[4337-15]

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

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RIN 1076-AF25

Indian Child Welfare Act Proceedings

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule.

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

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

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

I. Executive Summary

A. Introduction

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

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

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

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

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

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

B. Overview of Final Rule

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

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

In particular, the final rule addresses the following issues:

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

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

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

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

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

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

II. Background

A. Background Regarding Passage of ICWA

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Overview of ICWA's Provisions

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

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

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

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

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

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

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

C. Need for These Regulations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. The Department's Implementation of ICWA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Authority for Regulations

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

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

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

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

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

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

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

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

A. Statements Made in the 1979 Guidelines

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

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

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

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

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

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

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

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

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

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

B. Comments Agreeing that Interior May Issue a Binding Regulation

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

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

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

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

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

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

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

1. Agency Expertise

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

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

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

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

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

2. *Chevron* Deference

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

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

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

3. Primary Responsibility for Interpreting the Act

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

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

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

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

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

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

4. Tenth Amendment and Federalism

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

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

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

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

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

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

5. Federalism Executive Order

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

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

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

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

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

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

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

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

6. Change in Position from Statements Made in 1979

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

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

7. Timeliness

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

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

IV. Discussion of Rule and Comments

A. Public Comment and Tribal Consultation Process

1. Fairness in Proposing the Rule

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

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

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

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

2. Locations of Meetings/Consultations

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

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

B. Definitions

1. "Active Efforts"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. "Agency"

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

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

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

3. "Child-custody proceeding"

See "Applicability" section below.

4. "Continued Custody" and "Custody"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. "Domicile"

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

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

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

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

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

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

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

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

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

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

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

6. "Emergency proceeding"

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

7. "Extended Family Member"

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

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

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

8. "Hearing"

See "Applicability" section below.

9. "Imminent Physical Damage or Harm"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10. "Indian Child"

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

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

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

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

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

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

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

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

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

11. "Indian Child's Tribe"

The final rule retains the definition used in the statute.

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

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

12. "Indian Custodian"

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

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

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

13. "Parent"

The final rule retains the definition used in the statute.

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

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

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

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

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

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

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

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

14. "Reservation"

The definition in the final rule tracks the statutory definition.

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

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

15. "Status Offenses"

This definition was not changed from the proposed rule.

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

Response: See the "Applicability" discussion below. The final rule definition of "child-custody proceeding" is updated to make clear that its scope includes proceedings where a child is placed in foster care or another out-of-home placement as a result of a status offense. This reflects the statutory definition of "child-custody proceeding," which is best read to include placements based on status offenses, while explicitly excluding placement[s] based upon an act which, if committed by an adult, would be deemed a crime. *See* 25 U.S.C. 1903(1).

16. "Tribal Court"

The final rule retains the definition used in the statute.

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

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

17. "Upon Demand"

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

Comment: A commenter stated that the example "repaying the child's expenses" should be deleted from the definition of "upon demand" because it could unnecessarily limit interpretation of what is considered a contingency. A few other commenters suggested adding more examples for what "upon demand" means, to include "being placed into custody" because the return of the child upon demand is not a reality when the end result is that the agency may

remove the child. Some commenters suggested "upon demand" should mean without having to resort to legal proceedings or make a filing in court.

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

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

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

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

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

Response: The proposed rule allowed for "either parent" to choose the placement to address situations where only one parent is known or reachable. The final rule adds "both parents" to allow for situations where both parents are known and reachable. The final rule does not add that "if either parent refuses to consent to the placement, the placement shall not be considered voluntary" because in some cases, efforts to find the other parent may be

unsuccessful. If a parent refuses to consent to the foster-care, preadoptive, or adoptive placement or termination of parental rights, the proceeding would meet the definition of an "involuntary proceeding." Nothing in the statute indicates that the consent of one parent eliminates the rights and protections provided by ICWA to a non-consenting parent.

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

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

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

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

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

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

19. Suggested New Definitions

a. "Best Interests"

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

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

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

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

of protecting the best interests of children through specific provisions that are designed to protect children and their relationship with their parents, extended family, and Tribe.

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

Congress, however, also recognized that talismanic reliance on the "best interests" standard would not actually serve Indian children's best interests, as that "legal principle is vague, at best." H.R. Rep. No. 95-1386, at 19. Congress understood, as did the Supreme Court, that "judges [] may find it difficult, in utilizing vague standards like 'the best interests of the child', to avoid decisions resting on subjective values." *Id.* (citing *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 835 n.36 (1977)). These subjective values are

exactly what Congress passed ICWA to address, as demonstrated by the legislative history discussed above.

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

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

b. Other Suggested Definitions

Several commenters suggested adding new definitions, including the following.

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

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

Comment: "Guardianship" – A few commenters suggested adding a definition for "guardianship if resulting from placement involving an agency or private adoption attorney."

These commenters believe such a definition is necessary because agencies have instructed families to obtain guardianship of children to avoid notice to Tribes and allow time to pass in which to bond with the children prior to giving notice to the Tribe or filing a petition to adopt, in order to avoid ICWA's placement preferences.

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

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

Response: The final rule does not add this term because it is not used in the regulation, and because the Department believes that it could introduce confusion. The statute provides for certain placement preferences "in the absence of good cause to the contrary." 25 U.S.C. 1915(a), (b). If a State court properly found good cause to not place an Indian child with a preferred placement, the placement complies with ICWA.

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

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

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

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

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

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

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

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

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

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

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

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

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

Response: The Department declines to adopt the comments' suggestion at this time. The suggested definition and requirements for State courts were not included in the proposed rule, and the Department believes that it is advisable to obtain the views of State courts and other interested stakeholders before such provisions are included in a final rule.

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

C. Applicability

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

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

"child-custody proceeding" explains that there may be multiple hearings involved in a single child-custody proceeding.

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

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

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

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

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

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

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

--"Any proceeding or action"

Comment: A few commenters requested clarification of "any proceeding or action." A few commenters suggested clarifying that a proceeding or action may include an *ex parte* placement, a court-ordered placement or "any court hearing, proceeding, or action by an agency

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

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

--Guardianships

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

Response: The statute defines "child-custody proceeding" to include removal of an Indian child for temporary placement in… the home of a guardian or conservator. 25 U.S.C. 1903(1)(i). The fact that an agency places the child in the home of a guardian or conservator rather than in a foster home or institution does not affect applicability of the Act, as such placement would be a "child-custody proceeding."

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

--Custody Disputes Between Family Members

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

Response: The statute and final rule exclude custody disputes between parents (*see* next response), but can apply to other types of intra-family disputes, assuming that such disputes otherwise meet the statutory and regulatory definitions. ICWA can apply to other types of intra-family disputes because the statute makes only two exceptions, neither of which are for intra-family disputes other than parental custody disputes. 25 U.S.C. 1903(1) (ICWA does not apply to the custody provisions of a divorce decree or to delinquency proceedings). While at least one court held that ICWA excludes intra-family disputes (*see In re Bertelson*, 617 P.2d 121, 125-26 (Mont. 1980)), several subsequent court decisions have ruled to the contrary. *See, e.g.*, *Starr v. George*, 175 P.3d 50 (Alaska 2008); *In re Custody of A.K.H.*, 502 N.W.2d 790, 794 (Minn. Ct. App. 1993); *In re Q.G.M.*, 808 P.2d 684, 687-88 (Okla. 1991); *In re S.B.R.*, 719 P.2d 154, 156 (Wash. Ct. App. 1986); *A.B.M. v. M.H.*, 651 P.2d 1170, 1173 (Alaska 1982). BIA has concluded that, if the intra-family dispute meets the definition of a "child-custody proceeding," the provisions of this rule would apply. There is no general exception from ICWA for actions by grandparents or other family members.

--Divorce Proceedings

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

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

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

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

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

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

--Withdrawal of consent as "upon demand"

Comment: A few commenters suggested that the "foster-care placement" portion of the definition of "child-custody proceeding," which states that foster-care placement is when the parent or Indian custodian "cannot have the child returned upon demand" conflicts with § 1913 of the Act, which provides that the parent can withdraw consent to a foster-care placement. These commenters suggest adding the following language to the definition after "cannot have the child returned upon demand:" "(except as provided in § 103(b) [25 U.S.C. 1913(b)] of the Act)." *See In re Adoption of K.L.R.F.*, 515 A.2d 33 (Pa. Super. Ct. 1986).

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

2. Juvenile Delinquency Cases

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

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

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

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

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

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

ICWA proceeding and ICWA's standards (e.g., notice, timing, intervention) apply.

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

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

3. Existing Indian Family Exception

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

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

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

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

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

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

[8] *See, e.g., In re Alexandria P.*, 176 Cal. Rptr. 3d 468, 484-86 (Cal. Ct. App. 2014); *J.W. v. R.J.,* 951 P.2d 1206 (Alaska 1998); *Michael J., Jr. v. Michael J., Sr.,* 7 P.3d 960 (Ariz. Ct. App. 2000); *In re N.B.,* No. 06CA1325 (Colo. Ct. App. Sept. 6, 2007); *In re Baby Boy Doe*, 849 P.2d 925 (Idaho 1993); *In re S.S.,* 657 N.E.2d 935 (Ill. 1995); *In re R.E.K.F.*, 698 N.W.2d 147 (Iowa 2005); *In re Elliott*, 554 N.W.2d 32 (Mich. Ct. App. 1996); *In re Riffle*, 922 P.2d 510 (Mont. 1996); *In re Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988); *In re Baby Boy C.*, 805 N.Y.S.2d 313 (N.Y. App. Div. 2005); *In re A.D.L.,* 612 S.E.2d 639 (N.C. Ct. App. 2005); *In re A.B.,* 663 N.W.2d 625 (N.D. 2003); *In re Baby Boy L.,* 103 P.3d 1099 (Okla. 2004); *Quinn v. Walters*, 881 P.2d 795 (Or. Ct. App. 1994); *In re Baade,* 462 N.W.2d 485 (S.D. 1990); *In re W.D.H., III,* 43 S.W.3d 30 (Tex. App. 2001); *In re D.A.C.,* 933 P.2d 993 (Utah Ct. App. 1997); *Thompson v. Fairfax County Dep't of Family Servs.,* 747 S.E.2d 838 (Va. Ct. App. 2013).

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

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

The final rule no longer uses the nomenclature of the exception, and instead focuses on the substance, rather than the label, of the exception. Thus, the final rule imposes a mandatory prohibition on consideration of certain listed factors, because they are not relevant to the inquiry of whether the statute applies. If a child-custody proceeding concerns a child who meets the statutory definition of "Indian child," then the court may not determine that ICWA does not apply to the case based on factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child

and his or her Indian parents, whether the parent ever had custody of the child, or the Indian child's blood quantum.

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

4. Other Applicability Provisions

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

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

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

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

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

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

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

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

D. Inquiry and Verification

The applicability of ICWA to a child-custody proceeding turns on the threshold question of whether the child in the case is an Indian child. It is, therefore, critically important that there be an inquiry into that threshold issue as soon as possible. If this inquiry is not timely, a child-custody proceeding may not comply with ICWA and thus may deny IWCA protections to Indian

children and their families. The failure to timely determine if ICWA applies also can generate unnecessary delays, as the court and the parties may need to redo certain processes or findings under the correct standard. This is inefficient for courts and parties, and can create delays and instability in placements for the Indian child.

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

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

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

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

The final rule does, however, allow a court to rely on facts or documentation indicating a Tribal determination such as Tribal enrollment documentation. This provision was added to the

final rule in response to comments noting that sometimes Tribes are slow to respond to inquiries seeking verification of Tribal citizenship. It also reflects the fact that it may be unnecessary to obtain verification from a Tribe, if sufficient documentation is already available to demonstrate that the Tribe has concluded that a parent or child is a citizen of the Tribe or the child is eligible for citizenship.

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

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

1. How to Contact a Tribe

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

A State commenter requested revisions to clarify that BIA publishes the "official" list of contacts in the Federal Register, and to require BIA to make the list available on its website with

updates provided by Tribes between official Federal Register publications. A few commenters requested making the list easier to use, by including historical Tribal affiliations to facilitate notification of the correct Tribe or by grouping by Tribal heritage (e.g., Chumash, Pomo) in addition to their specific band.

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

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

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

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

Response: The final rule does not require this.

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

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

2. Inquiry

Comment: Many commenters stated that the provisions requiring early identification of Indian children will be particularly helpful. These commenters stated that children and families are too often denied ICWA protections because a court or agency did not ask whether the child was Indian. These commenters stated that a failure to ask whether a child is an Indian child risks the Indian children not being identified at all, creates a risk of insufficient efforts to reunify the

family, delay, or repetition in court proceedings, and increases the risk of placement instability. They noted that early identification is a best practice that will promote placement stability for children.

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

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

Response: The Department agrees with the comments that stress the importance of early inquiry into the applicability of ICWA. As discussed above, the rule requires such early inquiry. The final rule retains the requirement for State courts to ask in every proceeding whether the child is an "Indian child" because this inquiry is necessary to determine if ICWA applies. The inquiry is a limited, non-burdensome imposition on State courts that is designed to ensure that they abide by Federal law and appropriately address key questions that go to jurisdictional,

procedural, and substantive requirements under ICWA. ICWA applies to children that meet the definition of an "Indian child" and imposes obligations on a court when it knows or has reason to know that a child is an Indian child. In order for a court to determine whether it has reason to know that a child is an Indian child, the court needs to inquire into the issue. Asking if every child is subject to ICWA ensures that ICWA is implemented early on where applicable and thereby avoids the problems and inefficiencies generated by late identification that ICWA is applicable to a particular case.

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

Response: The inquiry into whether a child is an "Indian child" under ICWA is focused on only two circumstances: (1) whether the child is a citizen of a Tribe; or (2) whether the child's parent is a citizen of the Tribe and the child is also eligible for citizenship. For clarity, the terminology "could be an Indian child" is deleted from the final rule and the final rule changes the language in § 23.107(a) to reflect the statutory language as to whether there is knowledge or

a "reason to know" the child is an "Indian child." As discussed above, the final rule also provides clear guidance regarding when a court has "reason to know" the child is an "Indian child."

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

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

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

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

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

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

Response: The final rule directly addresses courts only, as discussed above. It requires the court to ask all participants in the case whether there is reason to know the child is an Indian child on the record. It does not, however, require the agency to provide genograms or other information that was listed in the proposed rule, as the Department has determined that suggestions on how agencies may conduct inquiries are more appropriate for guidance than regulation.

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

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

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

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

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

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

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

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

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

Response: The final rule requires State courts to confirm that the agency used due diligence to work with all Tribes for which there is reason to know the child may be a citizen.

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

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

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

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

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

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

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

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

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

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

Several commenters opposed the provision requiring treatment of a child as if ICWA applies. Some stated that it will result in overbroad application in violation of children's constitutional rights because, without confirmation of the political affiliation, it treats children as

Indian children solely due to racial identification. A commenter noted that this requirement places a large burden on State agencies to provide active efforts for all possibly Indian children when Tribes may take months to respond to a request for verification. Another commenter stated that the provision removes any discretion from the court and eliminates its role as fact-finder because "any reason" is too broad and presumes the court is not capable of determining if the evidence is sufficient to show the child is an Indian child. One commenter suggested it will be difficult to explain to the child that he or she is being treated as an Indian child, especially when it is later discovered the child was not an Indian child.

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

Comment: A few commenters suggested adding an end point to when the child should no longer be treated as an Indian child, to add clarity. A few commenters noted that Tribes often fail to respond to repeated inquiries as to whether children are Tribal citizens. One of these commenters stated that the rule should require Tribes to respond and another stated that imposing obligations on the Tribe would expand beyond the statute. A few commenters added that at some point, if the Tribe fails to respond, the court must be free to determine the child is not an Indian child.

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

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

Response: As noted above, if a Tribe repeatedly fails to respond, a court may make a determination regarding whether the child is an Indian child based on the information it has available. Treating the child as an Indian child in the interim does not overrule the Tribe's power to determine its citizenship. The determination of whether a child is an Indian child is made only for purposes of the particular child-custody proceeding. In addition, the Tribe remains free to

respond in the affirmative or negative as to whether the child is a citizen (and as to whether the parent is a citizen and the child is eligible for citizenship).

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

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

4. Verification from the Tribe

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

Response: The final rule requires the State court to ensure the agency worked with the Tribe(s) to obtain verification, but does not require that "the agency must obtain verification," as required by the proposed rule. *See* FR § 23.107(b). It is expected that the agency would work

with the Tribe(s) that the court has reason to know is/are the Indian child's Tribe to obtain verification regarding whether the child is a citizen (or a biological parent is a citizen and the child is eligible for citizenship). The Department encourages agencies to contact Tribes informally, in addition to providing written notice, to seek such verification. While written verification from the Tribe(s) is an appropriate method for such verification, other methods may be appropriate, so the final rule does not specify that the verification needs to be in writing.

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

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

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

Response: The request for verification is a meaningful request only if it provides sufficient information to the Tribe to make the determination as to whether the child is a citizen (or the parent is a citizen and the child is eligible for citizenship). Providing as much information as possible facilitates earlier identification of an Indian child and helps prevents disruptions. FR § 23.111(d) includes categories of information that must be provided in the notice to a Tribe in involuntary foster-care placement or termination of parental rights proceedings. Such

information may be helpful to provide for other types of proceedings to assist in verification of whether the child an Indian child.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Jurisdiction: Requirement to Dismiss Action

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. Notice

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

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

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

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

1. Notice, Generally

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

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

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

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

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

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

Comment: A commenter noted that an issue that constantly causes delay is the Tribe failing to timely respond to notice because often there are processes that have to take place

within the Tribe that prevent timely response, causing emotional and financial difficulty for all parties.

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

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

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

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

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

Tribes by phone, email, and through other means, in addition to sending registered or certified mail.

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

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

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

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

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

Response: The party seeking placement is responsible for providing the Tribe with notice under the statute. *See* 25 U.S.C. 1912(a). BIA assists when there is difficulty identifying or locating a Tribe; however, it is the responsibility of the party seeking placement to send notice directly to the appropriate Tribe(s).

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

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

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

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

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

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

2. Certified Mail v. Registered Mail

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

Several commenters opposed the requirement for registered mail with return receipt. These commenters noted issues with registered mail with return receipt requested that undermine ICWA compliance: specifically, that registered mail with return receipt requested is approximately three times more costly, and that registered mail is less reliable as timely notification. One commenter noted that, in 1994, BIA considered requiring registered mail with return receipt requested but ultimately rejected it because it determined it undermined the purpose of ICWA notice. A few commenters also stated that registered mail requires the individual to pick up the mail from the postal service whereas certified mail is in-person delivery with a sign-off; and that registered mail can result in delays because only the person whose name exactly matches the addressee can pick up the mail, and if the person is not present the mail is sent back to the sender.

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

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

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

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

Response: Maintaining documentation of notice is important; as courts have emphasized, the "filing of proof of service in the trial court's file would be the most efficient way of meeting [the] burden of proof" in proving notice. *See In re E.S.,* 964 P.2d 404, 411 (Wash. Ct. App.

1998). The rule requires the court to ensure this documentation is in the record. *See* FR § 23.111(a)(2).

3. Contents of Notice

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

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

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

Response: The rule recognizes the importance of providing meaningful notice to meet the goals of the statute. The statute provides that certain parties may seek to invalidate actions based on ICWA violations, including notice violations. *See* 25 U.S.C. 1914; FR § 23.137. In addition,

State courts may also make additional determinations imposing consequences for failure to provide meaningful notice.

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

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

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

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

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

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

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

4. Notice of Change in Status

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Notice to More than One Tribe

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. Notice for Each Proceeding

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

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

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

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

7. Notice in Interstate Placements

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

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

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

8. Notice in Voluntary Proceedings

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

G. Active Efforts

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

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

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

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

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

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

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

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

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

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

1. Applicability of Active Efforts

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

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

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

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

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

a. Active Efforts to Verify Child's Tribe

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

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

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

b. Active Efforts to Avoid Breakup in Emergency Proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

d. Active Efforts to Establish Paternity

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

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

e. Active Efforts to Apply for Tribal Membership

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

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

f. Active Efforts to Identify Preferred Placements

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

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

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

2. Timing of Active Efforts

a. Active Efforts Begin Immediately and During Investigation

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

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

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

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

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

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

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

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

b. Time Limits for Active Efforts

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

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

3. Documentation of Active Efforts

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

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

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

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

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

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

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

4. Other Suggested Edits for Active Efforts

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

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

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

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

H. Emergency Proceedings

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

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

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

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

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

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

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

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

1. Standard of Evidence for Emergency Proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Placement Preferences in Emergency Proceedings

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