National Indian Child Welfare Association
National Congress of American Indians
Native American Rights Fund
Association on American Indian Affairs

Comments on
Bureau of Indian Affairs Guidelines for State Courts: Indian Child Custody Proceedings

We thank you for this opportunity to provide comments on the Bureau of Indian Affairs Guidelines for State Courts in Indian Child Custody Proceeding ("Guidelines"). These guidelines were published in 1979 in response to the Indian Child Welfare Act of 1978 ("ICWA") and are long overdue for an update. Without consideration of whether the Bureau of Indian Affairs ("BIA") should provide guidance to state courts in the form of guidelines or regulations, we offer the following suggestions on how to improve the language and guidance currently contained within the Guidelines. We also make suggestions as to how the BIA could enhance guidance on ICWA best practice in state courts. Attached to these suggestions (Appendix A) is a document, which provides a summary of the BIA's authority to promulgate regulations related to ICWA. We support the adoption of regulations to the extent that they are legally justified. We welcome future discussions about the extent of this authority. We also welcome discussion about which parts of the current Guidelines are most appropriate for regulations.

Suggested Improvements

B.3 Determination That Placement is Covered by the Act

Provision (a): Application to juvenile justice proceedings

- ICWA language: "For the purposes of this chapter except as may be specifically provided otherwise, the term child custody proceeding shall mean and include… (i) foster care placement…(2) "termination of parental rights"…Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime…" 25 U.S.C. § 1903.
- In response, the Guidelines correctly interpret this language and state: *"Although most juvenile delinquency proceedings are not covered by the Act, the Act does apply to status offenses, such as truancy and incorrigibility, which can only be committed by children, and to any juvenile justice proceeding that results in the termination of the parental relationships."*
- Despite the guideline and the legislative language few states follow this important requirement of ICWA. Language should be added to this section and integrated throughout the guidelines to provide further detail on how delinquency courts apply the various provisions of ICWA in juvenile delinquency proceedings involving status offenses, foster care placements, and termination of parental rights.
- Guideline language specifically includes status offense proceedings and those juvenile justice proceedings that end in the termination of parental rights, in line with Section 1903(1)(ii). However, it does not include foster home placements by the juvenile justice system. Foster homes, especially foster family treatment homes, are increasingly being used by the juvenile justice system as interventions for youth in delinquency cases. This provision should specify that ICWA is applicable to any juvenile justice proceeding that results in the placement of an Indian child in foster care, pursuant to Section 1903(1).

Provision (c): Voluntary placements

- ICWA language: ICWA defines "foster care placement" as "any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home or guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated." 25 U.S.C. § 19103(1)(i). ICWA also states, "Where any parent or Indian custodian voluntarily consents to a foster care placement…, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction…" 25 U.S.C. § 1913 (a).
- In response, the Guidelines state: *"Voluntary placements which do not operate to prohibit the child's parent or Indian custodian from regaining custody of the child at any time are not covered by the Act. Where such placements are made pursuant to a written agreement, that agreement shall state explicitly the right of the parent of custodian to regain custody of the child upon demand."*
- Voluntary placements considered in the definition of "foster care placement" and described by the Guidelines in this section should be differentiated from voluntary foster care placements described under Section 1913. Voluntary placements continued to be used coercively by state child welfare agencies and parents are sometimes asked to sign a voluntary agreement "because otherwise they will just remove the child" in situations where allegations do not rise to a level that would justify removal. Section 1913 provides important protections to parents that should be recognized and not confused with the definition of foster care described in § 1903(1). Such protections should be reiterated in the Guidelines.

<u>B.5. Notice Requirements</u>

Provision (e): Personal service of notice

- ICWA Language: ICWA requires that notice be sent by "registered mail with return receipt requested." 25 U.S.C. § 1912 (a).
- In response, the Guidelines state: *"Notice may be personally served on any person entitled to receive notice in lieu of mail service."*
- The Guidelines conflict with the language of the Act. Personal service is often complicated for tribes. Although there is a designated service recipient, service is sometimes made to any tribal representative or administrative assistant. This makes it difficult for tribes to engage their response process effectively. This provision should be stricken.

Provision (b): Contents of notice

- ICWA states: "In any involuntary child custody proceeding in a State court where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement, or termination of parental rights to, an Indian child shall notify…the Indian child's tribe." 25 U.S.C. § 1912 (a). Where Indian child is defined as "any married person who is under age eighteen and is either (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 the Indian tribe." 25 U.S.C. § 1903(4).
- In response, the Guidelines provide a lengthy list of the information to be contained in notice to the tribe and parents or Indian custodians.
- Only a tribe can determine the membership of a child for the purposes of ICWA. *See, e.g., In re A.G.*, 109 P.3d 756; *In re A.L.W.*, 32 P.3d 297 (Wash Ct. App. 2001)
- Thus, notice is used to enable the tribe to investigate and determine whether a child the court only "has reasons to know" is in Indian child is actually an "Indian child" for the purposes of ICWA.
- The Guidelines provide a thorough list of the information to be contained in the notice. Missing from this list is a lineage chart for both parents. This addition would facilitate membership determinations and thus prompter responses from tribes. This would also facilitate compliance with the placement preferences.

<u>B.7. Emergency Removal of an Indian Child</u>

Provision (a): Emergency proceeding

- ICWA language: "The State authority, official or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is

no longer necessary to prevent imminent physical damage or ham to the child." 25 U.S.C. § 1922.

- In response, the Guidelines state: *"If the Indian child is not restored to the parents or Indian custodian or jurisdiction is not transferred to the tribe, the agency responsible for the child's removal must promptly commence a state court proceeding for foster care placement. If the child resides or is domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, such placement must terminate as soon as the imminent physical damage or harm to the child which resulted in the emergency removal no longer exists or as soon as the tribe exercises jurisdiction over the case whichever is earlier."*
- This portion of the Act and this guideline are often ignored. Every state now has emergency custody hearings within 72 hours of a child's removal. These probable cause hearings are the precursor to the "foster care placement" hearings and represent the "commencement" of the formal foster care proceeding, which may not occur for up to 90 days later. It is essential that the Guidelines make clear <u>that at the 72 hour emergency custody hearing</u> the court must make the findings required by § 1922 that "imminent physical damage or harm to the child" exists to justify the state's continued custody.
- Where § 1922 is not ignored, a number of courts have interpreted its provisions with bias, particularly as it pertains to courts' determinations of "imminent physical damage or harm to the child." Courts often identify parents' behavior but fail to show how it poses imminent harm to the child. Often the problematic parenting identified does not create an "immediate" risk of harm to the child, or could be alleviated with effective in-home services. This term should be defined to protect against the bias and unnecessary foster care placement and retention of Indian children after emergency removal.
- ICWA states that "[t]he state authority, official, or agency shall expeditiously initiate a child custody proceeding subject to the provisions of this chapter." 25 U.S.C. § 1922.
- Although not stated in the Guidelines, at an emergency hearing, in spite of the short timeline and emergency, in ICWA mandates that all applicable provisions be applied at the 72 hour hearing, including, but not limited to, a determination of the Indian status of the child, active efforts, and the placement preferences. Many state courts do not use all of the applicable ICWA requirements in emergency proceedings. This should be made clear in the Guidelines.

Provision (d): ICWA compliant adjudication

- ICWA language: "[t]he state authority, official, or agency shall expeditiously initiate a child custody proceeding subject to the provisions of this chapter." 25 U.S.C. § 1922.
- In response, the Guidelines state: *"Absent extraordinary circumstances, temporary emergency custody shall not be continued for more than 90 days without a determination by the court supported by clear and convincing evidence and the testimony of at least one qualified expert witness, that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."*
- The requirements included in this guideline describe "the provisions of this chapter" as required by statute. The statute also requires that this type of proceeding be "expeditiously initiated." Ninety days is not expeditious. This timeline is longer than many states require for non-ICWA adjudication and disposition hearings. In fact, in some states, this provision of the Guidelines has been interpreted to say that ICWA adjudications and dispositions can actually have a longer timeline than the average child welfare case—in complete contradiction to § 1922.
- This language should be changed to state that notice be sent <u>before</u> the emergency custody proceeding, and that upon emergency removal, the hearing described in this provision must occur <u>no later than 30 days after the emergency proceeding</u>. Thirty days allows sufficient time for the notice provisions of ICWA while still meeting the Act's requirement to "expeditiously initiate a child custody proceeding subject to the provisions of [ICWA]." 25 U.S.C. § 1922.

Application of emergency custody

- ICWA language: "Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency

placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding pursuant to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate." 25 U.S.C. § 1922

- States have inappropriately used the first sentence of § 1922 to limit the applicability of the second sentence, and, thus, also limit the protections Indian children who are domiciled off the reservation receive in emergency custody proceedings. The guidelines are silent on this issue.
- The first sentence expands (not limits) the authority of this second sentence. The second sentence provides those protections that must occur for all Indian children in state child custody proceedings. The first sentence simply provides states with authority for emergency removals where the state would otherwise have no jurisdiction. This provision has variously been interpreted by the courts to limit the protections that non-reservation-domiciled Indian children receive in emergency proceedings. Therefore, it should be clarified that the emergency removal requirements in the second sentence of § 1922 apply to *all* Indian children in state emergency proceedings. This will ensure that the heightened protections and minimum federal standards of ICWA are applied at these proceedings evenly across the states.

C.1. Petitions Under 25 U.S.C. § 1911(b) for Transfer of Proceedings

Promptly made request

- ICWA language: "In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, that such transfer shall be subject to declination by the tribal court of such tribe." 25 U.S.C. § 1911(c).
- In response, the Guidelines state: *"Either parent, the Indian custodian or the Indian child's tribe may, orally or in writing request the court to transfer the Indian child custody proceeding to the tribal court of the child's tribe. The request shall be made promptly after receiving notice of the proceeding. If the request is made orally it shall be reduced to writing by the court and made part of the record."*
- The Act does not require a prompt filing of transfer. If a tribe is able and willing to take a case at a later point in the proceeding, the burden falls onto the tribe. Their right and ability to effectively make this decision and take on this additional burden should be respected.
- Although the comments state that late requests will cause undue delays and disruptions to a case, state courts should be efficiently and effectively turning over records to minimize this delay. Further, concerns about such a delay would be better dealt with by providing a procedure for transfer of cases in a best practice document (see below) rather than by denying tribes their inherent and statutory right to jurisdiction over child custody proceedings.
- Tribes often make decisions about transfer based on resources, how well the state is able to work with the intervening tribe, application of ICWA requirements, and if the state court is showing respect and deference to tribal decisions and culture. Limiting their right to transfer to "promptly made requests" unnecessarily denies tribes' right to assert their interest and protect their children and families from bias treatment state courts. For all these reasons, this provision and corresponding comments should be stricken.

C.3. Determination of Good Cause to the Contrary

Provision (b)(i): Proceeding being at an "advanced stage"

- ICWA language: "In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child…the court, in the absence of good cause to

the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent or the Indian custodian or the Indian child's tribe…" 25 U.S.C. § 1911(b).

- In response, the Guidelines state: "*Good cause not to transfer this proceeding may exist if…[t]he proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing."*
- Tribes often make decisions about transfer based on resources, how well the state is able to work with the intervening tribe, application of ICWA requirements, and if the state court is showing respect and deference to tribal decisions and culture. Stated differently, tribes use their ability to transfer to protect against the very bias ICWA intends to curtail by recognizing tribal jurisdiction. By limiting tribes' ability to exercise their jurisdiction, this provision greatly undermines ICWA in a manner that outweighs any potential concerns a late transfer may raise. This provision should be removed.
- If not stricken, this provision must be further clarified. Because child welfare cases in state court often involve one judge, one courtroom, and one state attorney for the duration of the time the family is involved with the state, many courts have wrongfully interpreted this provision to assume that a child welfare "case" lasts the duration of the time a child is in care for the purposes of this provision. Foster care proceedings, terminations of parental rights, and adoptions as defined under § 1903(1) all require separate petitions. Each of these hearings are therefore separate proceedings before the court.
- This "good cause" provision has been expansively interpreted to exclude transfer where the tribe does not petition immediately after the adjudication or foster care petition is filed, even if the tribe has filed for transfer shortly after the petition for termination of parental rights has been filed. As noted, ICWA defines the foster care hearing or adjudication and the termination of parental rights proceedings as separate "child custody proceedings." "Advanced stage," must, therefore, be more carefully defined so that transfers are not unnecessarily excluded because of a misunderstanding of the definition of proceeding.
- Tribes often intervene at the advanced stage of a proceeding because they have been noticed late or received court documents late (this is particularly common in Alaska). If the tribe was not noticed until the proceeding was at an advanced stage, it would be inappropriate to find "good cause" to deny the petition to transfer that was promptly filed after notice even if this was at an "advanced stage." This provision, therefore, must clearly state that an analysis of when and how the tribe was noticed must be done before it can be determined that there is "good cause" to not transfer the petition because the proceeding was at an advanced stage.
- Further, the legislative history describes the intent behind the inclusion of "good cause" to not transfer. It states: "[t]his subsection is intended to permit a State court to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indians parents or custodian, and the tribe are fully protected." H.R. Rep. No. 1386, at 21. Traditionally, *forum non conveniens* is a discretionary power that courts exercise to dismiss a case where another court is better suited to hear the case. This must be modified to fit the context of § 1911(b) but similar factors will be considered when determining whether or not to exercise this modified *forum non conveniens*. These factors typically include:
    - The residence of the parties
    - The location of evidence and witnesses
    - Public policy
    - The relative burdens on the court systems
    - How changing the forum would affect each party's case

  The concerns that are raised about waiting to transfer a case at an "advanced stage" can better be considered in a manner intended by Congress through the factors provided in this doctrine.

Provision (b)(ii): Twelve-year-olds' ability to object to transfer

- ICWA language: "In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child…the court, in the absence of good cause to

the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent or the Indian custodian or the Indian child's tribe…" 25 U.S.C. § 1911(b).

- In response, Guidelines state *"Good cause not to transfer may exist if…[t]he Indian Child is over twelve years of age and objects to the transfer."*
- A child of sufficient age should have input in decisions pertaining to her life and these opinions may create good cause to not transfer a case to tribal court.
- It should be noted, however, that a child and a child's attorney are distinct from a Guardian ad Litem or Court Appointed Special Advocate (CASA). Where a child's attorney is tasked with representing the child's wishes, a Guardian ad Litem or CASA represents the child's best interest. In some states, judges have found objections to transfer from the Guardian ad Litem or CASA good cause to not transfer. As described below, using a best interest of the child analysis to deny transfer is an end run around the Act. Further, Guardian ad Litems and CASA's are not included in the Act as individuals who can object to the transfer of a case. This provision should clearly state that Guardian ad Litem or CASA objections do not create good cause to deny a transfer.

Provision (b)(iii): Modified *forum non conveniens* analysis

- ICWA language: "In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child…the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent or the Indian custodian or the Indian child's tribe…" 25 U.S.C. § 1911(b).
- In response, Guidelines state, "Good cause not to transfer may exist if…The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or witnesses."
- The "good cause" language in ICWA was included with a modified *forum non conveniens* analysis in mind as described by this provision.
- The Guidelines, however, should define "undue hardship to the parties or witnesses" to ensure that judges are not using an expansive analysis to prevent transfer to tribal court. Leaving "undue hardship" undefined has allowed state judges to define it expansively in order to prevent transfer of cases where there may not actually be "good cause."

Provision (b)(iv): Child's lack of contact with the tribe

- ICWA language: "In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child…the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent or the Indian custodian or the Indian child's tribe…" 25 U.S.C. § 1911(b).
- In response, the Guidelines state, *"Good cause not to transfer may exist if…The parents of a child over five years are not available and the child has had little or no contact with the child's tribe or members of the child's tribe."*
- This language suggests the same rationale as the discredited judicially-created "Existing Indian Family Exception." The vast majority of courts have found the language contained in this good cause provision to be counter to the statutory scheme and purpose of ICWA.
- At the time of the Guidelines' creation, various concerns, mentioned in the Guidelines comments, were brought forward, including:
    - This could virtually exclude transfers of infants born off the reservation
    - The tribe will be denied its legitimate interest in those children who are members regardless of their formal "ties to the tribe"
    - This criteria invites state courts to make cultural decisions that the Act intended to only be made by tribes.
- The concerns have borne out to be true. This provision should be stricken to protect the right of all tribal members to be protected under ICWA and to maintain contact with their tribes.

Best interest of the child used as "good cause"

- There is no current language that suggests that "good cause" to not transfer may be found where it would not be in the "best interest" of the Indian child. However, courts across the country have found good cause to not transfer because it would not be in the child's best

interest. *See, e.g., In re Maricopa County Juvenile Action No. JS-8287*, 828 P.2d 1245 (Ariz. Ct. App. 1991); *In re C.W.*, 479 N.W.2d 105 (Neb. 1992); *Chester County Dep't of Soc. Servs. v. Coleman (Coleman II)*, 399 S.E.2d 773 (S.C. 1990); *In re T.S.*, 801 P.2d 77 (Mont. 1990); *In re J.J.*, 454 N.W.2d 317 (S.D. 1990); *In re N.L.*, 754 P.2d 863, 869 (Okla. 1988); *In re Robert T.*, 246 Cal. Rptr. 2d 168, 174-75 (Ct. App. 1988).

- Congress believed that implementation of ICWA was in the Indian child's best interest, including the transfer provisions. Arguing that it is not in the best interest of the child ignores the statutory presumption that a tribal court will act in the best interest of the child. It re-introduces the mainstream bias into the analysis by allowing the state court to determine whether the tribe understands what is in the best interest of an Indian child.
- By deciding which court (and therefore whose code) will govern the decision, this analysis allows state judges to retain jurisdiction based on their distrust of tribal courts and codes. It allows for a "good cause" finding when a judge believes that the tribal courts decision would be detrimental to the child, essentially usurping tribal jurisdiction as granted under ICWA.
- For these reasons, "best interest of the child" should be explicitly forbidden as an analysis used to find good cause under the transfer provisions of the Act.

<u>D.2. Efforts to Alleviate Need to Remove Child from Parents or Indian Custodians</u>

Active efforts definition

- ICWA Language: "Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. § 1912(d)
- In response, the Guidelines state: *"Any party petitioning a state court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to the commencement of the proceeding active efforts have been made to alleviate the need to remove the Indian child from his or her parents or Indian custodians. These efforts shall take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies, and individual Indian care givers [defined in comments as traditional healers]."*
- This guideline appropriately reflects the statute. It does not, however, define active efforts. Courts across the nation have chipped away at this cornerstone of ICWA creating various definitions and requirements often to lessen the burden on the state agency and make removal and termination of parental rights easier. This is counter to the purposes of ICWA and the intent of the active efforts standard. As stated in the House Report: "[s]ubsection (d) provides that a party seeking foster care placement or termination of parental rights involving an Indian child must satisfy the court that active efforts have been made to provide assistance designed to prevent the breakup of Indian families. The committee is advised that most State laws require public or private agencies involved in child placements to resort to remedial measures prior to initiating placements or termination proceedings, but 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. 1386, at 22 (1978).
- Further complicating things is the fact that "reasonable efforts" are required for non-Indian children in the child welfare system, so it is important to explicitly and clearly differentiate between these two different standards.
- A definition and standards for active efforts should be created. Various states have created policy, state law, and procedural documents that delineate active efforts effectively. In addition to some of the elements mentioned in the guidelines, we would refer the BIA to these in the development of a definition. (See Appendix B)

Level of Proof

- Currently, there is no level of proof for active efforts stated in the guidelines. The level of proof, however, should correspond with the level of proof required by § 1912 (e) & (f) for foster care and termination of parental rights hearings. When §§ 1912(d),(e) and (f) are read

together, it is clear that active efforts are one of the elements that must be shown before a child can be placed into foster care or a parent's rights can be terminated. Levels of proof should therefore correspond. Courts have variously interpreted the interaction of these three provisions sometimes to lessen the level of proof required to show active efforts and decrease the protections provided by Section 1912(d). It should be clarified that at a foster care hearing active efforts should be proven by clear and convincing evidence, and at a termination of parental rights hearing active efforts should be proven beyond a reasonable doubt.

D.4. Qualified Expert Witness

Provision (b)(iii): Professional person as qualified expert witness

- ICWA language: "No foster care placement may be ordered in such proceeding in the absence of a determination supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912 (e); "No termination of parental rights proceeding may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912 (f).
- In response, the Guidelines state*, "Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child welfare proceedings….A professional person having substantial education and experience in the area of his or her specialty."*
- This definition of a qualified expert witness is counter to the purpose of qualified expert witness, which was to ensure that tribal customs and child rearing practices were presented to the court to provide insight, to overcome any potential bias, and to clarify cultural misunderstanding that might arise. "ICWA, thus, in the words of the House Report accompanying it, 'seeks 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.' House Report, at 23. It does so by establishing 'a Federal policy that, where possible, an Indian child should remain in the Indian community,' ibid., and by making sure that Indian child welfare determinations are not based on 'a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family.' Id. at 24" *Mississippi Band of Choctaw Indians v. Holyfield*, 490 US 30, 37 (1989).
- By allowing a professional who may know nothing about the child's tribal community, customs and child rearing practice the purpose of this provision is not actualized. Worse, this definition of a qualified expert witness has allowed witnesses who are qualified on other topics, such as bonding, to be used to satisfy this requirement and provide the testimony necessary to support removal of the child in complete contradiction to the purpose of this provision.
- Expert witnesses as required by ICWA can be better defined. We would refer the BIA to the Wisconsin statute in the development of a definition. (See Appendix C).

Comments on how a witness can be qualified:

- Guideline comments state: "The party presenting an expert witness must demonstrate that the witness is qualified by reason of educational background and prior experience to make judgments on those questions that are substantially more reliable than judgments that would be made by non-experts."
- Language should focus on qualification of "experience" and not education. ICWA does not require any educational background. An experiential understanding of the tribal customs and childrearing practices should be considered sufficient, if not preferred. There may be someone who is respected in a community who knows the child rearing practices but does not have the educational experience a court may consider to be required under this comment.

F.1. Adoptive Placements

Provision (c): Anonymity

- ICWA language: "That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences." 25 U.S.C. § 1915(c).
- In response, the Guidelines state: *"Unless a consenting parent evidences a desire for anonymity, the court or agency shall notify the child's extended family and the Indian child's tribe that their members will be given preference in the adoption decision"*
- In response, guideline comments state: "The provision recognizes, however, that the consenting parent's request for anonymity takes precedence over efforts to find a home consistent with the Act's priorities."
- This guideline and comment are inconsistent with the language in ICWA. Although ICWA requires a request for anonymity be "given weight" by the court it does not require that such a request control the decision to not follow the placement preferences as the Guidelines and the comments suggest. Courts have used this provision to not only avoid the placement preferences, but also to avoid noticing the tribe, thwarting their intervention into these cases.
- Further, this guideline is inconsistent with the intent of § 1915 (c). The legislative history states: "While the request for anonymity should be give weight in determining if a preference should be applied, it is not meant to outweigh the basic right of the child as an Indian." H.R. REP. NO. 1386, at 24 (1978)
- For these reasons, this Guideline and corresponding comment should be stricken.

Socio-economic status and placement

- ICWA language: "The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family members maintain social and cultural ties." 25 U.S.C. § 1915 (d).
- Currently the Guidelines do respond to this section of the Act. Over the past 35 years, courts have shown a propensity to consider the socio-economic well-being and other Western indicators of success when making adoptive placement determinations counter to this provision of ICWA. Clarification, particularly that socio-economic well-being cannot be a consideration in the placement decision under ICWA, could curb this problem.

F.3. Good Cause to Modify Preferences

Provision (a)(i): Request of the biological parents

- ICWA language: "In any adoptive placement of an Indian child under state law, a preference shall be given, in the absence of good cause to the contrary to a placement with…" 25 U.S.C. § 1915(a); "In any foster care or preadoptive placement, a preference shall be given, in absence of good cause to the contrary, to a placement with…" 25 U.S.C. § 1915(b); "Where appropriate, the preference of the Indian child or parent shall be considered: provided, that where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences." 25 U.S.C. § 1915(c).
- In response, the Guidelines state: *"For the purposes of foster care, preadoptive placement or adoptive placement, a determination of good cause not to follow the order of preference set out above shall be based on one or more of the following considerations…The request of the biological parents or the child when the child is of sufficient age."*
- In response, guideline comments state: "The Act indicates that the court is to give preference to confidentiality requests by parents in making placements. Paragraph [(a)(i)] is intended to permit parents to ask that the order of preference not be followed because it would prejudice confidentiality or for other reasons."
- The language of the Guidelines are inconsistent with ICWA, which states that the parents' preference "shall be considered" by the court but does not give parents the ultimate authority to determine the child's placement to where it would deny an Indian child their right to a placement in line with the Act and deny a tribe the rights to a continued relationship with their member children. In this sense, the Guidelines go beyond the authority provided in ICWA.
- The comment implies that this guideline is primarily included to effectuate the parent's right to confidentiality. As discussed above, the desire for confidentiality "shall be given weight" by the

court but is not statutorily intended to control the placement of the child. For this reason this good cause exception should either be stricken or drafted to match the language of the statute.

Provision (a)(iii): Unavailability of suitable families

- ICWA language: "In any adoptive placement of an Indian child under state law, a preference shall be given, in the absence of good cause to the contrary to a placement with…" 25 U.S.C. § 1915(a); "In any foster care or preadoptive placement, a preference shall be given, in absence of good cause to the contrary, to a placement with…" 25 U.S.C. § 1915(b).
- In response, the Guidelines state*: "For the purposes of foster care, preadoptive placement or adoptive placement, a determination of good cause not to follow the order of preference set out above shall be based on one or more of the following considerations…The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria."*
- The guideline's comments state: "A diligent attempt to find a suitable family includes at minimum, contact with the child's tribal social service program, a search of all county or state listings of available Indian homes and contact with nationally known Indian programs with available placement resources."
- Since the 1979 publication of the Guidelines, federal child welfare legislation has passed which includes various requirements that inform and support a "diligent search" including: consider giving preference to relatives in out of home placement of children 42 U.S.C. § 671(a)(19), provide notice to all adult relatives of children in the foster care system and provide information on how these relatives may be a resource to the child in care, 42 U.S.C. § 671(a)(29), and a requirement that states recruit pools of foster and adoptive homes that reflect the ethnic and racial diversity of children in foster care and adoption. 42 U.S.C. § 622(b)(7). A formal definition of diligent recruitment should be created to ensure that courts do not ignore ICWA's placement preferences. In addition to utilizing some of the concepts in the current guidelines, the requirements of other federal laws should be included in this definition.

<u>G.2. Adult Adoptee Rights</u>

Provision (a): Accessing information from the court which entered a final decree of adoption

- ICWA language: "Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individuals biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship." 25 U.S.C. § 1917.
- In response, the Guidelines state: *"Upon application by an Indian individual who has reach the age 18 who was the subject of an adoptive placement, the court which entered the final decree must inform such individual of the tribal affiliations, if any of the individuals biological parents and provide such other information necessary to protect any rights flowing from the individual's tribal relationship."*
- The Guidelines correctly restate the law. "Tribal relationship" is an ambiguous term particularly to district/family/probate courts who are unfamiliar with the tenets of federal Indian law. The Guidelines should clarify that it includes, but is not limited to, the ability to be recognized as a member of the tribe. It is important to clarify that courts must release to the individual (or the BIA and/or tribe where appropriate, as discussed below) the information necessary to aid that individual's application for enrollment or membership with any tribe with which they may be eligible, be recognized as a descendent of their tribe, and/or establish any other status from which rights may flow.

Provision (b): Clarifying that the right to gain information is available to all Indian adoptees regardless of adoption date

- ICWA language: "Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court that entered the final decree shall inform such individual of the tribal affiliation, if any, of the individuals biological

parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship." 25 U.S.C. § 1917; "None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after November 8, 1978, but shall apply to subsequent proceedings in the same matter on subsequent proceedings affecting the custody or placement of the same child." 25 U.S.C. § 1923.

- In response the Guidelines state: *"This section applies whether or not the original adoption was subject to the provisions of this act."*
- This provision accurately reflects the intent of ICWA and is the correct interpretation of the Act. As stated in the comments to this guideline, providing information to an adult adoptee "cannot be said to affect the proceeding by which the adoption was ordered" and, thus, is not limited by § 1923.
- Further, this provision is most relevant to those adoptees placed before the protections of ICWA were put into place to safeguard adoptees' right to a relationship with their tribe.
- This provision should remain.

Provision (c): BIA assistance in accessing information

- ICWA language: "Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court that entered the final decree shall inform such individual of the tribal affiliation, if any, of the individuals biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship." 25 U.S.C. § 1917;
- In response, the Guidelines state: *"Where state law prohibits revelation of the identity of the biological parent, assistance of the [BIA] shall be sought where necessary to help an adoptee who is eligible for membership in a tribe establishes that right without breaching the confidentiality of the record."*
- This provision is important to the actual implementation of § 1917 because many states continue to have closed adoption record laws. Using the BIA to moderate these situations helps adult adoptees gain access to otherwise sealed records so that they can establish tribal membership and the rights associated with it. BIA protocol and funding should be delineated to support these efforts to help adult adoptees know how to navigate this process.
- To further support adult adoptees' attempts to establish tribal membership and gain access to the rights associated with membership, the Guidelines should also clarify that in states where adoptions remain closed, district/probate/family courts should at minimum communicate directly with the tribe's enrollment office to facilitate the establishment of the adoptee's tribal membership. The court itself could to provide to the tribe the information necessary to ensure adult adoptees can establish membership while respecting state laws that mandate closed adoption records.

<u>G.4. Maintenance of Records</u>

Centralized location

- ICWA language: "A record of each such placement, under State law, of an Indian child shall be maintained by the state in which the placements were made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or Indian child's tribe." 25 U.S.C. § 1915(c).
- In response, the Guidelines state: *"The state shall establish a single location where all records of every foster care, preadoptive placement and adoptive placement of Indian children by courts of that state will be available within seven days of a request by an Indian child's tribe or the Secretary. The records shall contain, at a minimum the petition or compliant, all substantive orders entered in the proceeding, and the complete record of the placement determination."*
- Comments explaining this provision state: <u>"For some states (especially Alaska) centralization of the records themselves would create major administrative burdens."</u>

- Because the majority of states are not collecting or reporting this data, Indian children continue to be the most underserved children in the United States in large part because of this data gap. Further, policymakers and funders have been reluctant to address child welfare issues without something more than anecdotal data about ICWA non-compliance. This has allowed for high rates of disproportionality in out-of-home placements and disparate treatment by the child welfare system of tribal children and families.
- Although this may have been a "major administrative burden" in 1979, in today's day and age of electronic records, data collection systems, and technological advances this justification for not keeping the records in one central location is inexcusable. The records should be kept in a single location in the state to ensure easy, quick access for those tribes seeking information on the placement of their children.

Voluntary adoption records must also be maintained

- It should be clarified that records must be kept by the state courts for both voluntary adoptions as well as those adoptions which occur via the public child welfare system. Most states have no system to monitor private adoptions and no other federal laws have such a requirement making it important to clarify that Section 1915(c) also includes these records.

Oversight of non-compliance as authorized by 1915(e)

- This is one of the few provisions of ICWA that specifically mentions a concrete roll for the Secretary. The Guidelines should state that the Secretary requests a copy of all placement records, per ICWA, to be aggregated and produced in report form by each state on a certain date of each year for his or her review. The Secretary's request should include information on overall compliance with the Act's placement preference as well as specific information on foster care, child welfare adoptions, and voluntary or private adoptions. Breakdowns by tribal affiliation of the children in each such placement should also be requested.

<u>Definition of Acknowledge and Establish</u>

- ICWA language: "parent means 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 or custom. It does not include the unwed father where paternity has not been acknowledged or established." 25 U.S.C. 1903(9).
- There is no Guideline in response to this definition. Courts have variously interpreted the definition of "acknowledged or established." In the most troubling cases, courts have interpreted this definition to require an unwed (putative) father meet state laws regarding paternity and/or consent to adoption. Although the Supreme Court took certiorari on the question of this definitions interpretation in *Adoptive Couple v. Baby Girl*, 570 U.S. ___ (2013), they ultimately did not find it necessary to provide a definition. Clarity is needed to prevent further confusion and the further denial of fathers' rights under ICWA.
- In *Mississippi Band of Choctaw Indians v. Holyfield,* 490 U. S. 30, 45 (1989), the Court clearly stated that: "First, and most fundamentally, the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term; quite the contrary. It is clear from the very text of the ICWA, not to mention its legislative history and the hearings that led to its enactment, that Congress was concerned with the rights of Indian families and Indian communities *vis-a-vis* state authorities." The Guidelines, therefore, must include a uniform national definition for what it means for the father of an Indian child to "acknowledge and establish paternity." This will ensure that fathers of Indian children are not subject to state bias via state laws and definitions that deny them the protections of ICWA.

<u>Tribal-State Agreements</u>

- ICWA language: "States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and tribes." 25 U.S.C. § 1919.
- There is currently no language providing guidance on this provision of the Act.

- Tribal-state ICWA agreements have been incredibly useful. They have allowed states and tribes to fine tune and coordinate their child welfare practice, to fill gaps in services, and to best protect Indian children and families. Some states or local child welfare authorities, however, have been reluctant to negotiate tribal state agreements. Where a tribe has requested a tribal-state agreement and the state has been unwilling to enter into negotiations, and *if* the tribe so requests, the BIA should assist the tribe by contacting state officials, educating them about the benefits of agreements, encouraging their participation, and playing an active role in supporting the agreement process.

Tribal Licensing to be Deemed Equivalent to State Licensing

- ICWA language: "For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State." 25 U.S.C. § 1931(b)
- There is currently no language providing guidance on this provision of the Act.
- The Department of Health and Human Services (DHHS) currently recognizes only tribally licensed homes on or near the reservation for the purpose of Title IV-E reimbursement. Yet this section of the law provides greater licensing authority than this limited interpretation. The foster care placement preferences in 25 U.S.C. 1915(b) provide for placement in tribally licensed or approved homes as a preferred placement without a geographic limitation. DOI should work with DHHS to review current regulations and policy statements to ensure that Section 1931(b) is interpreted and implemented as intended.

Existing Indian Family Exception

- ICWA language: "'Indian' child means any unmarried person who is under age eighteen and is either (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(4); "'child custody proceeding' shall mean and include—''foster care placement'…'termination of parental rights'… 'preadoptive placement'… 'adoptive placement' such term or terms shall not include a placement based upon an act which, if committed by an adult would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents." 25 U.S.C. § 1903(1).
- ICWA requires two pre-requisites:,1) that there be an Indian child; 2) that the Indian child be involved in a state child custody proceeding. The Existing Indian Family Exception is a judicially-created exception to ICWA. It states that ICWA only applies when a child is being removed from an "existing Indian family unit." It is mostly commonly applied to children born to non-Indian mothers where the Indian father is not engaged in the pregnancy, or life of the child where the court believes the child has never been a part of an Indian home, nor engaged in Indian culture, and probably never would be.
- In *Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30 (1989) the court implicitly rejected the Existing Indian Family Exception when it interpreted ICWA to apply to Indian children who were placed for adoption and who never physically lived in an Indian home prior to being placed with non-Indian prospective adoptive parent. The court found that ICWA applied because these were "Indian children" in a "child custody proceeding" as defined by the act. In *Adoptive Couple v. Baby Girl*¸ 570 U.S. ___ (2013), the Court referenced this holding and implicitly endorsed it.
- The majority of courts have found the Existing Indian Family Exception to be counter to the language of ICWA and therefore an incorrect interpretation. Nonetheless, there still remain some states that continue to deny children who are "Indian children" in child custody proceedings the protections of the Act. This must be clarified to prevent misunderstanding and to ensure that all Indian children as defined by the Act receive its protections.

Clarification that ICWA Does Not Apply in Tribal Court Proceedings.

- ICWA requires two pre-requisites:1) that there be an Indian child; 2) that the Indian child be involved in a state child custody proceeding. Tribes are sovereign entities for this reason the federal government cannot dictate the laws to be followed in their courts.

- Nonetheless, there has been a recent trend of tribal court litigants who have received unfavorable decision in a tribal child custody case petition the state court with arguments that the tribal court has not followed various standards in ICWA (i.e., active efforts and placement preferences). In some instances, state judges have ruled for the parents in these cases. For this reason, Guidelines should clarify that ICWA's procedural and substantive mandates do not apply to tribal court proceedings.

Guidance on Best Practices

In the comments below, we provide additional suggestions about guidance that could be issued by the BIA to supplement what might be included in revised Guidelines or regulations and greatly enhance ICWA compliance nationwide.

B.3 Determination That Placement is covered by the Act

Contact with tribe before removal

- There are a few situations in the child welfare system where families are at great risk for dissolution but current Guidelines do not require the tribe be given notice, the ability to intervene, or the ability to transfer the case before a file is built against the family and the children are removed. This is counter to the stated purpose of ICWA: "to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902. ICWA must be applied in these proceedings.
- Although uncommon, child welfare cases arise where the child is not removed from the home after allegations of abuse or neglect but a formal court case is opened and the family is court-ordered to engage in services designed to keep the child safely in her home. It is important therefore, that although the child has not been removed, that the tribe receive notice of these proceedings and the ability to intervene. Tribes who are unaware of these families who are at greatest risk of having their children removed cannot help keep the family safely together, counter to the intent and language of ICWA.
- The Guidelines must take into account the rise in diversion, differential response, and alternative response programs used by states. Diversion, differential response, and alternative response programs allow the state to monitor and build a case against Indian families without tribal involvement. Yet these files are then often used to justify the eventual removal of a child from the home. Notice to the tribe should be required when a family is engaged in these alternative service contracts and relevant portions of ICWA should apply. The tribe should be allowed to work with the differential response team to ensure the family receives the services it needs to keep the child safely in the home.

C.1. Petitions under 25 U.S.C. § 1911(b) for transfer of proceedings

Promptly made request

- ICWA language: "In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, that such transfer shall be subject to declination by the tribal court of such tribe." (25 U.S.C. § 1911(c))
- In response, the Guidelines state**:** *"Either parent, the Indian custodian or the Indian child's tribe may, orally or in writing request the court to transfer the Indian child custody proceeding to the tribal court of the child's tribe. The request shall be made promptly after receiving notice of the proceeding. If the request is made orally it shall be reduced to writing by the court and made part of the record."*
- Although the comments state that late requests will cause undue delays and disruptions to a case, state courts should be efficiently and effectively turning over records minimizing this delay. Further, concerns about such a delay would be better dealt with by providing a procedure for transfer of cases in a best practice document (see below) rather than by denying tribes their inherent and statutory right to jurisdiction over child custody proceedings.

C.3. Determination of Good Cause to the Contrary

Provision related to modified *forum non conveniens* analysis (b)(iii)

- ICWA language: "In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child…the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent or the Indian custodian or the Indian child's tribe…" (25 U.S.C. § 1911(b))
- In response, Guidelines state: *"Good cause not to transfer may exist if…The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or witnesses"*
- Current guideline comments state: "The problem may be alleviated in some instances by having the court come to the witnesses."
- To fulfill the intent of ICWA and prevent the expansion of this exception counter beyond what may truly be "good cause" the Guidelines should explicitly include this "exception." In addition, the Guidelines should provide a protocol for such action where the state court is required to provide moderate resources to facilitate this process (such as conference call lines, Skype set up, or a vacant courtroom after regular business hours).

G.2. Adult Adoptee Rights

Accessing information from the court which entered a final decree of adoption provision (c)

- ICWA language: Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individuals biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship (25 U.S.C. § 1917).
- Many district/probate/family courts remain unfamiliar with ICWA's § 1917 mandate to provide adult adoptees with the information necessary to reconnect with their tribes. The protocol in these situations should be delineated to ensure state courts are aware of the provision and able to efficiently implement its requirements.
- States should be required to identify at least one peer advocate or court clerk who is familiar with this provision, able to assist adoptees statewide in this process, and who provides information to state judges about this provision on a yearly basis. Without these tools, this is an empty provision that leaves numerous adoptees unable to assert their rights under ICWA.

Tribal-State Agreements

- ICWA language: "States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and tribes." 25 U.S.C. § 1919.
- The BIA could provide a great deal of guidance on best practice for engaging and negotiating with tribes, important provisions to include in tribal-state agreements, sample tribal-state agreements, as well as persuasive documents that detail the benefits tribal-state agreements bring to the states that have them.

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If you have questions regarding these comments, please contact NICWA Government Affairs Associate Adrian (Addie) Smith at addie@nicwa.org, NCAI Staff Attorney Natasha Anderson at nanderson@NCAI.org, NARF Staff Attorney Erin Dougherty at dougherty@narf.org or Matt Newman at mnewman@narf.org, or AAIA Executive Director Jack Trope at jt.aaia@indian-affairs.org.

The National Indian Child Welfare Association (NICWA) is a national American Indian and Alaska Native (AI/AN) nonprofit organization located in Portland, Oregon. NICWA has over 30 years of experience providing technical assistance and training to tribes, states, and federal agencies on issues pertaining to child maltreatment, Indian child welfare, children's mental health, and juvenile justice. NICWA provides leadership in the development of public policy that supports tribal self-determination in child welfare, children's mental health, and juvenile justice systems, as well as compliance with the Indian Child Welfare Act (ICWA). NICWA also engages in research that supports and informs improved services for AI/AN children and families. NICWA is the nation's most comprehensive source of information on AI/AN child maltreatment, child welfare, and children's mental health issues.

Association on American Indian Affairs (AAIA) AAIA, founded in 1922, is a national Indian organization headquartered in Rockville, Maryland. AAIA is governed by an all-Native American board of directors from across the country. Its mission is the preservation and enhancement of the rights and culture of American Indian and Alaska Natives. The Association's programs fall into three main categories: youth/education, cultural preservation, and sovereignty. AAIA began its active involvement in the Indian child welfare issues in 1967 and for many years was the only national organization active in confront the crisis in Indian child welfare. AAIA studies were prominently mentioned in committee reports pertaining to the enactment of ICWA and, at the request of Congress, AAIA was closely involved in the drafting of the Act. Since that time, the Association has continued to work with tribes in implementing the Act.

The National Congress of American Indians (NCAI), founded in 1944, is the oldest, largest, and most representative American Indian and Alaska Native organization serving the broad interests of tribal governments and communities. It is a membership organization and a non-profit with membership that fluctuates but has been estimated at up to 70 percent of federally recognized tribes. NCAI is the go-to organization for the Administration, federal agencies, and organizations working to consult with and partner with tribes on a range of policy and research initiatives. NCAI's founders established the organization at a time when tribes were being terminated by the federal government. As stated in the Preamble to the NCAI Constitution that governs the organization today, the first stated purpose of NCAI is, "to secure to ourselves and our descendants the rights and benefits the traditional laws of our people to which we are entitled as sovereign nations."

Native American Rights Fund (NARF), founded in 1970, is the oldest and largest nonprofit law firm dedicated to asserting and defending the rights of Indian tribes, organizations, and individuals nationwide. NARF's practice is concentrated in five key areas: the preservation of tribal existence; the protection of tribal natural resources; the promotion of Native American human rights; the accountability of governments to Native Americans; and the development of Indian law and educating the public about Indian rights, laws, and issues. In addition to its courtroom advocacy on behalf of its tribal clients, NARF continues to maintain its educational mission through publishing its *Practical Guide to the Indian Child Welfare Act*. The *Guide* is intended to answer questions and provide a comprehensive resource of information on ICWA and is freely available online. Finally, NARF, in partnership with Casey Family Programs, also operates ICWA INFO, an online resource focusing solely on Indian child welfare issues.

APPENDIX A

PRELIMINARY ANALYSIS:
DOI's AUTHORITY TO CHANGE ICWA GUIDELINES TO REGULATIONS

Under *Chevron v. NRDC*, 467 U.S. 837, 842-843 (1984), a Court considers two questions in considering whether to defer to and accept an agency's regulation interpreting a statute. First, the Court asks whether Congress has directly spoken to the issue before the Court. If it has, that is the end of the inquiry. If the statute is silent or ambiguous, however, then the question is whether administration of the statute was delegated to the agency and whether the agency's interpretation was based upon a permissible construction of the statute. In the recent case of *City of Arlington, Tex. v. FCC*, 133 S.Ct. 1863 (2013), the Court specifically held that the principle of deference applies even to agency determinations of its own statutory authority. In short, if the agency concludes that it may act to fill in a "regulatory gap" in the statute, the Court will defer to the agency's exercise of authority if it is based upon a permissible construction of the statute.

Thus, legislative intent is critical. There are a number of factors present here that would support a decision by the Department of the Interior (DOI) that Congress authorized DOI to promulgate binding ICWA regulations beyond those already issued.

First and foremost, the ICWA regulatory language is general in scope. The statute provides that "the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this Act." 25 U.S.C. §1952. The Court has frequently recognized this type of language as a broad delegation of authority.

The case of *Gonzalez v. Oregon*, 546 U.S. 243, 258-259 (2006) is instructive. In holding that the Attorney General did not have authority to issue the "Interpretive Rule" in question in that case, the Court contrasted regulatory language similar to that in ICWA (language which provided for the issuance of regulations "necessary or proper to carry out the provisions of" the statute) with the narrower delegations to the Attorney General at question in that case. One provision in the Controlled Substances Act (the statute in question) specified only certain areas in which the Attorney General could regulate, and another section of the law provided that he may promulgate "rules, regulations and procedures which he may deem necessary and appropriate for the efficient execution of his functions under this subchapter." By contrast, neither type of limiting language is present in the ICWA delegation section. In fact, in the *City of Arlington* case, the Court stated that there was not "a single [Supreme Court] case in which a general conferral of rulemaking or adjudicative authority has been found insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field." 133 S.Ct. at 1874.

Secondly, an interpretation that DOI has authority to promulgate ICWA regulations is consistent with some of ICWA's underlying principles and approach. As stated in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 45 n.17 (1988), the primary mechanism

utilized by Congress to address the Indian child welfare crisis was to "curtail state authority". It was for this reason that Congress established "minimum federal standards" in ICWA to be applied in state child custody proceedings. 25 U.S.C. § 1902.

Thirdly, the authority for the Department of Interior to act can also be derived from the statute itself which has some "regulatory gaps" and ambiguities. For example, terms as "active efforts" and "good cause" are not defined in the statute.

Finally, it is worth noting that there are other examples of the Department of the Interior using a general regulatory delegation to develop regulations that go beyond simply defining the administrative duties of the agency. The Native American Graves Protection and Repatriation Act (NAGPRA) regulations are one example. The language in NAGPRA provides that the "Secretary shall promulgate regulations to carry out this Act…" 25 U.S.C. §3011. Based upon this language, DOI has promulgated substantive regulations interpreting various provisions in the law that apply to third parties and the courts. 43 C.F.R. Part 10.

The main authority that could be viewed to the contrary is a line of cases that held that if interpretation of a statute is left to the courts, then an agency's actions to implement the statute are not entitled to deference. *See, e.g., Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638 (1990). If ICWA is interpreted as manifesting a Congressional intent to delegate responsibility for interpreting the statute to state courts, this could support a finding that DOI does not have authority to issue binding regulations to which deference should be provided. This is similar to the argument made by the Department of Interior in 1979 when it decided to issue Guidelines, rather than regulations.

Given all of the reasons cited above, however – particularly the broad scope of the delegation language in the statute – a conclusion by DOI that it has authority would appear to be on strong ground. As indicated in the recent holding in *City of Arlington*, the Court will defer to the decision of an agency in regard to its own jurisdiction if it is a feasible construction of the statute. It would seem at a minimum that a conclusion that DOI has authority to issue regulations would be "feasible", even if it is not the only way to read the statute.

This change from DOI's 1979 interpretation might also be supported by referencing the experience of the last 35 years in regard to ICWA implementation. ICWA litigation has resulted in divergent interpretations of a number of ICWA provisions by state courts which could be viewed as undermining ICWA's attempt to create consistent minimum federal standards. In addition, no court has found the general imposition of ICWA requirements upon state courts to be unconstitutional, a fear that appeared to underlie some of the BIA's caution regarding whether to move forward with binding regulations in 1979 (see constitutional discussion below).

<u>Are there constitutional concerns if regulations are promulgated?</u>

In terms of Constitutional issues, if ICWA itself is constitutional, then regulatory action to implement ICWA based upon a proper delegation of authority would also be constitutional.

See Mistretta v. United States, 488 U.S. 361, 372 (1989). In this regard, the Supreme Court has found that imposition of federal requirements upon state courts is on stronger constitutional grounds than imposing requirements on state executive functions (absent a spending clause connection) *See Printz v. United States*, 521 U.S. 898 (1997). Also, in *Seminole Nation of Florida v. Florida*, 517 U.S. 44 (1996), the Court found that the Indian Commerce clause is a broader delegation of authority to the federal government than the Interstate Commerce clause. Thus, a constitutional challenge based upon a lack of federal authority is unlikely to succeed.

No court has found ICWA generally unconstitutional. The only reported appellate cases to find the ICWA unconstitutional, as applied, are two California cases that ruled it would be unconstitutional to apply ICWA to certain Indian children and families that lack a substantial relationship with an Indian tribe. *In re Bridget R.*, 49 Cal.Rptr.2d 507 (Ct. App. 1996) and *In re Alexandria R.*, 53 Cal.Rptr.2d 679 (Ct.App. 1996). These constitutionally-based decisions have not been followed by other states and have been rejected by other California judicial districts. *See generally* Lewerenz and McCoy, *The End of "Existing Indian Family" Jurisprudence: Holyfield at 20, In the Matter of A.J.S., and the Last Gasps of a Dying Doctrine*, 36 William Mitchell Law Review 684 (2010). Even if these cases were considered good law, they would not implicate the ability of DOI to issue regulations covering all cases where ICWA is applied.

What if a Court finds that the DOI was not delegated authority to promulgate regulations?

When it has been found that an agency does not have delegated authority, its regulations and other policy documents may be entitled to deference based upon the multi-part test enumerated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *United States v. Mead Corporation*, 533 U.S. 218, 234-235 (2001). The *Skidmore* test provides that the weight to be provided to such agency action depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade…" 323 U.S. at 140. This is similar to the approach that Courts have used in determining whether to follow the Guidelines. Thus, the worst case scenario is that the regulations would be treated in a manner similar to the Guidelines.

If a decision to go forward with regulations is made, what is the strongest approach?

It would be important in crafting regulations that they be based upon specific legislative history and intent wherever possible, as well as the agency's "unique expertise", with a focus upon filling in the "regulatory gaps" in the statute by defining the meaning of key terms. *Kelley v. EPA*, 15 F.3d 1100, 1108 (D.C. Cir. 1994), *cert. denied*, 115 S.Ct. 900 (1995) is worth considering in this respect. In *Kelley*, the Court applied the *Adams Fruit* case which held that a delegation of authority will not be found if Congress expressly left implementation of a statute to the courts. In deciding not to enforce the EPA regulation in question, the Court found it relevant that the agency had developed "an extensive quasi-legislative scheme", as opposed to simply defining certain ambiguous terms in the statute.

Of course, Interior may supplement whatever it includes in the regulations with commentary or broader policy guidance on implementing ICWA. This guidance may go beyond whatever may be explicitly included in the regulations.

This analysis will be part of a larger report prepared by the Association on American Indian Affairs, Inc. that will provide a detailed analysis of federal authority and responsibility for enforcement of the Indian Child Welfare Act (ICWA). This analysis was commissioned by Casey Family Programs whose mission is to provide, improve, and ultimately prevent the need for foster care. This analysis is a draft document; the findings and conclusions are those of the author alone and do not necessarily reflect the opinion of Casey Family Programs.