



**Proposed Regulations for  
State Courts and Agencies in  
Indian Child Custody Proceedings**  
“ICWA Proposed Rule” - 25 CFR 23

**Background**

- Indian Child Welfare Act of 1978 (ICWA)
  - “An alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children...”
  - Congress enacted ICWA to:
    - Protect the best interests of Indian children
    - Promote the stability and security of Indian tribes and families
  - By establishing minimum Federal standards for:
    - Removal of Indian children from their families and
    - Placement of such children in foster or adoptive homes or institutions which reflect the unique values of Indian culture.
  - Articulates a strong Federal policy that, where possible, an Indian child should remain in the Indian community.

**Background (continued)**

- 1979
  - *Guidelines* for State Court implementation of ICWA
  - Regulations on ICWA notice (grants sections updated in 1994)
- 1979-2014
  - State courts interpret ICWA provisions in various ways
- 2014
  - Listening sessions on 1979 *Guidelines*
  - AG Advisory Committee recommendations
- 2015
  - Updated *Guidelines for State Courts & Agencies*, 80 FR 10146 (2/25/15)
  - **Proposed Regulations for State Courts & Agencies**, 80 FR 14880 (3/20/15)

## Proposed Rule - Overview

- New & updated definitions
- Adds a new subpart (Subpart I) to 25 CFR 23
  - General Provisions
  - Pretrial Requirements
  - Procedures for Making Requests for Transfer to Tribal Court
  - Adjudication of Involuntary Placements, Adoptions, or Termination of Parental Rights
  - Voluntary Proceedings
  - Dispositions
  - Post-Trial Rights and Recordkeeping

## Proposed Rule New & Updated Definitions

- Adds definitions for:
  - Active Efforts
  - Continued custody
  - Custody
  - Domicile
  - Imminent physical danger or harm
  - Status offenses
  - Upon demand
  - Voluntary placement
- Revises several other definitions

See §§ 23.2, 102

## Proposed Rule General Provisions

- Goal – Consistent ICWA implementation in all States
- Applicability – ICWA applies whenever:
  - An “Indian child” is the subject of a child custody proceeding
    - Including status offenses and juvenile delinquency proceedings if placement or termination possible
- There is no so-called “existing Indian family” exception
  - See list of factors that should not be considered in determining applicability

See §§ 23.101 - 103

## Proposed Rule General Provisions (continued)

- Applicability (continued)
  - Agencies & State courts **must ask** whether child is an “Indian child”
  - If there is reason to believe the child is an “Indian child,”
    - Must treat the child as an Indian child
    - **Unless and until** it is determined child is not an Indian child
  - Voluntary placements
    - ICWA applies if parent consents to placement or termination
    - ICWA does not apply if parent/custodian may regain custody of the child “upon demand”
- Steps to contact a tribe to provide notice or verify membership

See §§ 23.103 - 104

## Proposed Rule Pre-trial Requirements

- Requirement to determine whether child is an “Indian child”
  - **Agencies** must:
    - Ask if “Indian child”
    - If reason to believe child is an “Indian child,” must obtain written verification from tribe(s)
  - **State courts** must:
    - Ask if “Indian child”
    - If reason to believe child is an “Indian child,” must confirm agency used active efforts to verify membership with tribe
  - Examples for when agency has reason to believe child is an Indian child (see proposed rule)

See §§ 23.106 - 107

## Proposed Rule Pre-trial Requirements (continued)

- Requirement to determine whether child is an “Indian child” (continued)
  - In a voluntary proceeding:
    - If consenting parent wants anonymity, then agency or court must keep relevant documents under seal
    - State court/agency must nevertheless provide notice and obtain verification from the tribe, even if there is a request for anonymity
- Requirement to engage in active efforts
  - Begins as soon as case/investigation may result in placement of Indian child outside custody of parent or Indian custodian
  - Applies while investigating whether child is an “Indian child”

See §§ 23.106 - 107

## Proposed Rule Pre-trial Requirements (continued)

- Designating the child's tribe
  - Only the tribe may determine whether a child is a member (or eligible for membership)
- Agency must notify all tribes in which child is potentially a member
  - Sets out steps if potentially a member of more than one tribe
- After designation of a tribe, agency must:
  - Notify all tribes that received notice of the designation
  - File designation with court
  - Send designation to each party and person that received notice of the proceeding
- State court must dismiss an action as soon as it determines it lacks jurisdiction (i.e., that Tribal court has jurisdiction)

See §§ 23.108 - 110

## Proposed Rule Pre-trial Requirements (continued)

- Notice required
  - When agency or court knows of or has reason to believe child is an "Indian child" in any proceeding
  - Proceeding includes:
    - Voluntary or involuntary proceeding
    - Temporary custody proceeding
    - Removal or foster care placement
    - Adoptive placement
    - Termination of parental or custodial rights
  - By registered mail with return receipt requested to:
    - Each tribe of which the child may be member (or eligible)
    - Parents (and, if applicable, Indian custodian)

See § 23.111

## Proposed Rule Pre-trial Requirements (continued)

- Time limits
  - No substantive proceedings, rulings, or decisions on child's placement or termination of parental rights may occur until notice and waiting periods have elapsed
  - Additional extensions of time may be granted
- Proceeding may not begin until:
  - 10 days after each parent/Indian custodian and tribe receives notice
  - 30 days after parent/Indian custodian or tribe receives notice if they requested an additional 20 days

See § 23.112

## Proposed Rule Pre-trial Requirements (continued)

- Emergency Removal
  - Must be as short as possible
  - Agency or State Court must:
    - Document whether removal or placement is proper and continues to be necessary to prevent imminent physical damage or harm to the child
    - Promptly hold a hearing to evaluate whether continued removal/placement is necessary
    - Immediately terminate placement/removal when emergency has ended

See § 23.113

## Proposed Rule Pre-trial Requirements (continued)

- Emergency Removal (continued)
  - Agency must:
    - Treat child as an "Indian child" until contrary determination
    - Conduct "active efforts" to prevent the breakup of the Indian family as early as possible (before removal if possible)
    - Immediately
      - Take and document steps to confirm whether child is an Indian child and verify tribal membership
      - Notify the child's parents/Indian custodian and tribe of removal
    - Notify parents/custodians and tribe about **each proceeding**
    - Maintain records that notice was provided

See § 23.113

## Proposed Rule Pre-trial Requirements (continued)

- Emergency Removal (continued)
  - At any court hearing on emergency removal/placement:
    - Court must decide if removal/placement is no longer necessary to prevent imminent physical damage or harm to the child
  - Temporary emergency custody should be < 30 days, unless:
    - Hearing with testimony of qualified expert witness; or
    - Extraordinary circumstances exist.
  - Emergency removal or placement must end as soon as:
    - Imminent physical damage or harm no longer exists; or
    - Tribe exercises jurisdiction over the case

See § 23.113

## Proposed Rule Transfers to Tribal Court

- Right to request transfer to Tribal court
  - Occurs with each proceeding
  - At any stage of proceeding
- State court must transfer unless:
  - Either parent objects,
  - Tribal court declines, or
  - State court determines **good cause** exists to deny transfer
    - “Good cause” basis must be stated on record
    - Court may not consider certain factors, for example:
      - Whether case is at an advanced stage
      - Child’s contacts with tribe or reservation
      - Tribal court’s prospective placement for child

See §§ 23.115 – 116, 118

## Proposed Rule

### Adjudications of Involuntary Placements, Adoptions, or Termination of Parental Rights

- Petition for placement or termination of parental rights must demonstrate to the Court that:
  - Active efforts to avoid the need to remove the child were made prior to, and until commencement of the proceeding; and
  - The active efforts were unsuccessful
- Active efforts must:
  - Be documented in detail
  - Use resources of extended family, tribe, Indian social service agencies, individual Indian caregivers, to the extent possible

See §§ 23.119 - 120

## Proposed Rule

### Adjudications of Involuntary Placements, Adoptions, or Termination of Parental Rights (continued)

- Court may order foster care placement only if:
  - **Clear & convincing evidence\***
  - Supported by testimony of one or more qualified expert witnesses
  - That continued custody with parent/Indian custodian is likely to result in serious physical damage or harm to the child
- Court may order termination of parental rights only if
  - **Evidence beyond reasonable doubt**
  - Supported by testimony of one or more qualified expert witnesses
  - That continued custody with parent/Indian custodian is likely to result in serious physical damage or harm to the child

\*Rule clarifies what is and is not “clear & convincing evidence”

See § 23.121

## Proposed Rule

### Adjudications of Involuntary Placements, Adoptions, or Termination of Parental Rights (continued)

- Qualified Expert Witness
    - Specific knowledge of the tribe's culture and customs
- Characteristics presumed to meet requirements for QEW  
(in descending order)

Member of child's tribe	Recognized by tribal community as knowledgeable in tribal customs of family organization and childrearing
Member of another tribe	Recognized by tribe as expert based on knowledge of delivery of child and family services to Indians and the tribe
Layperson	Recognized as having substantial experience in delivery of child and family services to Indians and knowledge of prevailing social and cultural standards in child's tribe
Professional	With education and experience in specialty who can demonstrate knowledge of prevailing social and cultural standards of childrearing practices within the tribe

Proposed ICWA Rule (March 20, 2015)  
U.S. Department of the Interior

See § 23.122

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## Proposed Rule Voluntary Proceedings

- In any voluntary proceeding, the agency & State court must:
  - Ask whether a child is an "Indian child"
  - Provide the tribe with notice of the voluntary proceeding, including notice of right to intervene
- Consent of parent or Indian custodian
  - Must be in writing, recorded before court
  - Court must explain consequences and terms of consent in detail
  - Court must certify that consequences and terms were explained and fully understood by the parent or Indian custodian
- Consent document contents
  - Must set out any conditions to consent

See §§ 23.123 - 125

Proposed ICWA Rule (March 20, 2015)  
U.S. Department of the Interior

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## Proposed Rule Dispositions

- Agency must follow ICWA (or tribal) placement preferences
  - Even if there is a request for anonymity
  - Must provide clear and convincing evidence it conducted a diligent search to meet preferences and explain if couldn't be met
  - Notify parents/Indian custodians, family members, tribe, etc.
  - Must maintain documentation of placements
- Departure from placement preferences only if court finds **good cause** to depart
  - "Good cause" basis must be included in the record
  - Party asserting "good cause" has burden to prove good cause by clear and convincing evidence

See § 23.128

Proposed ICWA Rule (March 20, 2015)  
U.S. Department of the Interior

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## Proposed Rule Dispositions (continued)

- **Good cause** to depart from placement preferences must be based on:
  - Parents' request, if both attest they reviewed placement options;
  - Child's request, if able to understand the decision;
  - Child's extraordinary physical or emotional needs-
    - As established by QEW,
    - Does not include bonding/attachment from placement; or
  - Unavailability of placement and a determination by court that active efforts were made to find placements
- **Good cause may not** be based on:
  - Socio-economic status of any placement relative to another placement

See § 23.131

## Proposed Rule Post-Trial Rights

- Establishes procedures to vacate an adoption if consent was obtained by fraud or duress, or proceeding violated ICWA
- Establishes who can invalidate an action based on a violation of ICWA
  - Indian child, parent/Indian custodian, tribe, regardless of whether that particular party's rights were violated
- Establishes adult adoptees rights to learn their tribal affiliation
  - Encourages States to designate someone to assist adult-adoptees
- Requires notice of any change in the child's status (such as a change in placement)

See §§ 23.132 - 135

## Proposed Rule Post-Trial Rights (continued)

- States must provide BIA with:
  - A copy of the decree or order in any final adoption, including information on the child
- States must establish single location for all records of voluntary or involuntary foster care, preadoptive placement, and adoptive placement that will be available within 7 days of request by Indian child's tribe or DOI
  - Records must contain, at a minimum:
    - Petition or compliant
    - All substantive orders in the proceeding
    - Record of placement determination (including findings in court record and social worker's statement)

See § 23.136

## Proposed Rule Request for Comments

- Please comment on **any provision** of the proposed rule
- Also, the current 25 CFR 23.11(a) requires notices be sent to the Secretary (Interior's Central Office) in addition to the BIA Regional office
  - Delete as duplicative?
- Additional edits to 23.11(a) may also be necessary, because it refers to (e), which the proposed rule would delete

See § 23.11(a)

## Public Meetings & Tribal Consultation Sessions

- Public Meetings
  - Wed., Apr. 22, 9 am – Portland, OR
  - Thurs., Apr. 23, 1pm – Rapid City, SD
  - Tues., May 5, 1pm – Albuquerque, NM
  - Thurs., May 7, 1pm – Prior Lake, MN
  - Tues., May 12, 1pm – Teleconference
  - Thurs., May 14, 1pm – Tulsa, OK
- Tribal Consultations
  - Mon., Apr. 20, 3:30 pm – Portland, OR
  - Thurs., Apr. 23, 9 am – Rapid City, SD
  - Tues., May 5, 9 am – Albuquerque, NM
  - Thurs., May 7, 9 am – Prior Lake, MN
  - Mon. May 11, 1pm – Teleconference
  - Thurs., May 14, 9 am – Tulsa, OK

## Comments Due

- Comments on the proposed rule are due: **May 19, 2015**
- Email is preferred method to submit comments:
  - E-mail: [comments@bia.gov](mailto:comments@bia.gov)
  - Mail: Elizabeth Appel, Office of Regulatory Affairs – Indian Affairs  
1849 C Street NW, MS 3642, Washington, DC 20240
- Next steps
  - Review comments, make changes as appropriate
  - Publish a final rule in the Federal Register
  - Final rule will not become effective for at least 30 days after publication

## Reference Slides

### For Reference – Proposed Rule Dispositions

- Adoption Placement Preferences (in descending order)
  - A member of child's extended family
  - Other members of the child's tribe
  - Other Indian families, including families of unwed individuals
  - Where appropriate, court should also consider the preference of the child or parent

See § 23.129

### For Reference – Proposed Rule Dispositions

- Foster Care or Preadoptive Placements
  - The least restrictive setting that most approximates a family, allows his/her special needs to be met; and is in reasonable proximity to his or her home, extended family, and/or siblings
  - Placement preferences (in descending order):
    - A member of child's extended family
    - Foster home licensed, approved, or specified by tribe
    - Indian foster home licensed or approved by an authorized non-Indian licensing authority
    - Institution for children approved by a tribe or operated by an Indian organization that has a program suitable to meet the child's needs

See § 23.130