

Comments in support of the proposed regulations: Indian Child Welfare Act (ICWA) Integration throughout Division 31, ORD No. 0614-05 issued by the California Department of Social Services (CDSS).¹

The Judicial Council of California supports CDSS's efforts to promote full compliance with the Indian Child Welfare Act (ICWA) through the enactment of these regulations intended to ensure that those interacting with Indian children and families in the context of child welfare proceedings are fully aware of their obligations and requirements under ICWA. Understanding ICWA requirements and responsibilities is essential to promoting the best interests of Indian children by ensuring connection to their tribes, their people, and their cultures. It is the public policy of this state to promote the best interest of an Indian child by encouraging and protecting the connection to the child's tribe and tribal community. (See Welfare and Institutions Code section 224(a)(2).)

The Judicial Council of California submits the comments below with the goal of further strengthening the proposed regulations as they relate to the interaction between child welfare agencies and the courts. The comments are intended to ensure that the regulations are consistent with federal and state law concerning ICWA, as well as the spirit of ICWA, and with its primary goal of keeping Indian children with Indian families.

California law and public policy support full enforcement of ICWA through statutory enactments, regulatory efforts and judicial rules and forms. Most significantly, in 2006, the state enacted Senate Bill 678, which incorporated many provisions of the federal statute, regulations, and guidelines governing ICWA into its Welfare and Institutions, Family and Probate Codes. The Legislature's intent was to ensure that California standards governing ICWA were at least as protective as federal law. In some instances, California law was made more protective of the rights of Indian children, parents, Indian custodians and tribes than federal law.

In February 2015, the Bureau of Indian Affairs issued new Guidelines for State Courts and Agencies in Indian Child Custody Proceedings (Guidelines).² Those new Guidelines became effective as soon as they were published in the federal register. California courts have consistently held that the Guidelines are entitled to great weight and deference as they represent the construction of the statute by the executive department charged with its administration.³ In addition, the Bureau of Indian Affairs has expressed its intention to adopt new federal ICWA regulations.⁴ The content of the proposed regulations is similar to that of the new Guidelines. When finalized, the regulations will be binding upon state courts and agencies.

The proposed regulations, as drafted, do not reflect the changes adopted in the new Guidelines and proposed federal regulations. To ensure compliance with the letter and spirit of federal and

¹ The proposal can be found at <http://www.dss.cahwnet.gov/ord/PG4808.htm>.

² Those Guidelines are available here <http://www.indianaffairs.gov/cs/groups/public/documents/text/idc1-029637.pdf>.

³ *In re Kahlen W.* (1991) 233 Cal. App. 3d 1414; *In re Desiree F.* (2000) 99 Cal Rptr. 2d 688; *In re. H.A.* (2002) 128 Cal. Rptr. 2d 12.

⁴ The proposed regulations can be found at <http://www.indianaffairs.gov/cs/groups/public/documents/text/idc1-029629.pdf>.

state ICWA law, we urge that the regulations be amended in a number of areas to ensure that they are consistent with the Guidelines and proposed regulations.

In particular, we recommend the following revisions:

- the provisions in section 31-001 .33 dealing with the “best interest the child” as it relates to an Indian child be revised to be consistent with the Guidelines and specifically sections C.3 (c) and F.4 (c)(3);
- the definition of “active efforts” in section 31-002 be revised to be consistent with section A.2 of the Guidelines;
- the definition of “Indian child’s parent” in section 31-002 be revised to be consistent with the definition of “parent” in section A. 3 of the Guidelines;
- the definition of “Non-Federally Recognized Tribe” in section 31-002 be clarified to be consistent with the term, unrecognized tribal groups, in use by the Bureau of Indian Affairs;⁵
- the definition of “Qualified expert witness” in section 31-002 be revised to be consistent with Guideline D.4;
- regulation 31-110 .32 be revised to require ICWA inquiry even when removal is not contemplated consistent with Guideline A.3 (c), which states that child welfare agencies must ask about a child’s Indian status “...Even in those cases in which the child is not removed from the home, such as when an agency opens an investigation or the court orders the family to engage in services to keep the child in the home as part of a diversion, differential, alternative response or other program....”.
- regulation 31-115 .2 be revised to require that if a removal is effectuated prior to contacting a tribe, contact must be made as soon as possible thereafter;
- revise regulation 31-125 .223 (a) to be consistent with Guideline B.2 (c) concerning when there is reason to believe a child may be an Indian child;
- revise regulation 31-125 .7 to be consistent with Guideline A.3 (c) to reflect that the agency should seek verification from a tribe at an early stage prior to formal notice of a hearing;

In terms of consistency with state law, we recommend:

- regulation 31-075 .3 (c) concerning documentation of initial inquiry be revised to include reference to Judicial Council⁶ form ICWA-020 *Parental Notification of Indian Status* in

⁵ See link: <http://www.bia.gov/WhoWeAre/RegionalOffices/Pacific/TribalOperations/index.htm>.

⁶ All subsequent references to forms refer to Judicial Council forms.

addition to the ICWA-010(A) *Indian Child Inquiry Attachment*. Rule 5.481(a)⁷ requires both forms in each case when a party is seeking a foster care placement of a child;

- revise regulation 31-075 .3 (d) to provide that copies of form ICWA-30 *Notice of Child Custody Proceeding for Indian Child* must be provided to "... the Indian child's tribe and the Secretary of the Interior" rather than or the Secretary of the Interior;
- revise regulation 31-075 .3 (f) to require that the documentation of active efforts taken to comply with the ICWA placement preferences be included in court reports. This information and supporting evidence are required by the court;
- revise regulation 31-075 .3 (z) to require that the documentation of discussions with an Indian child's tribe concerning concurrent planning including discussion of the potential for tribal customary adoption be included in court reports. This information and supporting evidence are required by the court;
- revise regulation 31-101 .512 to include reference to an Indian child's extended family and individual Indian caregiver consistent with Welfare and Institutions Code section 361.7 (b), which requires that active efforts include extended family and individual Indian caregiver in addition to the tribe and Indian service providers;
- revise regulation 31-125 .223 to require that the social worker have the parents form ICWA-020 *Parental Notification of Indian Status*;
- revise the notation following 31-125 .223 (4) to identify form ICWA-020 *Parental Notification of Indian Status*, which is also required for ICWA inquiry documentation under rule 5.481;
- revise regulation 31.125 .6 to reflect that, per rule 5.481, form ICWA-020 *Parental Notification of Indian Status* must be completed as part of initial inquiry in every child welfare case, not only when the social worker knows or has reason to know the child is or may be an Indian child;
- revise regulation 31.125 .731 and 31-125 .761 to require that, if any information requested by the ICWA-030 is not available, the social worker must explain in the court report why the information is missing and what efforts were made to obtain that information sufficient to comply with the requirements of Welfare and Institutions Code section 224.3 (c);
- revise regulation 31-125 .75 to clarify that notice must be by registered or certified mail, and that the notice must be sent far enough in advance that it will be received at least 10 days before the hearing date;

⁷ All references to rules are to California Rules of Court.

- revise regulation 31-135 .233 to require that the social worker must document all active efforts in the court report;
- revise regulation 31-135 .234 to require that, when the social worker becomes aware that the child may already be the ward of a tribal court or subject to the exclusive jurisdiction of a tribe and a petition has been filed in state court, the social worker must advise the state court of the facts that suggest the child may be a ward of a tribal court or subject to the exclusive jurisdiction of the tribe;
- revise regulation 31-206 .311 to require that the social worker include in the court report information concerning all efforts made to find a placement within the order of preference required by ICWA, the position of the Indian child's tribe on the placement, and what facts, if any, provide good cause to deviate from the ICWA placement preferences;
- revise regulation 31.405 .165 to clarify that it is the court, and not the social worker, that determines whether there is good cause to deviate from the ICWA placement preferences and that the social worker must provide in the court report the facts and supporting evidence that would justify deviation from the placement preferences;
- revise regulation 31.410 .31 to specify that the social worker must make active efforts to comply with the ICWA placement preferences when making a temporary placement; and
- revise regulation 31-420 .333 to clarify that it is the court, and not the social worker, that determines whether there is good cause to deviate from the ICWA placement preferences. The social worker must provide the court with the facts and supporting evidence that justify the request to deviate from the placement preferences and must ask the court for a finding that there is good cause to deviate from the ICWA placement preferences.