



Pokégnek Bodéwadmik \* Pokagon Band of Potawatomi  
Presenting Officer

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May 18, 2015

**Via electronic mail: [comments@bia.gov](mailto:comments@bia.gov)**

Elizabeth Appel  
Office of Regulatory Affairs & Collaborative Action  
U.S. Department of the Interior  
1849 C Street NW  
MS 3642  
Washington, DC 20240

RE: Proposed Indian Child Welfare Act Regulations  
Docket ID-BIA-2015-0001

Dear Ms. Appel:

I am writing on behalf of the Pokagon Band of Potawatomi Indians (“Pokagon Band”) to provide comments on the Department of the Interior’s (“DOI”) proposed regulations (“Proposed Regulations”) implementing the Indian Child Welfare Act (“ICWA”). For the last thirteen years, I have served as the Pokagon Band’s Presenting Officer representing the Pokagon Band in ICWA cases in State court as well as child protection cases in the Pokagon Band Tribal Court. In my experience as an attorney working in State courts, the application of ICWA differs from state to state and even from jurisdictions within the same state. Consistency is needed to provide the best outcomes for all children and I offer the following comments on behalf of the Pokagon Band in support of the implementation of the Proposed Regulations. In so doing, it is our hope the Proposed Regulations will assist all jurisdictions with consistently applying ICWA in the same manner that other federal laws are applied in State court child protection proceedings.

The Proposed Regulations represent a tremendous step forward in ICWA enforcement. The inconsistency in State court interpretation of ICWA has led to a tremendous amount of litigation and harm to children through delays in relative placements and permanency. Inconsistent application of ICWA perpetuates those issues which the ICWA was originally designed to address in 1978. Federal regulations that



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strongly support the goals and intent of ICWA are much needed and will support the needs of Indian children and their Tribes.

Uniform interpretation of key provisions is necessary to ensure compliance with ICWA. In the more than thirty years since ICWA was enacted, states have applied ICWA inconsistently, creating a multitude of different standards for Indian child welfare cases. These inconsistencies make it especially difficult for tribal attorneys who represent the tribe. Tribal attorneys represent the Tribe wherever our Tribal children are located—not just in the state or county closest to the tribe. Instead of being an expert of the application of one federal law, Tribal ICWA attorneys must know each individual state’s case law interpreting ICWA. Tribal ICWA attorneys must often convince our State court colleagues to apply and enforce the law—some of whom are not inclined to do so.

In addition, state appellate decisions change the interpretation of ICWA, not just by state, but also sometimes within the state itself. The Proposed Regulations will provide a stronger measure of consistency in the implementation of ICWA, which has been interpreted in different, and often conflicting, ways by various State courts and agencies and has resulted in different minimum standards being applied across the United States, contrary to Congress’ intent. *See, e.g., Holyfield*, 490 U.S. at 45–46 (describing the need for uniformity in defining “domicile” under ICWA).

The Pokagon Band respectfully requests that the Proposed Regulations be amended consistent with the comments provided below.

### 1. Section 23.2: *Definitions*.

#### A. Active Efforts

The DOI proposes to define “active efforts” as “actions intended primarily to maintain and reunite an Indian child with his or her family or tribal community and constitute more than reasonable efforts as required by Title IV-E of the Social Security Act (42 U.S.C. 671(a)(15)).” Active efforts may include for example: engaging the child, parents, extended family members, or custodians; taking steps to keep the siblings together; providing services; identifying, notifying, and inviting representatives of the child’s tribe; employing family preservation strategies; and many more.

**We recommend the DOI include a section that states there are no time limits on “active efforts” to distinguish ICWA cases from other cases where the Adoption and Safe Families Act (ASFA) may impose timelines.**





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The definition and requirements of “active efforts” varies from state to state. Although ASFA and ICWA have many similar provisions, some of their technical terms regarding timelines and definitions contradict one another. By setting a separate standard, the DOI will ensure that State courts do not deviate from ICWA by applying ASFA standards to Indian children or by neglecting to make active efforts throughout the case—no matter how long the case may take.

**We also recommend the DOI add a section that active efforts include assisting the child in establishing the paternity of the biological father, if that has not yet been established, as this is sometimes critical to determining whether ICWA applies.**

For those tribes which determine citizenship (or enrollment) via means other than blood quantum, knowing the biological father assists the Tribe in determining a child’s paternity and eligibility for citizenship.

### **B. Continued Custody**

The DOI proposes to define “continued custody” as “physical and/or legal custody that a parent already has or had at any point in the past.” In addition, “continued custody” also refers to when “the biological mother of a child has had custody of a child.”

**We recommend the DOI include a provision that allows a putative father who either acknowledges or establishes he is the biological father to assert custodial rights.**

By including this provision, the proposed ICWA regulations do not create a presumption that only a mother may have custody of a child, while a father does not. In addition, by including this provision, the proposed ICWA regulations will take into account that sometimes an Indian child’s heritage may come from a father who is unknown or not established at the time of the child custody proceedings. Such a provision will also benefit the child by identifying the putative father for reasons in addition to Indian heritage and tribal enrollment.

### **C. Domicile**

The DOI proposes to define domicile as “[f]or a parent or any person over the age of eighteen, physical presence in a place and intent to remain there;” and “[f]or an Indian child, the domicile of the Indian child's parents. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's mother.”



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**We recommend the DOI change the domicile definition to the common law definition of domicile. For example, “[t]he place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere.”** *See*, DOMICILE, Black's Law Dictionary (10th ed. 2014).

By including this provision, the DOI will take into consideration the American Indian / Alaskan Native population that may only leave the reservation for a short period of time to obtain education, pursue work, or enter the military. Although they are physically located away from the reservation, this change in location may not establish a permanent domicile, and should not deprive them of domicile on a reservation when these situations may be only temporary.

This was mentioned in the Supreme Court case *Mississippi Band of Choctaw Indians v. Holyfield*, where the Court stated “‘domicile’ is not necessarily synonymous with ‘residence,’” and “[f]or adults, domicile is established by physical presence in a place in connection with a certain state of mind concerning one’s intent to remain there.” 490 U.S. 30, 48 (1989); *see also*, *Texas v. Florida*, 306 U.S. 398, 424 (1939). The Court stated that “[o]ne acquires a ‘domicile of origin’ at birth, and that domicile continues until a new one (a ‘domicile of choice’) is acquired.” *Id.*

By changing the Proposed Regulations to state “was physically present” rather than “physically present” the regulations will take into consideration the differences between “domicile of choice” and “domicile of origin” as elaborated in *Holyfield*.

**We also recommend the DOI change the second part of the domicile definition to state that the Indian child has the domicile of the custodial parent.**

This way the Proposed Regulations take into account that a father or Indian custodian may have obtained custody of a child. As stated in *Holyfield*, domicile for children and minors are “determined by that of their parents.” 490 U.S. at 48. In addition, it is only “[i]n the case of an illegitimate child” that the child’s domicile “has traditionally meant the domicile of its mother.” *Id.*

### **D. Include Definition for Tribal Representative**

The DOI does not include a definition for this term, but it can be used in connection to several provisions under the Proposed Regulations. Specifically, Sections 23.2 referring to “representatives of the Indian child’s tribe;” Section 23.104 referring to tribal agents;





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Section 23.109 when referring to Tribe's acting as "representatives" for other Tribe's in child custody cases; and Section 23.115 transfer of a child custody proceeding.

**We recommend the DOI include a definition that defines "tribal representative." This definition may include, "a person who is representing a Tribe in a child custody proceeding, who is not required to be an attorney; and if the representative is an attorney, they are not required to be licensed in the jurisdiction where the Indian child's proceeding is located.**

By including this definition, the Proposed Regulations will provide clarification to State courts about the role of a tribal representative, and whether they can appear in the various sections that refer to the representation of the Tribe and Tribal agents. For many tribal nations across the United States, a licensed attorney or tribal representative may not always be available, and tribal attorneys may not be licensed to practice in the jurisdiction where the child custody proceeding is located. Failure to recognize the tribal representative as "the tribe" also results in findings that the child's Tribe has not "formally intervened" in a proceeding. This prevents a child's Tribe from participating in the proceeding and deprives the State court of information necessary to make adequate ICWA findings. A child's Tribe is then unable to provide culturally consistent recommendations to the court and forces tribes to rely on other lawyers less familiar with ICWA to apply ICWA. Relying on other lawyers is not a reliable means to ensure the law is applied in a manner which respects the sovereignty of the child's Tribal government.

**2. Section 23.103:**

*When does ICWA apply?* The DOI proposes that "ICWA applies whenever an Indian child is the subject of a State court child custody proceeding as defined by the Act. ICWA also applies to proceedings involving status offenses or juvenile delinquency proceedings if any part of those proceedings results in the need for placement of the child in a foster care, preadoptive or adoptive placement, or termination of parental rights."

**We recommend the DOI include as a proceeding that ICWA applies to: (1) "any domestic violence protection order proceeding in which the Court restricts the parent's access to the Indian child during the minority of the child," and (2) "any placement of an Indian child in foster care as the result of a juvenile delinquency proceeding in which a State court determines that it is not safe to return a child to the parent or guardian's home, or that it is inconsistent with the rehabilitation of the child."**

**In addition, we recommend the DOI also include third party custody or guardianship actions; and termination of parental rights actions brought by**



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**the other parents, third parties, or Indian custodians, which are all actions when the child cannot be returned upon demand of the parent.**

There is confusion in many jurisdictions regarding the extent to which ICWA covers involuntary proceedings. By including these specific child custody proceedings, the Proposed Regulations clarify what may be considered within the definition of a child custody proceeding.

**3. Section 23.103(f):**

*Voluntary Placements.* The DOI proposes that “[v]oluntary placements that do not operate to prohibit the child’s parent or Indian custodian from regaining custody of the child upon demand are not covered by ICWA.” In addition, “[s]uch placements should be made pursuant to a written agreement, and the agreement should state explicitly the right of the parent or Indian custodian to regain custody of the child upon demand.”

**We recommend the DOI include a section that states: “In general it is not appropriate for an involuntary proceeding to be commenced based upon an assertion that a parent consented to a previous voluntary placement of the child as proof of abandonment of the child.”**

Including this language into the Proposed Regulations will give protection to parents that enter into voluntary placements, from having that placement used as evidence against them in another child custody proceeding. If voluntary placements are not covered by ICWA, using voluntary placements as evidence should also be prohibited.

**4. Section 23.110(a):**

*When must a State court dismiss an action?* Under the Proposed Regulations, “[s]ubject to § 23.113 (emergency procedures), the following limitations on a State court’s jurisdiction apply: (a) [t]he court must dismiss any child custody proceeding as soon as the court determines that it lacks jurisdiction.”

**We recommend the DOI also allow an exemption for emergency cases, such as: “unless an emergency situation exists and in that case the State court must make every effort to contact the Tribe with exclusive jurisdiction over the matter to ensure the safety of the child.”**

Even when a State court does not have the jurisdiction to hear an emergency child custody proceeding, in order to ensure the safety and well-being of the child, these proceedings should not be dismissed until the Tribe has asserted jurisdiction. This must be conditioned on a representation that that the State court is making every effort to





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contact the Tribe with exclusive jurisdiction, and that the State court will transfer jurisdiction immediately without delay once the Tribe has been contacted.

**5. Section 23.111(h):**

*What are the notice requirements for a child custody proceeding involving an Indian child?* The DOI proposes to require “[n]o substantive proceedings, rulings or decisions on the merits related to the involuntary placement of the child or termination of parental rights may occur until the notice and waiting periods in this section have elapsed.”

**We recommend the DOI include in this section the parents’ right to have judicial review of an emergency removal of an Indian child that was not approved by a judicial officer.**

**Recommended language: “...except when State law provides an earlier hearing for the parents or Indian custodians. In that case, the State court must attempt to ensure compliance with notice requirements of the law. A State may notify a tribe of an emergency hearing via telephone or email in addition to the legally required registered mail notice. When notice cannot be provided as required at an emergency removal hearing, no finding of the State court made at the hearing shall be binding upon the Tribe or other party who was not notified of said hearing.”**

In some jurisdictions, parents have a right to judicial review of an emergency removal of an Indian child that was not approved by a judicial officer. In these cases, states may have hearings between 24 and 48 hours after the removal of the child. At those emergency hearings, decisions are made about continuing the out of home placement of the child. Because these hearings occur and are decided within such a short period of time, it is impossible to notify a Tribe by registered mail, return receipt requested, and give them adequate time to intervene or transfer. Due to the rapid decisions rendered in these cases, when the Court has not provided notice to a Tribe, these decisions should not be binding on the Tribe or party who was not notified of the hearing and decision.

**6. Section 23.113(i):**

*What is the process for the emergency removal of an Indian child?* The DOI proposes to require that “[t]he court should allow, if it possesses the capability, alternative methods of participation in State court proceedings by family members and tribes, such as participation by telephone, videoconferencing, or other methods.”

**We recommend the DOI mention in this section the possibility of a “tribal representative” (as recommended the term is defined above) being present at**



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**child custody proceedings, and participating in the proceedings before the State court, remotely or physically.**

By including this language, the Proposed Regulations will also take into consideration “tribal representatives” that may not be an attorney, licensed to practice in that jurisdiction, or be licensed to practice in any state, but that “tribal representative is the ‘tribe’ for purposes of the State court proceeding. Please also see the recommend definition of “tribal representative” in Section 3(c) of this comment.

**7. Section 23.115:**

*How are petitions for transfer of proceeding made?* The DOI proposes to require that “petitions for transfer may be requested, in writing or orally on the record, by either parent, Indian custodian, or Indian child’s tribe.” In addition, the right to transfer occurs with each proceeding, and is available at any stage of an Indian child custody proceeding.

**We recommend the DOI include a provision that permits a party requesting transfer, including the Tribe, “need not be represented by legal counsel in order to file a motion for transfer.”**

By including this language, the Proposed Regulations will also take into consideration “tribal representatives” that may not be attorneys or attorneys licensed to practice in that jurisdiction. Please also see the recommended definition of “tribal representative” in Section 1(d) of this comment.

**8. Section 23.116:**

*What are the criteria and procedure for ruling on transfer petitions?* The Proposed Regulations permit that “either parent [may] object to such transfer” of the case to the Tribe during a child custody proceeding.

**We recommend the DOI include a provision that “either parent, *unless that parent’s rights have been terminated by tribal or State court order*, has a right to object to transfer provided the objection is put into writing and the State court judge explains the consequences of the objection to the parent.**

By including this provision, the Proposed Regulations will protect the rights of the parent who has custody of the child, and will not allow a parent whose rights have been terminated to interfere in child custody proceedings under ICWA.





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**9. Section 23.117(e):**

*How is a determination of “good cause” not to transfer made?* The DOI proposes to require “[t]he burden of establishing good cause not to transfer is on the party opposing the transfer.”

**We recommend the DOI add “clear and convincing evidence” to the end of this statement.**

By adding this standard of evidence to the determination of “good cause” it will give State courts more guidance regarding the level of scrutiny they should apply when evaluating “good cause.” In addition, by establishing a federal standard to be applied, it will prevent State courts from adopting a lesser standard of evidence based on State common law, and keep the regulations in uniformity across the nation.

**10. Section 23.123:**

*What actions must an agency and State court undertake in voluntary proceedings?* The Proposed Regulations require “[a]gencies and State courts must provide the Indian tribe with notice of the voluntary child custody proceedings, including applicable pleadings or executed consents, and their right to intervene under § 23.111 of this part.”

**We recommend the DOI add “including, permitting the Tribe to determine whether the child involved in the voluntary proceeding is an Indian child.”**

Under ICWA, a Tribe may only receive notice if the pending court proceeding is an “involuntary proceedings.” 25 U.S.C. § 1912(a). By adding this language, it would preserve the language of ICWA and its purpose. This language will also support the wishes of the parents in a voluntary action by enabling the child’s Tribe to support those with whom the parents placed the child. This will promote stability in the decisions of the parents and enables the child’s Tribe the opportunity to provide support to the child and those caring for the child.

**11. Section 23.129:**

*What placement preference applies in adoptive placements?* In any adoptive placement of an Indian child under State law, “preference must be given in descending order, as listed below, to placement of the child with: (1) A member of the child’s extended family; (2) Other members of the Indian child’s tribe; or (3) Other Indian families, including families of unwed individuals.” In addition, the court should, where appropriate, “also consider the preference of the Indian child or parent.”

**We recommend the DOI include a provision that allows consideration of the Tribe’s recommended placement for an Indian child.**



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Currently under ICWA, an “Indian child’s tribe shall establish a different order of preference by resolution.” 25 U.S.C. § 1915(c). By adding the “Tribe’s recommended placement” to this provision, the Proposed Regulations will take into consideration Tribal custom, law, and practice when determining the welfare of Tribal children.

**12. Section 23.130:**

*What placement preferences apply in foster care or preadoptive placements?* In any foster care or preadoptive placement of an Indian child, preference is given to a member of the Indian child’s extended family; a foster home, licensed, approved or specified by the Indian child’s tribe, whether on or off the reservation; an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child’s needs.”

**We recommend the DOI include a provision that allows consideration of the Tribe’s recommended placement for an Indian child.**

By adding the “Tribe’s recommended placement” to this provision, the Proposed Regulations will take into consideration Tribal custom, law, and practice when determining the welfare of Tribal children. Currently under ICWA, an “Indian child’s tribe shall establish a different order of preference by resolution.” 25 U.S.C. § 1915(c). This proposed addition also enhances the opportunity for the child to grow up with the knowledge of his or her heritage and enables the Tribal community to offer support to the child and the caregivers.

**13. Section 23.131(c):**

*How is a determination for “good cause” to depart from the placement preferences made?* Under this section, the DOI proposes that determination of “good cause” to depart from placement preferences must be based the request of the parent, or the request of the child.

**In regards to (c)(1) and (2) we recommend the DOI include a provision that allows consideration of a Tribe’s request to deviate from placement preferences.**

By adding this provision, the Proposed Regulations will take into consideration the Tribe’s placement preference. Tribes should have a say in determining the welfare of Tribal children as the placement can enhance the welfare of the child.

**14. Section 23.135:**





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*When must notice of a change in child's status be given? The Proposed Regulations require that notice of a change in child's status be given to the child's biological parents and the child's tribe whenever there is "[a] final decree of adoption," "the adoptive parent has voluntarily consented to the termination of [their] parental rights," or "[w]henver an Indian child is removed from a foster care home or institution to another foster care placement, preadoptive placement, or adoptive placement."*

**We recommend the DOI include a provision that requires the names and addresses of placement of a child be forwarded to the Tribe when a child is removed from a parent, there is a termination of parental rights proceeding, the child is placed with a relative, or any other form of placement.**

Without adding this requirement to the Proposed Regulations, there is no other way for the Tribe to track where the child has gone when they are removed from one placement to another. By adding this requirement, a Tribe will be able to keep track of a child, and be prepared to intervene if they are already on notice and actively made aware of the status of the child.

Thank you for in advance for consideration of the Pokagon Band's comments.

Sincerely,

Annette D. Nickel  
Presenting Officer  
Pokagon Band of Potawatomi Indians

cc: Tribal Council