to an entity's annual operating budget. In cases where that is not true, the entity (such as a private adoption agency) may choose to pass their costs on to parties seeking placement and, on an individual level, the incremental increase in costs is minimal. Nor will this rule have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of the U.S.-based enterprises to compete with foreign-based enterprises because the rule affects only placement of domestic children who qualify as an "Indian child" under the Act. The Department has reviewed the potential increase in costs resulting from new regulatory requirements, and this analysis is available upon request.

D. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. A statement containing

the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 et seq.) is not required.

E. Takings (E.O. 12630)

Under the criteria in Executive Order 12630, this rule does not affect individual property rights protected by the Fifth Amendment nor does it involve a compensable “taking.” A takings implication assessment is therefore not required.

F. Federalism (E.O. 13132)

Under the criteria in Executive Order 13132, this rule does not have sufficient Federalism implications to warrant preparation of a Federalism summary impact statement. The Department carefully reviewed comments regarding potential Federalism implications and determined that this rule complies with the fundamental Federalism principles and policymaking criteria established in EO 13132. Congress determined that the issue of Indian child welfare is sufficiently national in scope and significance to justify a statute that applies uniformly across States. This rule invokes the United States’ special relationship with Indian Tribes and children by establishing a regulatory baseline for implementation to further the goals of ICWA. Such goals include protecting the best interests of Indian children and promoting the stability and security of Indian Tribes and families by establishing minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes that reflect the unique values of Indian culture. States are required to comply with ICWA even in the absence of this rule, and that requirement has existed since ICWA’s passage in 1978.

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

This rule complies with the requirements of Executive Order 12988. Specifically, this rule meets the criteria of section 3(a) requiring all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation and meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

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

The Department strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have identified substantial direct effects on federally recognized Indian Tribes that will result from this rule. This rule will affect Tribes by promoting implementation of a Federal statute intended to promote the stability and security of Indian Tribes and families. These regulations are the outcome of recommendations made by Tribes during several listening sessions on the ICWA guidelines. The Department hosted several formal Tribal consultation sessions on the proposed rule, including on April 20, 2015, in Portland, Oregon; April 23, 2015, in Rapid City, South Dakota; May 5, 2015, in Albuquerque, New Mexico; May 7, 2015, in Prior Lake, Minnesota; May 11, 2015, by teleconference; and May 14, 2015, in Tulsa, Oklahoma. Many federally recognized Indian Tribes submitted written comments and nearly all, if not all, uniformly supported the regulations, though some had suggestions for improvements. The Department considered each Tribe's comments and their suggested improvements and has addressed them, where possible, in the final rule.

I. Paperwork Reduction Act

This rule contains information collection requirements and a submission to OMB under the Paperwork Reduction Act (PRA) is required. The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq., prohibits a Federal agency from conducting or sponsoring a collection of information that requires OMB approval, unless such approval has been obtained and the collection request displays a currently valid OMB control number. Nor is any person required to respond to an information collection request that has not complied with the PRA. OMB has approved the information collection for this rule and has assigned a control number:

OMB Control Number: 1076-0186

Title: Indian Child Welfare Act (ICWA) Proceedings in State Court

Brief Description of Collection: This collection addresses the reporting, third-party disclosure, and recordkeeping requirements of ICWA, which requires State courts and agencies and private businesses to provide notice to or contact Tribes and parents/custodians of any child custody proceeding that may involve an “Indian child,” and requires State courts and agencies to document certain actions and maintain certain records regarding the removal and placement of an “Indian child.”

Type of Review: Existing collection in use without OMB control number.

Respondents: State and Tribal governments, businesses, and individuals.

Number of Respondents: 6,906 on average (each year).

Number of Responses: 98,069 on average (each year).

Frequency of Response: On occasion.

Estimated Time per Response: Ranges from 15 minutes to 12 hours.

Estimated Total Annual Hour Burden: 301,811 hours.

Estimated Total Annual Non-Hour Cost: \$309,630.

Sec.	Respondent	Information Collection	Annual Number of Respondents	Frequency of Responses	Annual Number of Responses	Completion Time per Response	Total Annual Burden Hours
23.107	State court and/or agency	Obtain information on whether child is “Indian child”	50	260	13,000	12	156,000
23.108, 23.109	Tribe	Respond to State regarding Tribal membership	567	23	13,041	1	13,041
23.110	State court	Notify Tribal court of dismissal and provide records	50	5	250	0.25	63
23.11, 23.111	State court and/or agency	Notify Tribe, parents, Indian custodian of child custody proceeding	50	273	13,650	6	81,900
23.11, 23.111	Private placement agency	Notify Tribe, parents, Indian custodian of child custody proceeding	1,289	2	2,578	6	15,468
23.113	State agency or State court	Document basis for emergency removal/placement	50	260	13,000	0.5	6,500
23.116, 23.119	State court	Notify Tribal court of transfer request, and provide records	50	5	250	0.25	63
23.120	Agency	Document “active efforts”	50	167	8,350	0.5	4,175
23.125, 23.126	Parent / Indian custodian	Consent to termination or adoption (with required contents)	5,000	1	5,000	0.5	2,500
23.127, 23.128	State court	Notify placement of withdrawal of consent	50	2	100	0.25	25
23.136	State court	Notify of petition to vacate	50	5	250	0.25	63

23.138	State court	Inform adult adoptee of Tribal affiliation upon request	50	20	1,000	0.5	500
23.139	State court	Notify of change in status quo of adopted child	50	4	200	0.25	63
23.140	State court	Provide copy of final adoption decree/order	50	47	2,350	0.25	588
23.141	State court	Maintain records of each placement (including required documents)	50	167	8,350	0.5	4,175
23.141	State court or agency	Provide placement records to Tribe or Secretary upon request within 14 days	50	167	8,350	1.5	12,525
23.141	State court or State agency	Notify where records maintained	50	167	8,350	0.5	4,175
					98,069		301,811

The annual cost burden to respondents associated with providing notice by certified mail is \$6.74 and the cost of a return receipt green card is \$2.80. For each Indian child-custody proceeding, at least two notices must be sent—one to the parent and one to the Tribe, totaling \$19.08. At an annual estimated 13,000 child welfare proceedings that may involve an “Indian child,” where approximately 650 of these include an interstate transfer (13,650), this totals: \$260,442. In addition, there are approximately 2,578 voluntary proceedings for which parties may choose to provide notice, at a cost of \$49,118. Together, the total cost burden is \$309,630.

Comment was taken on this information collection in the proposed rule, as part of the public notice and comment period proposed rule, in compliance with OMB regulations. One commenter, the California Health and Human Services Agency, Department of Social Services

(CHHS) submitted comments specifically in response to the request for comments on the information collection burden.

- *Comment on Proposed § 23.111:* The proposed rule states that notice must be by registered mail, whereas the current 23.11(a) allows for notice by certified mail. To require registered mail will increase costs that undermine noticing under ICWA.
Response: The statute specifies “registered mail with return receipt requested.” 25 U.S.C. 1912(a). In response to these comments, the Department examined whether certified mail with return receipt requested is allowable under the statute, and determined that it is because certified mail with return receipt requested better meets the goals of prompt, documented notice. The final rule allows for certified mail.
- *Comment on Proposed § 23.104, providing information on how to contact a Tribe:* The rule should clarify BIA’s obligation in gathering the information for the list of Tribe’s designated agents and contact information because the current list is outdated, inefficient, and inconsistently maintained. The list is hampered by publication in the Federal Register and BIA should be required to publish updates on the Web. The list also no longer maintains the historical affiliations, which was helpful. *Response:* BIA is now publishing the list using historical affiliations, as requested, and making the list available on its website, where it can be updated more frequently. The rule does not address this because these are procedures internal to the BIA.
- *Comment on Proposed § 23.111(i), requiring notice by both States where child is transferred interstate:* Requiring both the originating State court and receiving State court to provide notice is duplicative and burdensome because notice should only be required in the State where the actual court proceeding is pending. Another commenter

stated that the provision appears to apply to transfers between Tribes and States, where notice is unnecessary. *Response:* The final rule deletes this provision.

- *Comment on Proposed § 23.134, requiring BIA to disclose information to adult adoptees:*

This section appears to be creating duplicative work of the BIA and States, because both sections require each to provide adult adoptees information for Tribal enrollment.

Response: The Act imposes this responsibility on both BIA and the State. Section 1951(b) of the Act imposes the responsibility on BIA, which is in § 23.71(b) of the final rule. Section 1917 of the Act imposes the responsibility on States, which is addressed at § 23.134 of the final rule.

- *Comment on Proposed § 23.137, requiring the State to establish a single location for placement records:* This requirement would be an unfunded mandate with undue burden and would require relocating 1,145 files to a different location and require changes to existing recordkeeping systems. Another State agency commented that there is a significant fiscal and annual burden due to the staffing, costs for copying, packaging and transferring physical files to a different location. *Response:* The final rule deletes the provision requiring States to establish a single, central repository. The associated information collection request has also been deleted.
- *Comment on Proposed § 23.137, requiring providing records to the Department or Tribe upon request:* The 15-minute burden estimate allocated to this task is too low. The time to copy, package and mail the documents will be no less than one hour, but more realistically two hours. *Response:* The final rule updates the burden estimates to reflect 1.5 hours.

If you have comments on this information collection, please submit them to Elizabeth K. Appel, Office of Regulatory Affairs & Collaborative Action – Indian Affairs, U.S. Department of the Interior, 1849 C Street, NW, MS-3071, Washington, DC 20240, or by email to elizabeth.appel@bia.gov.

J. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment because it is of an administrative, technical, and procedural nature. *See*, 43 CFR 46.210(i). No extraordinary circumstances exist that would require greater review under the National Environmental Policy Act.

K. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

List of Subjects in 25 CFR Part 23

Administrative practice and procedure, Child welfare, Indians, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, amends part 23 in Title 25 of the Code of Federal Regulations as follows:

For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, amends part 23 in Title 25 of the Code of Federal Regulations as follows:

PART 23 – INDIAN CHILD WELFARE ACT

1. The authority citation for part 23 continues to read as follows:

5 U.S.C. 301; 25 U.S.C. 2, 9, 1901-1952.

2. In § 23.2:

- a. Add a definition for “active efforts”;
- b. Revise the definition of “child-custody proceeding”;
- c. Add definitions for “continued custody”, “custody”, and “domicile”;
- d. Add a definition for “emergency proceeding”;
- e. Revise the definition of “extended family member”;
- f. Add a definition for “hearing”;
- g. Revise the definitions of “Indian child”, “Indian child’s Tribe”, and “Indian custodian”;
- h. Add a definition for “Indian foster home”;
- i. Add a definition of “involuntary proceeding”;
- j. Revise the definition of “parent”;
- k. Revise the definitions of “reservation” and “Secretary”;
- l. Add a definition for “status offenses”;
- m. Revise the definition of “Tribal court”; and
- n. Add definitions for “upon demand”, and “voluntary proceeding”.

The additions and revisions read as follows:

§ 23.2 Definitions.

Active efforts means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources

necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

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

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

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

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

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

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

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

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

(9) Monitoring progress and participation in services;

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

(11) Providing post-reunification services and monitoring.

Child-custody proceeding means and includes any action, other than an emergency proceeding, that may culminate in one of the following outcomes:

(1) *Foster-care placement*, which is any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

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

(3) *Preadoptive placement*, which is the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; or

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

An action that may culminate in one of these four outcomes is considered a separate child-custody proceeding from an action that may culminate in a different one of these four outcomes. There may be several child-custody proceedings involving any given Indian child. Within each child-custody proceeding, there may be several hearings. If a child is placed in foster care or another out-of-home placement as a result of a status offense, that status offense proceeding is a child-custody proceeding.

Continued custody means physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law, that a parent or Indian custodian already has or had at any point in the past. The biological mother of a child has had custody of a child.

Custody means physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law. A party may demonstrate the existence of custody by looking to Tribal law or Tribal custom or State law.

Domicile means:

(1) For a parent or Indian custodian, the place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere.

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

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

Extended family member is defined by the law or custom of the Indian child's Tribe or, in the absence of such law or custom, is a person who has reached age 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

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

Indian child means any unmarried person who is under age 18 and either: (1) is a member or citizen of an Indian Tribe, or (2) is eligible for membership or citizenship in an Indian Tribe and is the biological child of a member/citizen of an Indian Tribe.

Indian child's Tribe means:

- (1) The Indian Tribe in which an Indian child is a member or eligible for membership; or
- (2) In the case of an Indian child who is a member of or eligible for membership in more than one Tribe, the Indian Tribe described in § 23.109.

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

Indian foster home means a foster home where one or more of the licensed or approved foster parents is an "Indian" as defined in 25 U.S.C. 1903(3).

Involuntary proceeding means a child-custody proceeding in which the parent does not

consent of his or her free will to the foster-care, preadoptive, or adoptive placement or termination of parental rights or in which the parent consents to the foster-care, preadoptive, or adoptive placement under threat of removal of the child by a State court or agency.

Parent or parents means any biological parent or parents of an Indian child, or any Indian who has lawfully adopted an Indian child, including adoptions under Tribal law or custom. It does not include an unwed biological father where paternity has not been acknowledged or established.

Reservation means Indian country as defined in 18 U.S.C 1151 and any lands, not covered under that section, title to which is held by the United States in trust for the benefit of any Indian Tribe or individual or held by any Indian Tribe or individual subject to a restriction by the United States against alienation.

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

Status offenses mean offenses that would not be considered criminal if committed by an adult; they are acts prohibited only because of a person's status as a minor (e.g., truancy, incorrigibility).

Tribal court means a court with jurisdiction over child-custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian Tribe, or any other administrative body of a Tribe vested with authority over child-custody proceedings.

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

Voluntary proceeding means a child-custody proceeding that is not an involuntary proceeding, such as a proceeding for foster-care, preadoptive, or adoptive placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, consented to for the Indian child, or a proceeding for voluntary termination of parental rights.

3. Revise § 23.11.

The revision reads as follows:

§ 23.11 Notice.

(a) In any involuntary proceeding in a State court where the court knows or has reason to know that an Indian child is involved, and where the identity and location of the child's parent or Indian custodian or Tribe is known, the party seeking the foster-care placement of, or termination of parental rights to, an Indian child must directly notify the parents, the Indian custodians, and the child's Tribe by registered or certified mail with return receipt requested, of the pending child-custody proceedings and their right of intervention. Notice must include the requisite information identified in § 23.111 of these regulations, consistent with the confidentiality requirement in § 23.111(a)(2)(I). Copies of these notices must be sent to the appropriate Regional Director listed in paragraphs (b)(1) through (12) by registered or certified mail with return receipt requested or by personal delivery and must include the information required by §

23.111 of these regulations.

(b)(1) For child-custody proceedings in Alabama, Connecticut, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, or any territory or possession of the United States, notices must be sent to the following address: Eastern Regional Director, Bureau of Indian Affairs, 545 Marriott Drive, Suite 700, Nashville, Tennessee 37214.

(2) For child-custody proceedings in Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio, or Wisconsin, notices must be sent to the following address: Minneapolis Regional Director, Bureau of Indian Affairs, 331 Second Avenue South, Minneapolis, Minnesota 55401-2241.

(3) For child-custody proceedings in Nebraska, North Dakota, or South Dakota, notices must be sent to the following address: Aberdeen Regional Director, Bureau of Indian Affairs, 115 Fourth Avenue, SE, Aberdeen, South Dakota 57401.

(4) For child-custody proceedings in Kansas, Texas (except for notices to the Ysleta del Sur Pueblo of El Paso County, Texas), or the western Oklahoma counties of Alfalfa, Beaver, Beckman, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Cotton, Custer, Dewey, Ellis, Garfield, Grant, Greer, Harmon, Harper, Jackson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Major, Noble, Oklahoma, Pawnee, Payne, Pottawatomie, Roger Mills, Texas, Tillman, Washita, Woods or Woodward, notices must be sent to the following address: Anadarko Regional Director, Bureau of Indian Affairs, P.O. Box 368, Anadarko, Oklahoma 73005. Notices to the Ysleta del Sur Pueblo must be sent to the Albuquerque Regional Director at the address listed in paragraph (b)(6).

(5) For child-custody proceedings in Wyoming or Montana (except for notices to the

Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana), notices must be sent to the following address: Billings Regional Director, Bureau of Indian Affairs, 316 N. 26th Street, Billings, Montana 59101. Notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, must be sent to the Portland Regional Director at the address listed in paragraph (b)(11).

(6) For child-custody proceedings in the Texas counties of El Paso and Hudspeth or in Colorado or New Mexico (exclusive of notices to the Navajo Nation from the New Mexico counties listed in paragraph (b)(9)), notices must be sent to the following address: Albuquerque Regional Director, Bureau of Indian Affairs, 615 First Street, P.O. Box 26567, Albuquerque, New Mexico 87125. Notices to the Navajo Nation must be sent to the Navajo Regional Director at the address listed in paragraph (b)(9).

(7) For child-custody proceedings in Alaska (except for notices to the Metlakatla Indian Community, Annette Island Reserve, Alaska), notices must be sent to the following address: Juneau Regional Director, Bureau of Indian Affairs, 709 West 9th Street, Juneau, Alaska 99802-1219. Notices to the Metlakatla Indian Community, Annette Island Reserve, Alaska, must be sent to the Portland Regional Director at the address listed in paragraph (b)(11).

(8) For child-custody proceedings in Arkansas, Missouri, or the eastern Oklahoma counties of Adair, Atoka, Bryan, Carter, Cherokee, Craig, Creek, Choctaw, Coal, Delaware, Garvin, Grady, Haskell, Hughes, Jefferson, Johnson, Latimer, LeFlore, Love, Mayes, McCurtain, McClain, McIntosh, Murray, Muskogee, Nowata, Okfuskee, Okmulgee, Osage, Ottawa, Pittsburg, Pontotoc, Pushmataha, Marshall, Rogers, Seminole, Sequoyah, Stephens, Tulsa, Wagoner, or Washington, notices must be sent to the following address: Muskogee Regional Director, Bureau of Indian Affairs, 101 North Fifth Street, Muskogee, Oklahoma 74401.

(9) For child-custody proceedings in the Arizona counties of Apache, Coconino (except for notices to the Hopi Tribe of Arizona and the San Juan Southern Paiute Tribe of Arizona) or Navajo (except for notices to the Hopi Tribe of Arizona); the New Mexico counties of McKinley (except for notices to the Zuni Tribe of the Zuni Reservation), San Juan, or Socorro; or the Utah county of San Juan, notices must be sent to the following address: Navajo Regional Director, Bureau of Indian Affairs, P.O. Box 1060, Gallup, New Mexico 87301. Notices to the Hopi and San Juan Southern Paiute Tribes of Arizona must be sent to the Phoenix Regional Director at the address listed in paragraph (b)(10). Notices to the Zuni Tribe of the Zuni Reservation must be sent to the Albuquerque Regional Director at the address listed in paragraph (b)(6).

(10) For child-custody proceedings in Arizona (exclusive of notices to the Navajo Nation from those counties listed in paragraph (b)(9)), Nevada, or Utah (exclusive of San Juan County), notices must be sent to the following address: Phoenix Regional Director, Bureau of Indian Affairs, 1 North First Street, P.O. Box 10, Phoenix, Arizona 85001.

(11) For child-custody proceedings in Idaho, Oregon, or Washington, notices must be sent to the following address: Portland Regional Director, Bureau of Indian Affairs, 911 NE 11th Avenue, Portland, Oregon 97232. All notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, located in the Montana counties of Flathead, Lake, Missoula, and Sanders, must also be sent to the Portland Regional Director.

(12) For child-custody proceedings in California or Hawaii, notices must be sent to the following address: Sacramento Regional Director, Bureau of Indian Affairs, Federal Office Building, 2800 Cottage Way, Sacramento, California 95825.

(c) Upon receipt of the notice, the Secretary will make reasonable documented efforts to locate and notify the child's Tribe and the child's parent or Indian custodian. The Secretary will

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

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

4. Revise § 23.71 as follows:

Subpart G – Administrative Provisions

§ 23.71 Recordkeeping and information availability.

(a) The Division of Human Services, Bureau of Indian Affairs (BIA), is authorized to receive all information and to maintain a central file on all State Indian adoptions. This file is confidential and only designated persons may have access to it.

(b) Upon the request of an adopted Indian who has reached age 18, the adoptive or foster parents of an Indian child, or an Indian Tribe, BIA will disclose such information as may be necessary for purposes of Tribal enrollment or determining any rights or benefits associated with Tribal membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, BIA must certify to the Indian child's Tribe, where the information warrants, that the child's parentage and other circumstances entitle the

child to enrollment under the criteria established by such Tribe.

(c) BIA will ensure that the confidentiality of this information is maintained and that the information is not subject to the Freedom of Information Act, 5 U.S.C. 552, as amended.

5. Add subpart I to read as follows:

Subpart I –Indian Child Welfare Act Proceedings

General Provisions

Sec.

- 23.101 What is the purpose of this subpart?
- 23.102 What terms do I need to know?
- 23.103 When does ICWA apply?
- 23.104 What provisions of this subpart apply to each type of child-custody proceeding?
- 23.105 How do I contact a Tribe under the regulations in this subpart?
- 23.106 How does this subpart interact with State and Federal laws?

Pretrial Requirements

- 23.107 How should a State court determine if there is reason to know the child is an Indian child?
- 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?
- 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?
- 23.110 When must a State court dismiss an action?
- 23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?
- 23.112 What time limits and extensions apply?
- 23.113 What are the standards for emergency proceedings involving an Indian child?
- 23.114 What are the requirements for determining improper removal?

Petitions to Transfer to Tribal Court

- 23.115 How are petitions for transfer of a proceeding made?
- 23.116 What happens after a petition for transfer is made?
- 23.117 What are the criteria for ruling on transfer petitions?
- 23.118 How is a determination of "good cause" to deny transfer made?
- 23.119 What happens after a petition for transfer is granted?

Adjudication of Involuntary Proceedings

- 23.120 How does the State court ensure that active efforts have been made?
- 23.121 What are the applicable standards of evidence?
- 23.122 Who may serve as a qualified expert witness?
- 23.123 Reserved.

Voluntary Proceedings

- 23.124 What actions must a State court undertake in voluntary proceedings?
- 23.125 How is consent obtained?
- 23.126 What information must a consent document contain?
- 23.127 How is withdrawal of consent to a foster-care placement achieved?
- 23.128 How is withdrawal of consent to a termination of parental rights or adoption achieved?

Dispositions

- 23.129 When do the placement preferences apply?
- 23.130 What placement preferences apply in adoptive placements?
- 23.131 What placement preferences apply in foster-care or preadoptive placements?
- 23.132 How is a determination of “good cause” to depart from the placement preferences made?

Access

- 23.133 Should courts allow participation by alternative methods?
- 23.134 Who has access to reports and records during a proceeding?
- 23.135 Reserved.

Post-Trial Rights & Responsibilities

- 23.136 What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?
- 23.137 Who can petition to invalidate an action for certain ICWA violations?
- 23.138 What are the rights to information about adoptees’ Tribal affiliations?
- 23.139 Must notice be given of a change in an adopted Indian child’s status?

Recordkeeping

- 23.140 What information must States furnish to the Bureau of Indian Affairs?
- 23.141 What records must the State maintain?
- 23.142 How does the Paperwork Reduction Act affect this subpart?

Effective Date

- 23.143 How does this rule apply to pending proceedings?

Severability

- 23.144 What happens if some portion of this rule is held to be invalid by a court of competent jurisdiction?

General Provisions

§ 23.101 What is the purpose of this subpart?

These regulations clarify the minimum Federal standards governing implementation of the Indian Child Welfare Act (ICWA) to ensure that ICWA is applied in all States consistent with the Act's express language, Congress's intent in enacting the statute, and to promote the stability and security of Indian tribes and families.

§ 23.102 What terms do I need to know?

The following terms and their definitions apply to this subpart. All other terms have the meanings assigned in § 23.2.

Agency means a nonprofit, for-profit, or governmental organization and its employees, agents, or officials that performs, or provides services to biological parents, foster parents, or adoptive parents to assist in the administrative and social work necessary for foster, preadoptive, or adoptive placements.

Indian organization means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians or a Tribe, or a majority of whose members are Indians.

§ 23.103 When does ICWA apply?

- (a) ICWA includes requirements that apply whenever an Indian child is the subject of:
 - (1) A child-custody proceeding, including:
 - (i) An involuntary proceeding;

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

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

(2) An emergency proceeding.

(b) ICWA does not apply to:

(1) A Tribal court proceeding;

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

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

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

(c) If a proceeding listed in § 23.103(a) concerns a child who meets the statutory definition of "Indian child," then ICWA will apply to that proceeding. In determining whether ICWA applies to a proceeding, the State court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum.

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

§ 23.104 What provisions of this subpart apply to each type of child-custody proceeding?

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

Section	Type of Proceeding
23.101 - 23.106 (General Provisions)	Emergency, Involuntary, Voluntary
<i>Pretrial Requirements</i>	---
23.107 (How should a State court determine if there is reason to know the child is an Indian child?)	Emergency, Involuntary, Voluntary
23.108 (Who makes the determination as to whether a child is a member whether a child is eligible for membership, or whether a biological parent is a member of a Tribe?)	Emergency, Involuntary, Voluntary
23.109 (How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?)	Emergency, Involuntary, Voluntary
23.110 (When must a State court dismiss an action?)	Involuntary, Voluntary
23.111 (What are the notice requirements for a child-custody proceeding involving an Indian child?)	Involuntary (foster-care placement and termination of parental rights)
23.112 (What time limits and extensions apply?)	Involuntary (foster-care placement and termination of parental rights)
23.113 (What are the standards for emergency proceedings involving an Indian child?)	Emergency
23.114 (What are the requirements for determining improper removal?)	Involuntary
<i>Petitions to Transfer to Tribal Court</i>	---
23.115 (How are petitions for transfer of a proceeding made?)	Involuntary, Voluntary (foster-care placement and termination of parental rights)
23.116 (What happens after a petition for transfer is made?)	Involuntary, Voluntary (foster-care placement and termination of parental rights)
23.117 (What are the criteria for ruling on transfer petitions?)	Involuntary, Voluntary (foster-care placement and termination of parental rights)
23.118 (How is a determination of "good cause" to deny transfer made?)	Involuntary, Voluntary (foster-care placement and termination of parental rights)
23.119 (What happens after a petition for transfer is granted?)	Involuntary, Voluntary (foster-care placement and termination of parental rights)
<i>Adjudication of Involuntary Proceedings</i>	---
23.120 (How does the State court ensure that active efforts have been made?)	Involuntary (foster-care placement and termination of parental rights)
23.121 (What are the applicable standards of evidence?)	Involuntary (foster-care placement and termination of parental rights)
23.122 (Who may serve as a qualified expert witness?)	Involuntary (foster-care placement

	and termination of parental rights)
23.123 Reserved.	N/A
<i>Voluntary Proceedings</i>	---
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
<i>Dispositions</i>	---
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
<i>Access</i>	---
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
<i>Post-Trial Rights & Responsibilities</i>	---
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
<i>Recordkeeping</i>	
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
<i>Effective Date</i>	---
23.143 (How does this rule apply to pending proceedings?)	Emergency, Involuntary, Voluntary
<i>Severability</i>	---
23.144 (What happens if some portion of this rule is held to be invalid by a court of competent jurisdiction?)	Emergency, Involuntary, Voluntary

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

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

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

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

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

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

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

(a) These regulations provide minimum Federal standards to ensure compliance with ICWA.

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

Pretrial Requirements

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (i) Preference of the parents for membership of the child;
- (ii) Length of past domicile or residence on or near the reservation of each Tribe;
- (iii) Tribal membership of the child's custodial parent or Indian custodian; and
- (iv) Interest asserted by each Tribe in the child-custody proceeding;
- (v) Whether there has been a previous adjudication with respect to the child by a court of one of the Tribes; and
- (vi) Self-identification by the child, if the child is of sufficient age and capacity to meaningfully self-identify.

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

§ 23.110 When must a State court dismiss an action?

Subject to 25 U.S.C. 1919 (Agreements between States and Indian Tribes) and § 23.113 (emergency proceedings), the following limitations on a State court's jurisdiction apply:

- (a) The court in any voluntary or involuntary child-custody proceeding involving an Indian child must determine the residence and domicile of the Indian child. If either the residence or domicile is on a reservation where the Tribe exercises exclusive jurisdiction over child-custody proceedings, the State court must expeditiously notify the Tribal court of the pending dismissal based on the Tribe's exclusive jurisdiction, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.

(b) If the child is a ward of a Tribal court, the State court must expeditiously notify the Tribal court of the pending dismissal, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.

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

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

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

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

(b) Notice must be sent to:

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

(2) The child's parents; and

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

(c) Notice must be sent by registered or certified mail with return receipt requested.

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

- (d) Notice must be in clear and understandable language and include the following:
- (1) The child's name, birthdate, and birthplace;
 - (2) All names known (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and Tribal enrollment numbers if known;
 - (3) If known, the names, birthdates, birthplaces, and Tribal enrollment information of other direct lineal ancestors of the child, such as grandparents;
 - (4) The name of each Indian Tribe in which the child is a member (or may be eligible for membership if a biological parent is a member);
 - (5) A copy of the petition, complaint, or other document by which the child-custody proceeding was initiated and, if a hearing has been scheduled, information on the date, time, and location of the hearing;
 - (6) Statements setting out:
 - (i) The name of the petitioner and the name and address of petitioner's attorney;
 - (ii) The right of any parent or Indian custodian of the child, if not already a party to the child-custody proceeding, to intervene in the proceedings.
 - (iii) The Indian Tribe's right to intervene at any time in a State-court proceeding for the foster-care placement of or termination of parental rights to an Indian child.
 - (iv) That, if the child's parent or Indian custodian is unable to afford counsel based on a determination of indigency by the court, the parent or Indian custodian has the right to court-appointed counsel.
 - (v) The right to be granted, upon request, up to 20 additional days to prepare for the child-custody proceedings.

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

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

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

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

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

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

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

§ 23.112 What time limits and extensions apply?

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

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

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

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

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

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

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

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

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

(b) The State court must:

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

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

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

(4) Immediately terminate (or ensure that the agency immediately terminates) the emergency proceeding once the court or agency possesses sufficient evidence to determine that

the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

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

- (1) Initiation of a child-custody proceeding subject to the provisions of ICWA;
- (2) Transfer of the child to the jurisdiction of the appropriate Indian Tribe; or
- (3) Restoring the child to the parent or Indian custodian.

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

- (1) The name, age, and last known address of the Indian child;
- (2) The name and address of the child's parents and Indian custodians, if any;
- (3) The steps taken to provide notice to the child's parents, custodians, and Tribe about the emergency proceeding;

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

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

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

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

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

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

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

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

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

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

§ 23.114 What are the requirements for determining improper removal?

(a) If, in the course of any child-custody proceeding, any party asserts or the court has reason to believe that the Indian child may have been improperly removed from the custody of his or her parent or Indian custodian, or that the Indian child has been improperly retained (such as after a visit or other temporary relinquishment of custody), the court must expeditiously determine whether there was improper removal or retention.

(b) If the court finds that the Indian child was improperly removed or retained, the court must terminate the proceeding and the child must be returned immediately to his or her parent or Indian custodian, unless returning the child to his parent or Indian custodian would subject the child to substantial and immediate danger or threat of such danger.

Petitions to Transfer to Tribal Court

§ 23.115 How are petitions for transfer of a proceeding made?

(a) Either parent, the Indian custodian, or the Indian child's Tribe may request, at any time, orally on the record or in writing, that the State court transfer a foster-care or termination-of-parental-rights proceeding to the jurisdiction of the child's Tribe.

(b) The right to request a transfer is available at any stage in each foster-care or termination-of-parental-rights proceeding.

§ 23.116 What happens after a petition for transfer is made?

Upon receipt of a transfer petition, the State court must ensure that the Tribal court is promptly notified in writing of the transfer petition. This notification may request a timely response regarding whether the Tribal court wishes to decline the transfer.

§ 23.117 What are the criteria for ruling on transfer petitions?

Upon receipt of a transfer petition from an Indian child's parent, Indian custodian, or Tribe, the State court must transfer the child-custody proceeding unless the court determines that transfer is not appropriate because one or more of the following criteria are met:

- (a) Either parent objects to such transfer;
- (b) The Tribal court declines the transfer; or
- (c) Good cause exists for denying the transfer.

§ 23.118 How is a determination of "good cause" to deny transfer made?

(a) If the State court believes, or any party asserts, that good cause to deny transfer exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing on the record and to the parties to the child-custody proceeding.

(b) Any party to the child-custody proceeding must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists.

(c) In determining whether good cause exists, the court must not consider:

(1) Whether the foster-care or termination-of-parental-rights proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage;

(2) Whether there have been prior proceedings involving the child for which no petition to transfer was filed;

(3) Whether transfer could affect the placement of the child;

(4) The Indian child's cultural connections with the Tribe or its reservation; or

(5) Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems.

(d) The basis for any State-court decision to deny transfer should be stated orally on the record or in a written order.

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

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

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

Adjudication of Involuntary Proceedings

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

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

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

§ 23.121 What are the applicable standards of evidence?

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

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

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

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

§ 23.122 Who may serve as a qualified expert witness?

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

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

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

§ 23.123 [Reserved.]

Voluntary Proceedings

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

(a) The State court must require the participants in a voluntary proceeding to state on the record whether the child is an Indian child, or whether there is reason to believe the child is an Indian child, as provided in § 23.107 of these regulations.

(b) If there is reason to believe the child is an Indian child, the State court must ensure that the party seeking placement has taken all reasonable steps to verify the child's status. This may include contacting the Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) to verify the child's status. As described in § 23.107, where a consenting parent requests anonymity, a Tribe receiving such information must keep relevant documents and information confidential.

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

§ 23.125 How is consent obtained?

(a) A parent's or Indian custodian's consent to a voluntary termination of parental rights or to a foster-care, preadoptive, or adoptive placement must be executed in writing and recorded before a court of competent jurisdiction.

(b) Prior to accepting the consent, the court must explain to the parent or Indian custodian:

(1) The terms and consequences of the consent in detail; and

(2) The following limitations, applicable to the type of child-custody proceeding for which consent is given, on withdrawal of consent:

(i) For consent to foster-care placement, the parent or Indian custodian may withdraw consent for any reason, at any time, and have the child returned; or

(ii) For consent to termination of parental rights, the parent or Indian custodian may withdraw consent for any reason, at any time prior to the entry of the final decree of termination and have the child returned; or

(iii) For consent to an adoptive placement, the parent or Indian custodian may withdraw consent for any reason, at any time prior to the entry of the final decree of adoption, and have the child returned.

(c) The court must certify that the terms and consequences of the consent were explained on the record in detail in English (or the language of the parent or Indian custodian, if English is not the primary language) and were fully understood by the parent or Indian custodian.

(d) Where confidentiality is requested or indicated, execution of consent need not be made in a session of court open to the public but still must be made before a court of competent jurisdiction in compliance with this section.

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

§ 23.126 What information must a consent document contain?

(a) If there are any conditions to the consent, the written consent must clearly set out the conditions.

(b) A written consent to foster-care placement should contain, in addition to the information specified in paragraph (a) of this section, the name and birthdate of the Indian child; the name of the Indian child's Tribe; the Tribal enrollment number for the parent and for the Indian child, where known, or some other indication of the child's membership in the Tribe; the name, address, and other identifying information of the consenting parent or Indian custodian;

the name and address of the person or entity, if any, who arranged the placement; and the name and address of the prospective foster parents, if known at the time.

§ 23.127 How is withdrawal of consent to a foster-care placement achieved?

(a) The parent or Indian custodian may withdraw consent to voluntary foster-care placement at any time.

(b) To withdraw consent, the parent or Indian custodian must file a written document with the court or otherwise testify before the court. Additional methods of withdrawing consent may be available under State law.

(c) When a parent or Indian custodian withdraws consent to a voluntary foster-care placement, the court must ensure that the Indian child is returned to that parent or Indian custodian as soon as practicable.

§ 23.128 How is withdrawal of consent to a termination of parental rights or adoption achieved?

(a) A parent may withdraw consent to voluntary termination of parental rights at any time prior to the entry of a final decree of termination.

(b) A parent or Indian custodian may withdraw consent to voluntary adoption at any time prior to the entry of a final decree of adoption.

(c) To withdraw consent prior to the entry of a final decree of adoption, the parent or Indian custodian must file a written document with the court or otherwise testify before the court. Additional methods of withdrawing consent may be available under State law.

(d) The court in which the withdrawal of consent is filed must promptly notify the person or entity who arranged any voluntary preadoptive or adoptive placement of such filing, and the Indian child must be returned to the parent or Indian custodian as soon as practicable.

Dispositions

§ 23.129 When do the placement preferences apply?

(a) In any preadoptive, adoptive, or foster-care placement of an Indian child, the placement preferences specified in § 23.130 and § 23.131 apply.

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

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

§ 23.130 What placement preferences apply in adoptive placements?

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

- (1) A member of the Indian child's extended family;
- (2) Other members of the Indian child's Tribe; or
- (3) Other Indian families.

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

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

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

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

- (1) Most approximates a family, taking into consideration sibling attachment;
- (2) Allows the Indian child's special needs (if any) to be met; and
- (3) Is in reasonable proximity to the Indian child's home, extended family, or siblings.

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

- (1) A member of the Indian child's extended family;
- (2) A foster home that is licensed, approved, or specified by the Indian child's Tribe;
- (3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

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

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

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

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

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

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

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

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

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

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

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

(5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a

placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

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

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

Access

§ 23.133 Should courts allow participation by alternative methods?

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

§ 23.134 Who has access to reports and records during a proceeding?

Each party to an emergency proceeding or a foster-care-placement or termination-of-parental-rights proceeding under State law involving an Indian child has a right to timely examine all reports and other documents filed or lodged with the court upon which any decision with respect to such action may be based.

§ 23.135 [Reserved.]

Post-Trial Rights & Responsibilities

§ 23.136 What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?

(a) Within two years after a final decree of adoption of any Indian child by a State court, or within any longer period of time permitted by the law of the State, the State court may invalidate the voluntary adoption upon finding that the parent's consent was obtained by fraud or duress.

(b) Upon the parent's filing of a petition to vacate the final decree of adoption of the parent's Indian child, the court must give notice to all parties to the adoption proceedings and the Indian child's Tribe and must hold a hearing on the petition.

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

§ 23.137 Who can petition to invalidate an action for certain ICWA violations?

(a) Any of the following may petition any court of competent jurisdiction to invalidate an action for foster-care placement or termination of parental rights under state law where it is alleged that 25 U.S.C. 1911, 1912, or 1913 has been violated:

(1) An Indian child who is or was the subject of any action for foster-care placement or termination of parental rights;

(2) A parent or Indian custodian from whose custody such child was removed; and

(3) The Indian child's Tribe.

(b) Upon a showing that an action for foster-care placement or termination of parental rights violated any provision of 25 U.S.C. 1911, 1912, or 1913, the court must determine whether it is appropriate to invalidate the action.

(c) To petition for invalidation, there is no requirement that the petitioner's rights under ICWA were violated; rather, a petitioner may challenge the action based on any violations of 25 U.S.C. 1911, 1912, or 1913 during the course of the child-custody proceeding.

§ 23.138 What are the rights to information about adoptees' Tribal affiliations?

Upon application by an Indian who has reached age 18 who was the subject of an adoptive placement, the court that entered the final decree of adoption must inform such individual of the Tribal affiliations, if any, of the individual's biological parents and provide such other information necessary to protect any rights, which may include Tribal membership, resulting from the individual's Tribal relationship.

§ 23.139 Must notice be given of a change in an adopted Indian child's status?

(a) If an Indian child has been adopted, the court must notify, by registered or certified mail with return receipt requested, the child's biological parent or prior Indian custodian and the Indian child's Tribe whenever:

(1) A final decree of adoption of the Indian child has been vacated or set aside; or
(2) The adoptive parent has voluntarily consented to the termination of his or her parental rights to the child.

(b) The notice must state the current name, and any former name, of the Indian child, inform the recipient of the right to petition for return of custody of the child, and provide sufficient information to allow the recipient to participate in any scheduled hearings.

(c) A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice and filing the waiver with the court.

(1) Prior to accepting the waiver, the court must explain the consequences of the waiver and explain how the waiver may be revoked.

(2) The court must certify that the terms and consequences of the waiver and how the waiver may be revoked were explained in detail in English (or the language of the parent or Indian custodian, if English is not the primary language), and were fully understood by the parent or Indian custodian.

(3) Where confidentiality is requested or indicated, execution of the waiver need not be made in a session of court open to the public but still must be made before a court of competent jurisdiction in compliance with this section.

(4) The biological parent or Indian custodian may revoke the waiver at any time by filing with the court a written notice of revocation.

(5) A revocation of the right to receive notice does not affect any child-custody proceeding that was completed before the filing of the notice of revocation.

Recordkeeping

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

(a) Any State court entering a final adoption decree or order in any voluntary or involuntary Indian-child adoptive placement must furnish a copy of the decree or order within 30 days to the Bureau of Indian Affairs, Chief, Division of Human Services, 1849 C Street NW., Mail Stop 4513 MIB, Washington, DC 20240, along with the following information, in an envelope marked "Confidential":

(1) Birth name and birthdate of the Indian child, and Tribal affiliation and name of the Indian child after adoption;

(2) Names and addresses of the biological parents;

(3) Names and addresses of the adoptive parents;

(4) Name and contact information for any agency having files or information relating to the adoption;

(5) Any affidavit signed by the biological parent or parents asking that their identity remain confidential; and

(6) Any information relating to Tribal membership or eligibility for Tribal membership of the adopted child.

(b) If a State agency has been designated as the repository for all State-court adoption information and is fulfilling the duties described in paragraph (a) of this section, the State courts in that State need not fulfill those same duties.

§ 23.141 What records must the State maintain?

(a) The State must maintain a record of every voluntary or involuntary foster-care, preadoptive, and adoptive placement of an Indian child and make the record available within 14 days of a request by an Indian child's Tribe or the Secretary.

(b) The record must contain, at a minimum, the petition or complaint, all substantive orders entered in the child-custody proceeding, the complete record of the placement determination (including, but not limited to, the findings in the court record and the social worker's statement), and, if the placement departs from the placement preferences, detailed documentation of the efforts to comply with the placement preferences.

(c) A State agency or agencies may be designated to be the repository for this information. The State court or agency should notify the BIA whether these records are maintained within the court system or by a State agency.

§ 23.142 How does the Paperwork Reduction Act affect this subpart?

The collections of information contained in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned OMB Control Number 1076–0186. Response is required to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless the form or regulation requesting the information displays a currently valid OMB Control Number. Send comments regarding this collection of information, including suggestions for reducing the burden, to the Information Collection Clearance Officer – Indian Affairs, 1849 C Street, NW., Washington, DC 20240.

Effective Date

§ 23.143 How does this rule apply to pending proceedings?

None of the provisions of this rule affects a proceeding under State law for foster-care placement, termination of parental rights, preadoptive placement, or adoptive placement that was initiated prior to [INSERT DATE 180 days after publication in the FEDERAL REGISTER], but the provisions of this rule apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

Severability

§ 23.144 What happens if some portion of this rule is held to be invalid by a court of competent jurisdiction?

If any portion of this rule is determined to be invalid by a court of competent jurisdiction, the other portions of the rule remain in effect. For example, the Department has considered separately whether the provisions of this rule apply to involuntary and voluntary proceedings; thus, if a particular provision is held to be invalid as to one type of proceeding, it is the Department's intent that it remains valid as to the other type of proceeding.

Dated: **JUN - 6 2016**

 
Lawrence S. Roberts,
Acting Assistant Secretary – Indian Affairs.