AAIA
Association on American Indian Affairs

Executive Office
966 Hungerford Drive, Suite 12-B
Rockville, MD 20850
Phone: 240-314-7155 Fax: 240-314-7159
E-Mail: general.aaia@indian-affairs.org Website: www.indian-affairs.org

May 14, 2015

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

Re: Notice of Proposed Rulemaking – Regulations for State Courts and Agencies in Indian Child Custody Proceedings – RIN 1076-AF25 – Federal Register (March 20, 2015)

Dear Ms. Appel:

The Association on American Indian Affairs (AAIA) is a 93 year old Indian advocacy organization located in Maryland, Rhode Island and North Carolina and governed by an all-Native American Board of Directors. The Association began its active involvement in Indian child welfare issues in 1967 and for many years was the only national organization active in confronting the crisis in Indian child welfare. AAIA studies were prominently mentioned in committee reports pertaining to the enactment of the Indian Child Welfare Act and, at the invitation of Congress, AAIA was closely involved in the drafting of the Act. Since 1978, AAIA has continued to work with tribes to implement the Act, including the negotiation of tribal-state agreements to better serve Indian children, training for tribal and state employees and officials about Indian child welfare, and legal assistance in contested cases.

Introduction

AAIA very much supports the issuance of proposed ICWA regulations by the Bureau of Indian Affairs. We believe that regulations are critically important if states are to fully comply with the Indian Child Welfare Act (ICWA), 25 U.S.C. 1901 *et seq*.

The ICWA was enacted in 1978 in response to a crisis affecting Indian children, families and tribes. Studies revealed that large numbers of Indian children were being separated from their parents, extended families, and communities and placed in non-Indian homes. Congressional testimony documented the devastating impact this was having upon Indian children, families and tribes. As a result, Congress enacted mandatory legal requirements to be followed by state courts who are adjudicating the rights of Indian children and their families who live outside of an Indian reservation.

Although progress has been made as a result of ICWA, out-of-home placement of Indian children is still much greater for Indian youth than it is for the general population and Indian children continue to be regularly placed in non-Indian homes. *See, e.g.*, Alicia Summers, Steve Woods, & Jesse Russell, National Council of Juvenile and Family Court Judges, *Technical Assistance Bulletin: Disproportionality Rates for Children of Color in Foster Care* 7 (2012) (finding that although Native children make up 0.9% of the United States population they make up 1.9% of children in foster care); Rose M. Kreider, *Interracial Adoptive Families and Their Children: 2008, in* National Council for Adoption Factbook V 109 (2011) (reporting that in 2008 more Indian children in adoptive placements lived in non-Indian adoptive homes than Indian adoptive homes). Compliance with the ICWA by states is erratic and state court decisions inconsistent. There is a great need for the federal government to provide binding regulations to ensure that the ICWA is enforced and applied properly and consistently in all states so that Indian children and families are fully protected.

Legal Justification for the Regulations

We would note that we believe that the legal basis for regulatory action is strong. The statute provides that "the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this Act" which is a broad grant of authority.

An analysis of recent United States Supreme Court case law supports a conclusion that the Department of the Interior has the authority to issue regulations binding on state courts and agencies. The rationale for that conclusion is as follows.

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.

First and foremost, the ICWA regulatory language is general in scope. The statute (25 U.S.C. 1952) provides that "the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this Act." 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". Arguments that implementation of ICWA was to be left totally to state courts ignore one of the very bases for ICWA.

Congress found that "the States, exercising their recognized jurisdiction over American Indian and Alaska Native child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of American Indian and Alaska Native people and the cultural and social standards prevailing in American Indian and Alaska Native communities and families." 25 U.S.C. § 1901(5). The House Committee described "'the failure of State officials, agencies, and procedures to take into account the special problems and circumstances of the Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future.'" House Report 95-1386 at 19, *cited in Holyfield,* 490 U.S. at 45, n. 18; *see also id.* ("'state courts and agencies and their procedures share a large part of the responsibility' for crisis threatening 'the future and integrity of Indian tribes and Indian families.'") (statement by Rep. Morris Udall).

There was considerable testimony about the abuses taking place in state child welfare systems. One of the most frequent complaints was the tendency of social workers to apply standards that ignored the realities of Indian societies and cultures. For example, children were often removed or threatened with removal because they were placed in the care of relatives or their homes lacked the amenities that could be found in non-Indian society. *See, e.g.*, 1977 Senate Hearings at 77-78, 166, 316; 1978 House Hearings at 115.

State child welfare systems operated in virtually an unfettered fashion, largely unchecked by judicial due process. In addition, "[g]enerally there . . . [were] no requirements for responsible tribal authorities to be consulted about or even informed of child removal actions by nontribal government or private agents." 124 Cong. Rec. H12849 (1978) (statement of Rep. Robert Lagomarsino). The result of this systemic failure was summarized in House Report 95-1386 as follows:

(1) . . . many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.

(2) The decision to take Indian children from their natural homes is, in most cases, carried out without due process of law . . . Many cases do not go through an adjudicatory process at all, since the voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children. Because of the availability of waivers and because a great number of Indian parents depend on welfare payments for survival, they are exposed to the sometimes coercive arguments of welfare departments.

(3) . . . agencies established to place children have an incentive to find children to place.

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, and authorized the Secretary of Interior to promulgate regulations to implement those federal standards, 25 U.S.C. § 1952.

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 such 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.

Given all of the reasons cited above – 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, especially if the regulations are carefully crafted to clarify the statute based upon the agency's expertise. 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.

We would note that assertions that the drafters of ICWA did not contemplate regulations are incorrect. Our organization (directly involved in drafting the Act) and the National Tribal Chairman's Association received a contract to conduct listening sessions shortly after ICWA was enacted to develop recommendations for what we believed would be regulations pursuant to the broad statutory delegation. The Departments of Interior (which had opposed the bill and was not involved in its drafting) decided to take a cautious approach and issue Guidelines instead. The Department of Interior should not be bound in 2015 by the cautious decision that was made in 1979, especially given the perspective that it now has after more than 35 years of experience with the Act. Indeed, case law recognizes that an agency may change its policy so long as there is "some minimal explanation for the change." *See, e.g., Redding Rancheria v. Jewell*, 776 F.3d 706, 714 (9th Cir. 2015).

Thus, support for issuing binding federal ICWA regulations can be found in the broad language of the regulatory delegation, Congress' specific decision to curtail state authority over Indian children, the need to address ambiguities in the statute, and the experience since 1978 which has demonstrated the need for regulations if the ICWA is to be fully implemented and effective.

Overview

We particularly support the following provisions in the proposed regulations:

- Requiring that agencies and courts ask in every proceeding whether a child is Indian. This will help ensure that all Indian children are identified and accorded ICWA protections.
- Recognition of a tribe's exclusive authority to determine tribal membership. We very much support the affirmation of this key principle of tribal sovereignty.
- Rejection of the Existing Indian Family Exception. This section ensures that the ICWA will be applied to all Indian children in any child custody proceeding and that no Indian children will be left behind.
- Notice to tribes in voluntary cases. Tribes are *parens patriae* for their children. By providing notice, this ensures that tribes will be able to assert their jurisdiction (which may be exclusive) and/or intervene in the case if necessary. Notice to the tribe is also critical if the state court is to confirm (as it is required to do) whether the child is an Indian child and covered by the ICWA.
- Defining active efforts to prevent the breakup of Indian families and requiring that such efforts begin immediately. This provision is vitally important to keeping Indian families together, a central and critical purpose of the ICWA.
- Limiting the discretion of state courts to deny transfer of a case to tribal court. Too often state courts refuse to transfer a case because they think that a tribal court will make a

decision with which they disagree. The regulations make clear that this is not an appropriate reason to deny transfer.

- Emphasizing the need to follow the placement preference and limiting the ability of agencies to deviate from the preferences. The failure of state courts and agencies to place Indian children in relative, tribal and Indian homes is one of the biggest problems with the Act's implementation. Keeping children with their families and within their tribal communities and cultures is vitally important to their well-being and a central purpose of the ICWA.

Although we strongly support these regulations in general, we have a few recommendations for changes that we advance for consideration. We believe that it is important that the rationale for the authority to regulate be carefully explained and that individual provisions should be justified with references to supportive cases, state regulations and policies that reflect best practices and legislative history. We also believe that the regulations should explicitly address the *Adoptive Couple v. Baby Girl* case: 1) clarifying that it should not generally be applied outside of the private adoption context; and 2) providing guidance on how the Supreme Court interpretation of the law should be effectuated in state court and agency practice. We will expand upon these recommendations in our section-by-section comments. In addition, we have a number of technical comments on the regulations that we will present for your consideration.

Section-by-Section Analysis

23.2

Active Efforts – We believe that the proposed definition does an excellent job of clarifying the meaning of "active efforts". Contrary to what some have suggested, the vast majority of states have concluded that active efforts means more than the reasonable efforts requirement that applies to all children. *In the Interest of P.S.E.*, 816 N.W.2d 110 (S.D. 2012).

Child Custody Proceeding- While this definition mirrors the definition in the statute, it has been pointed out in case law that the definition has a flaw in it. Specifically, the foster care language indicating that the Act applies only "where the child cannot have the child returned upon demand" conflicts with the language in 25 U.S.C. 1913 which provides that in any voluntary placement covered by the Act, the parent can obtain the child back upon demand. See *In re Adoption of* K.L.R.F., 515 A.2d 33 (Pa. Super. Ct., 1986). Thus, we recommend the following clarification:

After "demand", insert "(except as provided in section 103(b) [25 U.S.C. 1913(b)] of the Act)"

In addition, we recommend that the definition make clear that guardianships, conservatorships and intra-family disputes (except for disputes between parents) are all included in the definition. There have been variations in state interpretations of these issues.

Continued Custody - We agree with the intent of these definitions which have been crafted to help states implement the *Adoptive Couple v. Baby Girl* case. We would clarify and strengthen the definitions as follows:

"'Continued custody' means prospective legal or physical custody by any parent that already has or has ever had legal or physical custody at any time. A biological mother is always deemed as having had prior custody of her child."

"'Custody' means physical and/or legal custody under any applicable tribal law or custom or State law. If any tribal law or custom or State law has recognized the legal or physical custodial rights of a parent at any time, that parent is deemed to have had prior custody of the child."

Domicile – Although we recognize that this definition is derived from the *Holyfield* case, the discussion in that case was connected with the specific fact pattern in question. As applied more generally, this definition has the potential to lead to results in some cases at odds with most state laws on domicile, particularly as it pertains to unwed fathers with custody or students who are temporarily living away from their permanent home. It is also inconsistent with the perspective of many tribes on this issue who recognize that many Indian people may consider their tribal community to be their domicile and maintain a home there even while absent for extended periods. For these reasons, we would suggest the following alternative:

"Domicile shall be defined by the tribal law or custom of the Indian child's tribe, or in the absence of such law or custom, means (1) the place at which a person has been physically present and the person regards as home or, alternatively, a person's true, fixed and permanent home, to which that person intends to return and remain even though currently residing elsewhere, and (2) for an Indian child, the domicile of the Indian child's parents. In the case of an Indian child whose parents are not married, the domicile of the Indian child is that of the custodial parent with whom the child lives most often or, where the child is living with neither parent, the domicile of the Indian child's mother."

Parent – We believe that adding language specifying what constitutes acknowledgment or establishment of paternity by a father would be helpful as it would make clear that a federal standard governs this issue, not multiple and divergent state standards. This is an issue that the Supreme Court did not decide (despite its specific grant of *certiorari*) in *Adoptive Couple v. Baby Girl*. Justice Sotomayor in her dissent indicated that relying on state definitions would be "inconsistent with our recognition in *Holyfield* that Congress intended the critical terms of the statute to have uniform federal definitions." 133 S.Ct. at 2574. As Justice Sotomayor suggested, we believe that the Department should take this opportunity to provide a federal definition. We suggest a slightly amended version of what is in the Guidelines as follows:

"To qualify as a parent, an unwed father need only take reasonable steps to establish or acknowledge paternity. Such steps may include acknowledging paternity in the action at issue, establishing paternity through DNA testing, or any other action that is recognized by tribal law or custom or any applicable State law."

Indian Child- We would suggest adding a sentence to this definition to reflect recent changes in federal law in the Fostering Connections to Success Act which allow states to continue foster care until 21. Thus, we suggest the following:

"Nothing in this definition shall preclude application of the Indian Child Welfare Act to a child custody proceeding conducted in a state that has exercised the option of redefining the term child to include individuals between the ages of 18 and 21 pursuant to section 475(8)(B) of the Social Security Act [42 U.S.C. 675(8)(B)]."

Imminent risk of harm- We suggest that the language used in the Guidelines be utilized. We understand that some have viewed this language as inadequate to cover situations like sexual abuse. We would support any clarifications that would make clear that such situations can be grounds for emergency removal as we agree that it is vitally important to protect the health and safety of Indian children when physical or sexual abuse is occurring. We would note that 80% of the cases that result in a child being removed from his or her parents are neglect cases and it would very seldom be the case that such cases should be addressed by an emergency removal, rather than through normal processes and active efforts to provide services. It is the overuse of emergency removals in this context that is the issue that we believe needs to be addressed. We do not oppose valid emergency removals to protect children who are being subjected to sexual abuse or physical violence.

Upon Demand- We agree with this definition and suggest adding at the end, "and without having to resort to legal proceedings."

Voluntary Placement- We recommend dealing with the situation where one parent has refused consent by adding the following sentence: "If either parent refuses to consent to the placement, the placement shall not be considered voluntary."

23.101

In order to make clear that ICWA's minimum standards define what is in the best interests of Indian children, 25 U.S.C. 1902, we would suggest changing the first sentence to read:

"These regulations clarify the minimum Federal standards that define the best interests of Indian children and govern implementation of the Indian Child Welfare Act (ICWA) to ensure that ICWA is applied in all States consistent with the Act's intent."

23.102

Agency - We believe that this definition which makes clear that agency includes private state-licensed agencies is very helpful. We would also add language to the definition making clear that any agency that contracts with the state to provide child welfare or adoptive services falls within this definition, regardless of whether they are licensed.

23.103

(a) – We believe that the sentence on juvenile justice proceedings is flawed because it could lead to undue delay in the application of the ICWA – to a point in time where a dispositional hearing has already been held and a placement decision already made. AAIA recently completed a joint study with the National Indian Child Welfare Association of a New Mexico statute that requires tribal notice of all juvenile justice proceedings. In the study, we found that notice was being given after adjudication of the youth as delinquent. Both state and tribal participants in the study agreed that this was much too late in the process – that notice needed to be provided (at the latest) when a petition is filed with the court. We are concerned that the language in this section would lead to a similar result. Thus, we suggest the following:

"ICWA also applies to status offenses in juvenile delinquency proceedings if those proceedings have the potential to result in a foster care, preadoptive or adoptive placement or the termination of parental rights."

(b)- We strongly agree with the inclusion of this section. We believe it is important in the Commentary to the regulations, however, that it be clearly explained why and how this section is consistent with *Adoptive Couple v. Baby Girl* to ensure that State courts do not disregard this section based upon their interpretation of that case. The following is one way in which this might be explained:

"Although presented with the opportunity, the United States Supreme Court did not adopt the Existing Indian Family doctrine (EIF) in the *Baby Girl* decision. The EIF, which is followed by a small minority of states (seven),[1] provides generally that the entirety of ICWA does not apply when a Court concludes that an Indian child has not been part of an existing Indian family unit.

In *Baby Girl*, the Court never mentioned the term "existing Indian family exception", nor endorsed its application. Instead, it referenced the holding in the *Mississippi Band of Choctaw Indians v. Holyfield* case that the statute as a whole is triggered when an "Indian child", as defined by ICWA, is the subject of "child custody proceeding", 133 S.Ct. 2557 n.1 and corresponding text, noting it was "undisputed" that both elements were present in this case.

---

[1] *S.A. v. E.J.P.*, 571 So. 2d 1187 (Ala. Civ. App. 1990); *In re Adoption of T.R.M.*, 525 N.E.2d 298 (Ind. 1988); *Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996); *Hampton v. J.A.L.*, 658 So. 2d 331 (La. Ct. App. 1995); *In Interest of S.A.M.*, 703 S.W.2d 603 (Mo. Ct. App. 1986); *In re N.J.*, 221 P.3d 1255 (Nev. 2009); *In re Morgan*, 1997 WL 716880 (Term. Ct. App. 1997). Of note, 19 state affirmatively oppose application of this doctrine. *In re Adoption of T.N.F.*, 781 P.2d 973 (Alaska 1989); *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960 (Ariz. Ct. App. 2000); *In re N.B.*, 199 P.3d 16 (Colo. App. 2007); *In re Baby Boy Doe*, 849 P.2d 925 (Idaho 1993); In re Adoption of S.S., 622 N.E.2d 832 (111. App. Ct. 1993), rev'd on other grounds, 657 N.E.2d 935 (111. 1995); In re *A.J.S.*, 204 P.3d 543 (Kan. 2009); *In re Elliott*, 554 N.W.2d 32 (Mich. Ct. App. 1996); *In re Adoption of Riffle*, 922 P.2d 510, 514 (Mont. 1996); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re Baby Boy C.*, 805 N.Y.S.2d 313 (N.Y. App. Div. 2005); *In re A.B.*, 663 N.W.2d 625 (N.D. 2003); *Quinn v. Walters*, 845 P.2d 206 (Or. Ct. App. 1993), rev'd on other grounds, 881 P.2d 795 (Or. 1994); *In re Adoption of Baade*, 462 N.W.2d 485 (S.D. 1990); *In Interest of D.A.C.*, 933 P.2d 993 (Utah Ct. App. 1997); *See* CAL. WELF. & INST. CODE § 224(c) (2014); IOWA CODE § 232B.5 (1999); MINN. STAT. § 260.771 (2010); OKLA. STAT. tit. 10, § 40.1 (2010); WASH. REV. CODE § 13.34.040(3); WIS. STAT. § 938.028(3)(a).

What the United States Supreme Court actually held was much narrower than the EIF, namely that two specific sections of the ICWA do not apply in a voluntary adoption proceeding when the father has abandoned the child and has not had previous legal or physical custody of the child. In so doing, the majority opinion noted the dissent's observation that "'numerous' ICWA provisions not at issue here afford 'meaningful' protections to biological fathers regardless of whether they ever had custody." 133 S.Ct. at 2561 n.6, 2573-2575. The provisions of the Act which the dissent indicated would continue to apply to fathers similarly situated are 25 U.S.C. 1911(b) (right to request transfer to tribal court); 25 U.S.C. 1913(a) and (c) (heightened protection and procedures for voluntary consent to adoption); 25 U.S.C. 1912(a) (right to notice); 25 U.S.C. 1912(b) (right to counsel); and 25 U.S.C. 1912(c) (access to court documents). *Id.* at 2574-75 (Sotomayor, J., dissenting) (listing these same rights). The fact that the majority referenced the dissent's analysis, without rejecting it or even suggesting that the application of these sections was an open question, suggests acquiescence by the majority of the dissent's position that these protections continue to apply to biological fathers, even in the absence of a "previously existing Indian family." 133 S.Ct. at 2561 n.6.

Thus, the *Baby Girl* holding is inconsistent with the EIF cases which have precluded application of the ICWA in its entirety when there was no Indian family in existence at the time of the proceeding. If ICWA is triggered anytime an Indian child is involved in a child custody proceeding (even if a father without custody is denied certain rights under two of its provisions), this is the antithesis of the EIF."

(c) – (d) – We support these provisions which require that courts and agencies must inquire and investigate whether a child is an Indian child in every case and require that the child be treated as Indian if there is any reason to believe that the child is Indian. ICWA has been viewed as the "gold standard of child welfare practice" by mainstream child welfare organizations. Thus, there is no harm in applying ICWA to a child who may be Indian, even if it is ultimately determined that he or she is not. You may want to consider replacing the phrase "is an Indian child" with "may be an Indian child".

(f) We believe that this section is confusing. In essence, 25 U.S.C. 1913(b) and (c) provide for a child to be returned to his or her parent upon demand in any voluntary child custody proceeding. Thus, (f) and (g) appear to be in conflict with each other. We would recommend either deleting (f) or changing the language to read, "Voluntary placements made without involvement of an agency or State court where the parent can regain custody of the child upon demand are not covered by ICWA."

23.105

(a) – We would reword this section in a manner similar to what we recommended for section 23.101. We recommend the following:

"These regulations provide minimum Federal standards that define the best interests of Indian children to ensure compliance with ICWA and are applicable in all child custody proceedings in which ICWA applies."

(b) We believe that it is important that it be made clear that these standards are minimum standards and that state efforts to expand upon and clarify ICWA provisions are not negatively affected by these regulations. Thus, we suggest adding a second sentence as follows:

"As these regulations constitute minimum standards, nothing herein shall be interpreted to preempt any state law, policy or procedures or tribal-state agreement (as provided for by section 109 of the Act [25 U.S.C. 1919]) that expands upon or clarifies the ICWA in a manner consistent with the intent of ICWA to provide maximum protection to the rights of Indian children, families and tribes."

23.106

We strongly support this section. Subsection (a) might read better if the phrase "in order to prevent removal" was moved to the beginning of the sentence.

23.107

We support the intent of this section to clarify and strengthen requirements regarding identification of Indian children. We believe that the section should be revised in several respects.

(a) – The Bureau may want to consider changing the language to reason to believe that the child "may be" an Indian child, not "is" an Indian child. In addition, we think that agencies should need to "seek" verification, not "obtain" verification since states cannot control whether a tribe responds. Also, if no agency is involved in the case, the party seeking placement of the child should have an obligation to inquire about the Indian status of the child. Finally, it would help to be clear who (at a minimum) should be asked about the child's ancestry. Thus, we propose amending (a) as follows:

"Agencies (or where no agency is involved, the party seeking placement) must ask (at a minimum) the child's parents, custodians, or other relatives that have a close relationship with the child whether there is reason to believe that a child may be an Indian child. If there is reason to believe that the child may be an Indian child, the agency (or party) must seek verification, preferably in writing, from all tribes in which it is believed the child may be a member or eligible for membership, as to whether the child is an Indian child. These efforts must be documented in the record."

(b) – We have a few suggestions for tightening up the language in this section.

- We would suggest changing "is an Indian child" to "may be an Indian child"; at the end of the first paragraph;
- We would add at the end of this subsection the phrase "following a good faith effort to obtain such information as required by subsection (a)" to make clear that agencies and parties should also affirm that they complied with section (a) inquiry requirements;

- In the first section of paragraph (1), we suggest changing "may wish to" to "should" – this does not make these requirements mandatory, but would at least encourage courts to consider asking for this information;
- We would change the phrase "active efforts" in paragraph (2) to "due diligence" – active efforts is a term of art in ICWA (section 1912(d)) and using it here might be confusing. We also suggest an additional sentence in paragraph (2) as follows: "Written notice to a tribe by itself is not sufficient to meet the requirements of this paragraph (unless said notice results in verification)."

(c) – We suggest changing "is an Indian child" to "may be an Indian child". We also suggest adding two new paragraphs – "(6) – "The child is or has been a ward of a tribal court." "(7) Either parent or child possesses a tribal membership card or a certificate of Indian blood".

(d) – We are concerned that this section as drafted could interfere with the identification of Indian children and the application of ICWA. Thus, we would recommend redrafting the first section as follows:

"Unless it would interfere with obtaining verification of the child's status, in a voluntary proceeding where a consenting parent evidences a desire for anonymity, the agency or court should keep relevant documents confidential and under seal."

We also recommending adding a third sentence to this section as follows: "This requirement shall not be interpreted to prevent any party to the child custody proceeding, including the Indian child's tribe, from obtaining access to these documents if needed to fully present the party's legal position to the Court."

We are aware that arguments are being made that notice to the tribe somehow violates the constitutional rights of a parent who is seeking anonymity apparently because it may affect the parent's rights to determine the placement of his or her child. This reasoning is flawed for at least two reasons. First, the link between notice and the alleged harm is attenuated. Secondly, the supposed constitutional right would be a significant expansion of Supreme Court jurisprudence on parental rights as it would extend those rights to a parent who is relinquishing those very rights in an adoption proceeding. Adoption laws and rights are purely statutory. As the Courts have stated, "[a]doption always involves the weighing and balancing of many competing interests. The rights of a couple to adopt must be reconciled with the state's interest in protecting the existing rights of the natural parents, as well as in securing ultimately the welfare of the child." *Lindley for Lindley v. Sullivan*, 889 F.2d 124, 131 (7th Cir. 1989).

23.108

In general, we strongly support this section as tribes as sovereigns are the only entities that can make a definitive determination about tribal membership. We suggest one change to this section, however, to make clear that the absence of a tribal response does not preclude application of ICWA where the Court otherwise has reason to know that the child may be an Indian child. Otherwise, courts may say, "the tribe didn't respond, so ICWA doesn't apply." Our recommended language is as follows:

Add at the end of section (d), "Provided that if the tribe does not respond following a good faith effort to obtain confirmation from the tribe regarding membership, the Court must still treat the child as an Indian child if it otherwise has reason to believe that the child may be an Indian child as provided for in these regulations."

23.109

We agree with this section and particularly note our support for subsection (d) which clarifies that one tribe may designate another tribe to act on its behalf in a child custody case, but would suggest modifying "child custody case" to read "child custody proceeding" to make the wording of this section consistent with the statute.

23.111

We support this section, particularly clarifying that notice is required in voluntary proceedings. We understand that this requirement is not specifically in the statute. Thus, it is important for these regulations to explain why notice is necessary to achieve the purposes of the provisions in the statute applicable to voluntary proceedings.

Congress was very concerned about voluntary proceedings when it enacted ICWA. As the sponsor of the ICWA (Senator Abourezk) observed, "[p]artly because of the decreasing numbers of Anglo children available for adoption and changing attitudes about interracial adoptions, the demand for Indian children has increased dramatically." 123 Cong. Rec. 21043 (1977). *See also* 1974 Senate Hearing at 146 ("[Indian] Infants under 1 year old are adopted at [a] rate . . . 139 percent greater than the rate of non-Indians in the state of Minnesota.")

Senator Abourezk's statement was an accurate reflection of the hearings which were replete with testimony about public and private agencies and private attorneys and their sometimes overzealous pursuit of Indian children for adoption by non-Indians. *See, e.g.*, 1974 Senate Hearing at 70 (referring to the adoption system as a "grey market" because "there's tremendous pressure to adopt Indian children, or have Indian children adopted out") (testimony of Bertram Hirsch for AAIA), *id.* at 161 (calling for "an investigation of agencies who deal with the Indian adoptions and make them accountable for the methods they use for transporting Indian children across the state lines and the Canadian borders") (testimony of Esther Mays, Native American Child Protection Council); 1977 Senate Hearing at 359, *viz.*,

> Private adoption . . . process involves doctors and private attorneys who arrange for adoptions of their Indian client's children to a non-Indian through their attorney directly through a court . . . All of us are aware of the adoption black market that has blossomed due to the effects of modern family planning efforts. Some people will pay thousands of dollars for a child. It is also well-known that Indian children have always been a prize catch in the field of adoption.
>
> (statement of Don Milligan, State of Washington, Department of Social and Health Services)

Particular concerns were expressed about the failure of adoption agencies to utilize Indian families for placement. *See, e.g.*, 1974 Senate Hearing at 61 ("[W]elfare agencies tend to think of adoption too quickly without having other options available . . . Once you're at the point of thinking about adoption . . . welfare agencies are not making adequate use of the Indian communities themselves. They tend to look elsewhere for adoption type of homes.") (testimony of Dr. Carl Mindell, a child psychiatrist at Albany Medical College); *id.* at 116 ("The standards that have been established by adoption agencies have created an additional burden . . . as they are white status quo oriented . . . As you well know, this automatically leaves the Indian out.") (statement of Mel Sampson, Northwest Affiliated Tribes); 1977 Senate Hearing at 271 ("Through various ways, the State of Washington public assistance and private placing agencies can completely go around the issue and place without contact to that child's tribe, until the action is completed and irreversible", noting that of 136 Colville adoptions in the last 10 years, only 20 went to Indian families and 31 were out-of-state.) (testimony of Virgil Gunn, Colville Business Council); 1974 Senate Hearing at 147 (testimony of Leon Cook).

Moreover, many "voluntary" consents are not truly voluntary. House Report 95-1386 at 11. Consents in voluntary adoption cases were sometimes "coerced" or induced by "trickery." *See, e.g.*, 1974 Senate Hearing at 23 and 222-23 (testimony about woman who was tricked into signing a form which she was told would allow two non-Indian women to take her child for a short visit, but which in reality was a consent to adoption, and a discussion of parents who have been "induced to waive their parental rights voluntarily without understanding the implications.") As Senator Abourezk summarized, it was asserted that "in many cases they [parents] were lied to, they were given documents to sign and they were deceived about the contents of the documents." 1974 Senate Hearing at 463.

Many of these practices continue today. State voluntary private adoption systems have been described as "inadequate" and "largely under-regulated." *See* Michele Goodwin, *The Free-Market Approach to Adoption: The Value of a Baby*, B.C. Third World L.J. 61, 64, 66 (2006); *see also* Carol S. Silverman, *Regulating Private Adoptions*, 22 Colum. J. L. & Soc. Probs. 323. Moreover, as white infants are in short supply, Debora L. Spar, *The Baby Business: How Money, Science, and Politics Drive the Commerce of Conception* 173 (2006), there is an increased demand for Indian, Asian American, or Latina babies. Pamela Anne Quiroz, *Adoption in a Color Blind Society* 5-6 (2007) (labeling this category of adoptable babies "honorary white babies").

> Thus, a recent report found that
>
> 1) Available data and experience indicate a minority of infant adoptions involve fathers in the process . . . Many states have established putative father registries . . . but they are often used as a means of cutting them out rather than including them;
> 2) In some states, attorneys paid by and representing the prospective adoptive parents also may represent the women (and men when they are involved) considering placing their children. This practice . . . raises acute ethical and practical concerns;

> 3) Most states do not have laws that maximize sound decision-making . . . such as required counseling, waiting periods of at least several days after childbirth before signing relinquishments, and adequate revocation periods during which birthparents can change their minds.
>
> Evan B. Donaldson Adoption Institute, *Safeguarding the Rights and Well-Being of the Birth Parents in the Adoption Process* 3-4 (2006).

It is not surprising that there are numerous examples of individuals seeking to effectuate an adoption who have engaged in unethical behavior, including trying to circumvent ICWA. *See, e.g., In Re Bridget R.,* 49 Cal. Rptr. 2d 507, 517 (Cal. Ct. App. 1996) (father omitted information that he was Native American on adoption form because "the adoption would be delayed or prevented if [Father's] Indian ancestry were known"); *In the Matter of the Adoption of Infant Boy Crews*, 803 P.2d 24, 26 (Wash. Ct. App. 1991) ([Adoption counselor] advised Crews not to mention her Indian blood to anyone, stating, "What I don't hear, I don't know."); *In re Adoption of Kenton H.*, 725 N.W.2d 548 (Neb. 2007) (Mother who "was hospitalized and 'under the influence of morphine and other mind-altering medications' when she signed the relinquishment . . . " was told by a caseworker "that her only hope of keeping any of her children was to voluntarily relinquish her rights to [the one child]").

Thus, it is essential that the regulations include requirements to make sure that the provisions in ICWA that apply to voluntary proceedings can be enforced and applied to all Indian children. These rights include 25 U.S.C. 1911(a) (exclusive jurisdiction by tribe if child is resident or domiciled on the reservation); 25 U.S.C. § 1911(b) (right to request transfer to tribal court), 25 U.S.C. § § 1913(a) and (c) (heightened protection and procedures for voluntary consent to adoption), 25 U.S.C. §1915(a) (application of the placement preferences except in certain limited circumstances), and 25 U.S.C. §1911(c) (tribal right to intervene). (The scope of the right to request transfer to tribal court and the tribal right to intervene are discussed in more detail below.)

Without notice to tribes (1) many Indian children will not be afforded the protections provided by ICWA because notice to the tribe is essential to determining whether the child is a member of the tribe or eligible to be a member and child of a member (i.e., whether the child is an "Indian child" within the meaning of the Act.), (2) states will be less able to determine if they have appropriate jurisdiction as it will be more difficult to determine the domicile of the child, (3) it will be more difficult to comply with the placement preferences, including the diligent search requirements, and (4) it will inhibit the ability of a tribe to exercise their rights of intervention, seek transfer of the case, or exercise their rights under § 1914 if the tribe does not know about the proceeding. Thus, given that these important rights would be compromised, if not thwarted, by the absence of tribal notice, and given the clear Congressional intent to address the issue of abusive practices in the private adoption market, we believe that the absence of a specific notice provision in the ICWA does not mean that the BIA does not have the authority to impose such a requirement if it can be shown to be necessary to effectuate the purposes of the Act. Indeed, it is entirely reasonable to take such action after 35 years of experience has shown that without notice many of these ICWA provisions and rights have not been fulfilled as intended.

Among other things, opponents of this provision argue that tribes have no right to intervene in voluntary proceedings and that therefore this is not a rationale for tribal notice. While a few cases have supported this view, they are certainly incorrect insofar as they hold that tribes do not have these rights in all voluntary proceedings. The language of the intervention section (25 U.S.C. § 1911(c)) makes clear that tribes can intervene in all termination of parental rights proceedings. This section is placed in 25 U.S.C. § 1911 which applies to both voluntary and involuntary proceedings, not § 1912 which is specifically about involuntary proceedings. There is no limiting language in this section that refers to "involuntary" proceedings only. Thus, there are compelling reasons to provide notice to tribes of all termination of parental rights proceedings so that they can effectuate these rights, particularly since some of these proceedings happen very quickly before the tribe would be likely to find out about the proceeding without notice.

Thus, the only real issue is whether tribes have the right to intervene in adoption proceeding which take place separately from the proceeding during which parental rights are terminated. Notwithstanding the statutory language, there is a strong rationale for concluding that tribes should have an intervention right in all child custody proceedings. First of all, the tribe is *parens patriae* for all of its children wherever they reside. *See* 1977 Final Report of the American Indian Policy Review Commission cited as part of the legislative history of the Indian Child Welfare Act, Senate Report No. 597, 95th Congress, 1st Sess. (November 3, 1977) at 51 (an Indian tribal government stands in the "relationship...of *parens patriae* to all its tribal members."); *Native Village of Venetie IRA Council v. Alaska*, 155 F.3d 1150, 1152 (9th Cir. 1998); *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982) (Puerto Rico, as *parens patriae*, has right to intervene in Virginia state court to protect the health and safety of Puerto Rican workers in Virginia.). In order to serve that vital function for its children, the right to intervene is essential. Indeed, even some of the (small number of) courts that have concluded that tribes do not have the right to intervene under federal law have allowed tribes to intervene under state law to advance this sovereign interest. *See, e.g., In re Baby Girl A.*, 282 Cal. Rptr. 105 (Ct. App. 1991). When opponents of tribal notice and involvement argue that the regulations treat the child as the "property" of the tribe, it is a clear indication that they either do not understand or accept that tribes have this sovereign authority and responsibility, just as states do.

Secondly, as noted earlier, Congress wanted minimum and (as recognized in the *Holyfield* case) uniform federal standards to be applied to child custody proceedings involving Indian children. Yet, state procedures pertaining to adoption vary widely. In some states, termination occurs as part of the adoption proceeding. In other states, termination occurs in a totally separate proceeding from that of the adoption. Thus, if the tribal right to intervene is limited to termination proceedings, in some states tribes will be able to intervene in adoption proceedings, in others they will not. Indeed, some courts have recognized this broader right of intervention. *See, e.g., Matter of Baby Girl Doe*, 865 P.2d 1090, 1093 (Mont. 1993) (stating that the ICWA "grant(s) tribes the right to intervene in any proceeding involving the placement of Indian children.").

Whether or not this interpretation is fully accepted, however, should not affect the proposed regulation on notice. As noted earlier, the tribe's right (or not) to intervene in a case is not the sole rationale for voluntary notice. Even if tribes were viewed as not having the right to intervene in separate adoption proceedings, at most this gives rise to an argument that where the child's

Indian identity and domicile is clear and the child will be placed with a preferred placement in an adoption proceeding, notice is less essential and the rule can provide an exception under those circumstances. However, most voluntary placements do not meet these criteria. Thus, a prophylactic rule can be justified even without reference to the tribal right of intervention.

In addition to supporting the voluntary notice requirement in this section, we also support the requirement that notice to tribes be provided by both the sending and receiving State court when an interstate placement is made.

We also have two additional suggestions regarding this section:

The Fostering Connections to Success and Increasing Adoptions Act codified at 42 U.S.C. 670 *et seq.* requires that within 30 days after removal of a child, the State must identify and provide notice to all adult grandparents and other adult relatives. A provision should be added to the regulations clarifying that nothing herein is meant to lessen those requirements.

23.113

In general, we believe that this regulation usefully clarifies that emergency removals must be as short as possible, terminate when the emergency has ended and that these restrictions apply to all Indian children, regardless of domicile or residence. We have a few technical amendments to recommend:

We are concerned that subsection (f) as currently drafted could be interpreted to allow a child to be removed for up to 30 days without an evidentiary hearing, notwithstanding the language in (a)(2), and that the regulations could inadvertently interfere with the "normal" ICWA foster care hearing requirements. Thus, we would suggest redrafting subsection (f) to include the following components

- Initial evidentiary hearing at which testimony is provided. Language in the Guidelines indicating that courts should accept and evaluate all relevant evidence should be included in this section. The timing of the hearing would be as provided by state law, provided that it is no longer than 72 hours after removal.
- Absent extraordinary circumstances, there should be no removal after 30 days absent a 1912(e)-compliant foster care hearing; if that is not possible due to requests for an extension of time by the parent or tribe, then the procedure described in the regulations may be substituted.

We would reword subsection (g) to provide that the placement must terminate as soon as the emergency no longer exists or as soon "as the tribal court issues an order that the placement terminate". Exercise of tribal jurisdiction by itself should not be the trigger; the tribal court must be given the opportunity to make a decision about what should be done.

Finally, we believe that another subsection should be added as follows:

"Any emergency placement of an Indian child should be made in accordance with the placement preferences whenever possible. If the child cannot be placed with a preferred placement initially, then every effort should be made to identify and move the child to a preferred placement as soon as possible, absent extraordinary circumstances."

23.114

We support this section in general, but suggest that the provision should reference the statutory language in 25 U.S.C. 1920, rather than the language in 25 U.S.C. 1922. Thus, we would suggest that the language provide that the child be returned to the parent "unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger."

23.115

We support this section, particularly the clarifications that a request to transfer may be done orally, applies to each proceeding and may be done at any stage of the process. We would recommend that the language in the Guidelines indicating that there is a presumption in favor of transfer (derived from the *Holyfield* case) be added to the regulations.

23.116

We would recommend modifying this section to make it clear that a parent whose rights have been terminated cannot object to the transfer of a proceeding to tribal court.

23.117

We strongly support this section in general, particularly provisions spelling out reasons that are not legitimately part of a good cause determination not to transfer.

Again, we recognize that some opponents of the regulations are contending that there is no right to transfer voluntary proceedings to tribal court. Our analysis in regard to this issue is similar to our analysis of the intervention issue in our comments to section 23.111. The language of the transfer section (25 U.S.C. § 1911(b)) makes clear that all termination of parental rights proceedings can be transferred to tribal court. This section is placed in 25 U.S.C. § 1911 which applies to both voluntary and involuntary proceedings, not § 1912 which is specifically about involuntary proceedings. There is no limiting language in this section that refers to "involuntary" proceedings only. Biological parents can veto transfers to tribal court, so a relinquishing parent is not forced to have his or her case heard by a tribal court if he/she does not want to appear before that forum.

Once again, the only question is whether adoption proceedings that happen separately from termination can be transferred. We believe that the same arguments that we made about *parens patriae* and uniformity apply here. *See also House Report 95-1386* (95th Cong., 2nd Sess.) (July 24, 1978) ("Subsection (b) directs the State court, having jurisdiction over an Indian child custody proceeding, to transfer such proceeding, absent good cause to the contrary, to the

appropriate tribal court upon the petition of the parents or the Indian tribe."). We would note that there is no question that the tribe would legitimately have concurrent jurisdiction over such cases because the focal point of the proceeding is the Indian child, not the adoptive parents.

While we support this section in general, we believe that it can be strengthened by making the following change:

In subsection (c), the word "would" should be changed to "could" since it can be the mere "fear" by the state court judge of the potential a change in placement that sometimes leads to the denial of a transfer motion.

We would also note that the legislative history of ICWA indicates that the good cause provision was intended to permit a state court to apply a modified version of the doctrine of *forum non conveniens*. House Report 95-1386 at 21. *See also Yavapai-Apache Tribe v. Meija*, 906 S.W.2d 152, 165 (Tex. Ct. App. 1995). This is consistent with the narrowing of the reasons for good cause in the proposed regulations. (Indeed, if a tribal court can and is willing to develop procedures to make its forum more convenient and accessible to the litigants, then even that doctrine should not serve as grounds to deny transfer. *See In re A.B.*, 663 N.W.2d 625 (N.D. 2003).)

23.120

We would suggest specifically addressing the holding of *Adoptive Couple v. Baby Girl* in this section. If it is not specifically acknowledged and addressed, we are afraid that courts will ignore this section and instead substitute their own interpretation of *Baby Girl* which may be more expansive than warranted by the case.

Thus, we suggest the following clause be added to the beginning of this section:

"Except in the case of a private adoption where the father abandoned the child (having knowledge of the pregnancy) and never had previous legal or physical custody,"

We believe that this limitation of the scope of *Adoptive Couple v. Baby Girl* is justified. Much of the Court's analysis of section 1912(d) in that case was based on the specific facts of the case, in particular the voluntary adoption context from which it arose. In fact, the Court stated that "Section 1912(d) is a sensible requirement when applied to state social workers who might otherwise be too quick to remove Indian children from their Indian families." 133 S.Ct. at 2563. In addition, Justice Breyer's concurrence (Justice Breyer's vote was necessary for the five vote majority) is consistent with limiting the scope of the Court's holding to the type of factual circumstances presented by the case as he insisted that the decision "decided no more than is necessary." 133 S.Ct. at 2571.

In addition to language addressing *Adoptive Couple v. Baby Girl*, we would add language that there are no time limits on the provision of active efforts, or exclusions to the application of the active efforts requirements. There are time limits and other limitations upon the reasonable efforts requirement present in generally applicable federal child welfare law that were added by

the Adoption and Safe Families Act (ASFA) in 1997. It has sometimes been argued that ASFA has somehow modified ICWA in this respect. For a number of reasons, however, ASFA requirements should not be imputed into or in any way be interpreted as changing the requirements of ICWA regarding active efforts.

First of all, Title IV-B and IV-E (which ASFA amended) have never been interpreted as modifying ICWA. Indeed, Title IV-B include a requirement that state plans include a description about how the State will comply with ICWA, developed after consultation with tribes. 42 U.S.C. 622(11). This was not changed by ASFA.

Secondly, ICWA was specifically crafted to meet the unique needs of Indian children and it is a standard rule of statutory construction that specific legislative enactments take precedence over general statutory enactments. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 550-551 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.") This does not mean that ASFA and Title IV-B and IV-E are inapplicable to Indian children. Many of the provisions of ASFA and ICWA do not conflict and in that case ASFA provisions may be applied. Where they do conflict, however, ICWA must be applied. This is especially true given the canon that Indian-specific statutes are "to be construed liberally in favor of the Indians . . ." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

23.121

In subsections (a) or (b), there appears to be an inadvertent drafting error. Each section should read "serious emotional or physical damage" to make the sections consistent with the statute and with subsections (c) and (d).

We would also recommend that this section be modified to provide that the standard of proof for each element of proof necessary for a foster care placement or termination of parental rights should match the standard of proof for that proceeding. In other words, active efforts in the case of a foster care placement must be shown by clear and convincing evidence; in the case of a termination of parental rights proceeding, it would need to be proven beyond a reasonable doubt.

23.122

We believe that it is very important that this section clarifies the purpose of a Qualified Expert Witnesses – specifically that before a foster care placement is made or order terminating parental rights entered, the court must receive testimony from at least one expert that understands the Indian tribe's culture and customs as they pertain to childrearing practices.

We believe that there are two clarifications/technical changes that would be helpful. First, we would suggest that language be added making clear that this section does not preclude courts from hearing testimony from other expert witnesses as well. This may allay concerns about this section that have arisen (at least in part) due to misinterpretations of this section in this regard.

Secondly, we believe that the first sentence in (b) does not make sense as drafted and needs a technical amendment. If all of the persons listed are presumed to be QEWs, it is not clear what it means that the presumption is in descending order. The section should either say (depending on the Bureau's intent) that (1) the preferred QEW to testify in a case shall be determined pursuant to the following order, or (2) it should delete the words "in descending order".

23.123

We support the clarification that notice should be provided in all voluntary proceedings for the reasons discussed in our comments to section 23.111. We would suggest a few additions to this section:

First, we suggest that the language explaining the rationale for this section which is included in the Guidelines be included in this section or, if not in the section, at least in the Commentary, perhaps expanded to include some of the other points that we made in our comments on section 23.111.

Second, this section should explicitly reference the tribal right to transfer of the proceeding as well.

Finally, we would suggest language indicating that "state courts should consider promulgating court rules that would apply this section to attorneys and other officers of the court as well." This will help to prevent circumvention of this rule in cases where no agency is involved.

23.124

We would suggest adding the following language to subsection (b) after the word explain: "to the parent his or her rights under ICWA and … [the consequences, etc.]"

23.125

We suggest adding language stating that "Any consent to adoption not executed in exactly this way is not binding."

We also believe that the consent should include specific information about how consent may be withdrawn as part of the "conditions of the consent" and that such right to withdraw consent cannot be waived.

23.126

We believe that it should be made clear that this section does not require a withdrawing parent to be the person who files the withdrawal with the court. This section should require the agency to so inform the court when a parent revokes consent and those procedures should clearly be included in the consent itself so the parent is informed how to invoke this right. This recommendation recognizes that many parents may not have access to legal representation and may lack the sophistication to file papers with the court.

23.127

We strongly support the clarification in this section that consent may be withdrawn at any time prior to the TPR or adoption, whichever is later. The language in this statute is admittedly ambiguous and it is legitimate and helpful for the BIA to clarify its meaning. We believe the interpretation in the regulations is the proper interpretation. Because Congress found that many parents were pressured or even tricked into consent to termination of their parental rights and/or adoption, Congress crafted a withdrawal of consent provision in order to give Indian parents time to change their minds about giving up their child for adoption. Yet in some states, termination is entered almost immediately after the consent has been executed. Thus, a narrow reading of this provision (essentially to mean "whichever is earlier", rather than "whichever is later") would in many instances thwart the Congressional intent to provide Indian parents with the opportunity to reconsider.

We also recommend a change to this section similar to that recommended in section 23.126 – namely that the parent not be required to actually file with the court (although the parent should have that option). If an agency is informed of the parent's withdrawal of consent pursuant to procedures specified at the time of consent (or if the attorney representing the prospective adoptive parents is informed in cases where an agency is not involved), those parties should have the obligation to file the withdrawal with the court.

Finally, because the state where the consent has been issued may be different than the state where the child has been placed for adoption, there should be language added requiring that (1) the agency or party seeking the adoption inform the court that certified the consent of the specific location of the court where the adoption is being sought, (2) the certifying court inform the court where the adoption is pending of the withdrawal, and (3) the court handling the adoption facilitate return of the child when consent has been withdrawn.

23.128

We believe that requiring agencies to follow the placement preferences and conduct a diligent search for a preferred placement in every case are critically important requirements. The ICWA recognizes that in the vast majority of cases it is in the best interests of Indian children to be placed with their relatives, other tribal members or other Indian families. Yet these requirements have been widely ignored and almost half of Indian children continue to be placed in non-preferred placements. Thus, strengthening compliance with these requirements is critical.

We believe that this section can be improved if certain changes are made:

It should be made clear that this section applies to both voluntary and involuntary proceedings.

Section (b)(2) should have an exception similar to the Fostering Connections to Success Act, specifically that exceptions to notice are possible in case of family or domestic violence. See 42 U.S.C. 671(a)(29).

Section (b)(4)(i) – The following phrase should be added to the end of this section – "identified by the tribe as available for placements"

Section (b)(4)(ii) – Reword to read – "All Indian foster homes located within reasonable proximity to the child's home that are authorized or approved by any authorized non-Indian licensing authority." This change makes this requirement more manageable, meaningful and focused. It recognizes the statutory preference to place children in promixity to their parents to promote reunification, but eliminates the artificial limitation that the home be located within the same state.

Add a section specifically addressing the *Adoptive Couple v. Baby Girl* case's limitation on the application of the placement preferences by defining what a person needs to do to "demonstrate that he or she is willing to adopt" a particular child, thereby triggering the application of the placement preferences in an adoption case. We would suggest the following:

"For the purposes of triggering application of the placement preferences in an adoption proceeding, a party shall be deemed as having demonstrated that he or she is willing to adopt a particular child if (1) the individual so informs the court orally during a court proceeding or in writing or (2) an agency or tribe informs the court orally in a court proceeding or in writing that a specific individual or individuals has indicated to the agency or tribe that they are willing to adopt the child. An agency must inform the court whenever it has been so notified."

This would help to clarify the ambiguities in the Court's decision. We would not recommend leaving this unaddressed as it will invite courts to read the decision more expansively, as the Alaska Supreme Court did in *Native Village of Tununak v. State of Alaska.*

23.131

We believe that it is vitally important that good cause to deviate from the placement preferences be defined and limited. Almost 50 percent of Indian children are placed in non-preferred placements, even though more than 35 years ago Congress determined that it is normally in the best interests of Indian children to be placed with their relatives, other tribal families or other Indian families. Thus, we support this provision (with three suggested changes below).

We are aware that the limitation on the consideration of "ordinary bonding and attachment" in (c)(3) is vigorously opposed by adoption attorneys and their supporters and constituents. We believe, however, that there are strong reasons to retain this provision. The proposed section acts as a preventive measure to encourage compliance with ICWA. Without this provision, those advocating for the departure from the placement preferences may be rewarded for the attachment or bonding that occurs from intentional or unintentional noncompliance with ICWA. Congress has determined that placing Indian children with their families, tribal members or other Indian families is in their best interest in most cases. If significantly more Indian children are placed in preferred placements by reason of this proposal, then many more children will have been placed consistent with their best interests.

The argument by the adoption advocates fails to acknowledge the problem that the BIA is seeking to address with the provision. Specifically, agencies and attorneys have sometimes thwarted ICWA's placement preferences by placing Indian children with non-preferred families, resisting efforts to move the child for an extended period even when a family member is available, and then justifying the initial improper placement by arguing bonding or attachment. When these arguments are successful, they incentivize non-compliance with the law and therefore promote placement insecurity for Indian children.

We would note that the adoption attorneys' arguments are flawed in other respects. The adoption advocates' argument assumes that the use of bonding and attachment is essential for a court to make decisions based upon the best interests of the child. This ignores two salient facts:

1) Attachment theory (which is the underlying basis for the bonding/attachment criteria used by courts) is based squarely on Western (i.e., Euro-American) cultural norms. The viability of its application outside that context, particularly in the context of indigenous cultures, has been questioned by a number of researchers and social scientists.
2) There has been increasing criticism of the use of bonding and attachment in child custody proceedings and serious questions raised about how probative such evaluations are for all children, not just Indian children.

Of note, the provision prevents consideration of "ordinary" bonding and attachment. Presumably, this would mean if there is some extraordinary situation above and beyond the usual relationship formed by a caregiver and child, this could be considered by a court.

Finally, we would note that there are court decisions that support this proposed regulation. *See, e.g., In re C.H.*, 997 P.2d 776, 783-784 (Mont. 2000) (allowing emotional bonding to be considered good cause would "negate the ICWA presumption" that the statutory preferences are in the Indian child's best interests.")

Attached to these comments is a more extensive paper addressing the bonding and attachment issue.

We do recommend three changes to this section.

First, (c)(1) should be modified to provide that the request of both parents may constitute good cause, but that a court should review such a request to determine whether the placement would be in the best interests of the child, taking into account the child's rights and interests as an Indian child. Parents who have decided not to raise their child should not have the unilateral authority to determine whether the child will have continued contact with relatives and the tribe. The court should weigh the parents' request and the impact upon the child of a given non-preferred placement in determining whether good cause exists.

Second, we would add a subsection indicating that if the child's tribe approves of the placement, this constitutes good cause. Tribes sometimes decide that a placement with a non-preferred

placement is in the child's best interests and these regulations should defer to such determinations by a tribe acting as *parens patriae*.

Finally, while we agree that the request of the child may be good cause, we think that the child needs to be of sufficient age and maturity. The language in the proposal is so broad that relatively young children could be included within its scope. We do not think this would be appropriate. The 1979 Guidelines made reference to age and we believe the regulations should as well. Including a specific minimum age (perhaps 12 or 13) might also be considered.

23.132 and 23.133

There appear to be some inconsistencies between and within the two sections. 23.132 refers only to the parent in subsection (a), but not the tribe, which is inconsistent with 23.133 at least in regard to actions alleging violations of ICWA. 23.132(a) and 23.133(a) refer to violations of ICWA generally, but 23.133(b) limits remedies to violations of 25 U.S.C. 1911, 1912 and 1913 (which tracks the statute – 25 U.S.C. 1914). We would suggest revising these sections to make them more straightforward, i.e., a parent may challenge an adoption for fraud or duress and a parent, child or tribe may challenge a violation of 25 U.S.C. 1911, 1912 or 1913.

In terms of the statute of limitations question, ICWA specifically provides for a 2 year limit for fraud or duress and is silent in regard to challenges under 25 U.S.C. 1914. It is unclear if the draft regulation intended to set a 2 year limit on all challenges. The language in 23.132(a) could read that way, but given the inconsistencies discussed above it is not entirely clear. At a minimum, this provision should clarify it is not appropriate to rely upon state statutes of limitation to limit section 1914 rights. *See Mississippi Band of Choctaw Indians v. Holyfield.*

23.134

We do not support this section as written. It narrows the scope of 25 U.S.C. 1917 and would disrupt more than three decades of practice during which many adoptees have obtained full access to their adoption records and/or reconnected with their original families pursuant to this provision. I have represented some of those adoptees. The regulations adopt the narrowest interpretation by state courts of this provision, an interpretation that should be rejected.

Both the legislative history and language of the statute mandate that the information about the adoption be provided directly to the adoptee, not to the tribe or funneled through third parties and that any confidentiality provisions in state law are preempted to the extent that they interfere with the adoptee's rights to a relationship with the tribe. Senate Report 95-597, 95th Congress, 1st Sess. (November 3, 1977) discussing a nearly identical version in the Senate version of the ICWA stated that it was the intent of this section to release only such information "as is necessary to establish the child's rights as an Indian person. Upon a proper showing to a court that knowledge of the names and addresses of his or her natural parent or parents is needed, only then shall *the child* be entitled to the information under the provision of this section."

Thus, we recommend that subsections (b) and (c) be deleted and be replaced with a new subsection (b) that reflects this legislative intent as follows:

"Notwithstanding any state law to the contrary, when knowledge of the names and addresses of biological parents is needed by any Indian individual who has reached the age of 18, and who was adopted, to protect any rights flowing from the individual's tribal relationship, the court must provide this information to such individual. If necessary, the court must also issue a court order authorizing the individual to obtain such records from an agency or officer of the court that possesses the records."

We would note that limiting access of records to the tribe or BIA may thwart the ability of some adoptees to establish their relationship with their tribe. Often records are incomplete. The BIA and agencies may not have the resources or motivation to take the information provided and conduct additional research to establish a tribal right or even to identify the correct tribe. Likewise, tribes may not have the capacity to fill in the gaps in information provided to determine membership. It is adult adoptees who have the motivation to take the limited information and find the additional facts necessary to secure their tribal rights

23.135

We support the notice requirement in this section, but do not agree with the waiver provision as drafted. In an involuntary proceeding where parental rights have not been terminated, we can think of no reason why notice should not be sent to a parent. A waiver by parents in that circumstance -- vulnerable parents with significant problems that have given rise to the involuntary proceeding – is particularly suspect.

In terms of voluntary proceedings, we recognize that some relinquishing parents may not want to receive any further information about their child. We also know, however, that in some cases parents may be pressured to waive the right to notice. In order to deal with these two possibilities, we would suggest that any waiver be explicitly confirmed before the judge with the consequences explained as part of the required 1913 process, as well as the parent's right to withdraw the waiver and how that can be done. In addition, the court should be required to maintain this information in a database and inform waiving parents that they can obtain that information at any time, notwithstanding the waiver, merely by contacting the court through a clearly defined and simple process that does not require legal counsel.

23.136 and 23.137

We support enhanced reporting and record requirements as originally contemplated by the ICWA. Data pertaining to placements of Indian children has always been inadequate and enforcing the data collection and storage requirements of the ICWA can help to rectify this shortcoming. We would note, however, that the ICWA has a provision for adult adoptees to access this information from the Department of Interior and a section should be added implementing this provision.

Other

Safe Haven Laws

We believe that the issue of safe haven laws should be addressed. As you probably know, these laws permit a parent to anonymously surrender a baby to a safe haven location. This can result in an Indian child not being identified and not being able to access the protections of ICWA. As a federal law, ICWA rights should supersede and preempt, to the extent necessary, state safe haven laws. Thus, we suggest adding a section to the regulations as follows:

"Upon relinquishment, representatives of the safe haven facility must ask the parent to provide information regarding tribal affiliation. If the parent provides the facility with reason to believe that the child is Indian, or the facility has any other reason to so conclude, then it should take steps to ensure that the court and any agency that may be involved with the child is so informed. Any child custody proceeding for such a child shall be conducted in accordance with the ICWA."

Intervention through Tribal Representative

We recommend including in the regulations a section that makes clear that a tribe may intervene through a tribal representative who need not be an attorney and, if an attorney, who need not be admitted in the particular jurisdiction in question. (We are not suggesting that non-attorneys necessarily be given all of the rights of attorneys – for example, the right of cross-examination of witnesses – but merely that the tribe would have the right to express its opinion to the court through a non-attorney if it chooses to do so because of resource limitations or other considerations). *See State ex. rel. Juv. Dept. v. Shuey*, 850 P.2d 378 (Or. App. 1993) (state interest in requiring attorney representation is outweighed by tribal interest in participating in ICWA proceedings).

Conclusion

Thank you for the opportunity to comment on these regulations. Once again, we very much appreciate the issuance of these proposed regulations and urge you to adopt strong ICWA regulations to ensure that the ICWA fulfills its essential purposes of protecting the rights of Indian children, families, and tribes.

Sincerely,

Jack F. Trope
Executive Director

Section 23.131 of the Proposed ICWA Regulations – Restrictions on the use of bonding and attachment

Overview

Section 23.131 of the proposed Regulations for State Courts and Agencies in Indian Child Custody Proceedings states that the "extraordinary physical or emotional needs of the child" may qualify as "good cause" to depart from the ICWA placement preferences, "provided that extraordinary physical or emotional needs of the child does not include ordinary bonding or attachment that may have occurred as a result of a placement…"

In the ICWA Guidelines issued in February, the Bureau of Indian Affairs (BIA) explained its rationale for this provision. It noted that "'good cause' has been liberally relied upon to deviate from the placement preferences in the past." It noted that state courts have not applied the placement preferences in circumstances where an Indian child has spent significant time with a family, even though the placement was made in violation of ICWA. Thus, this provision is included to "prevent such circumstances from arising…"

The proposed section acts as a preventive measure to encourage compliance with ICWA. Without this provision, those advocating for the departure from the placement preferences may be rewarded for the attachment or bonding that occurs from intentional or unintentional noncompliance with ICWA. Congress has determined that placing Indian children with their families, tribal members or other Indian families is in their best interest in most cases. If significantly more Indian children are placed in preferred placements by reason of this proposal, then many more children will have been placed consistent with their best interests.

Some adoption advocates are arguing that failing to consider attachment or bonding in ICWA cases will lead to decisions that are not in the best interests of Indian children. This argument is flawed in several respects:

1. It fails to acknowledge the problem that the BIA is seeking to address with the provision. Specifically, agencies and attorneys have sometimes thwarted ICWA's placement preferences -- which Congress has found advance the best interests of Indian children -- by placing Indian children with non-preferred families, resisting efforts to move the child for an extended period even when a family member is available, and then justifying the initial improper placement by arguing bonding or attachment. When these arguments are successful, they incentivize non-compliance with the law and therefore promote placement insecurity for Indian children.

2. The adoption advocates' argument assumes that the use of bonding and attachment is essential for a court to make decisions based upon the best interests of the child. This ignores two salient facts:

a. Attachment theory (which is the underlying basis for the bonding/attachment criteria used by courts) is based squarely on Western (i.e., Euro-American) cultural norms. The viability of its application outside that context, particularly in the context of indigenous cultures, has been questioned by a number of researchers and social scientists.
b. There has been increasing criticism of the use of bonding and attachment in child custody proceedings and serious questions raised about how probative such evaluations are for all children, not just Indian children.

3. The provision prevents consideration of "ordinary" bonding and attachment. Presumably, this would mean if there is some extraordinary situation above and beyond the usual relationship formed by a caregiver and child, this could be considered by a court.

Purpose of the Proposed Regulation – Legal Basis

As described above, the provision is a preventive measure to increase compliance with the ICWA. The United States Supreme Court has recognized bonding and attachment cannot be grounds to override the larger purposes that the Act which has been crafted to advance the best interests of Indian children. In *Mississippi Band of Choctaw Indians v. Holyfield*, the Court overturned a state court adoption three years later, stating that "[h]ad the mandate of the ICWA been followed in 1986, of course, much potential anguish might have been avoided, and in any case the law cannot be applied so as automatically to 'reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.'"[1]

Bonding and Attachment in child welfare cases

Application of Bonding and Attachment theory in the Context of Non-Western Cultures

The theoretical assumptions and considerations in regard to attachment theory apply mainly to and were derived from studies of middle-class European and Euro-American parents from the twentieth century.[2] Indeed, much of the traditional attachment research has often overlooked or downplayed the role of culture.[3]

[1] 490 U.S. 30, 53-54 (1989).
[2] Cara Flanagan, *Early socialization: sociability and attachment* (1999); John W. Berry et al., *Cross-Cultural Psychology: Research and Applications* (1992).
[3] Fred Rothbaum et al., *Attachment and culture: Security in the United States and Japan*, 55 AMERICAN PSYCHOLOGIST 1093 (2000).

While studies are limited, those that have taken place have "reported inconsistencies of attachment security across cultures." [4] For example, scholars have questioned "the relevance of attachment theory to (Canadian) Aboriginal parents who do not adhere to the mother-infant dyad as the sole contributor to the child's sense of security."[5] Instead, those cultures emphasize a "multi-layered" set of bonds and a "dense network of relationships".[6] Studies have been made of similar cultures, including Australian aborigines and tribal people in Nigeria, which have concluded that an attachment network approach would be preferable in evaluating the quality of a child's emotional health, as opposed to one basis upon a dyadic perspective.[7]

Caution in using bonding and attachment as a basis for making decisions about the long-term well-being of Indian children is confirmed by a study of resilience among American Indian adolescents in the Upper Midwest. For children who have been placed in foster care or adoptive placement, resilience is often a key quality that determines their successful transition. Resilience is the "capacity to face challenges and to become somehow more capable despite adverse experiences."[8] This study found that although higher levels of maternal warmth had a positive impact on resilience, the "strongest predictor of higher levels of resilience [for American Indian adolescents] was enculturation", i.e., greater engagement with traditional culture.[9] "The level of community support for pro-social outcomes" was also significantly associated with resilience, confirming earlier studies highlighting the importance of individuals such as community leaders and teachers.[10]

These studies are confirmed by anecdotal stories of Indian children who have been separated from their biological parents. American Indian children placed out of home, alumni of the foster care system and adult adoptees describe their experiences as a search for a connection to their culture, language and relatives during and after out of home placement, a search essential to developing positive self-esteem.[11]

---

[4] Annemarie Huiberts et al., *Connectedness with parents and behavioural autonomy among Dutch and Moroccan adolescents*, 29 ETHNIC AND RACIAL STUDIES 315 (2006); Chia-Chih D. Wang & Brent S. Mallinckrodt, *Differences between Taiwanese and US cultural beliefs about ideal adult attachment*, 53 J. COUNSELING PSYCHOLOGY 192 (2006); Maureen E. Kenny et al., *Self-image and parental attachment among late adolescents in Belize*, 5 J. ADOLESCENCE 649 (2005); Fred Rothbaum et al., *Attachment and culture: Security in the United States and Japan*, 55 AMERICAN PSYCHOLOGIST 1093 (2000).

[5] Raymond Neckoway et al., *Is Attachment Theory Consistent with Aboriginal Parenting Realities?*, 3 FIRST PEOPLES CHILD & FAM. REV. 65 (2007).

[6] *Id.*

[7] Soo See Yeo, *Bonding and Attachment of Australian Aboriginal Children*, 12 CHILD ABUSE REV. 292 (2003).

[8] T.D. LaFromboise et al., *Family, Community, and School Influences on Resilience Among American Indian Adolescents in the Upper Midwest*, 34 J. COMMUNITY PSYCHOLOGY 193 (2006).

[9] *Id.*

[10] *Id.*

[11] See, e.g., Terry L. Cross, *Child Welfare In Indian Country: A Story Of Painful Removals*, HEALTH AFFAIRS, 33, no.12 (2014):2256-2259

In short, the research on how attachment theory should be applied in different cultures is limited. Given that the theory is based almost entirely upon Western values and subjects, it must be employed in the context of Indian children with great caution. Studies such as the resilience study confirm that the framework for security in American Indian cultures is often based on an independency of family, culture, nature and spirituality. "Evidence-based" practices that may have shown promising results in one context do not automatically translate to positive results when applied to Indian children and families.

Limitations in the Application of the Attachment Theory in general

Even aside from concerns about the application of attachment theory to American Indian children specifically, the scientific literature has raised concerns about the over-reliance on concepts of ordinary bonding or attachment in child custody proceedings in general. While there is certainly considerable literature about the significance of attachment theory, there is also significant research and scholarship which (1) reveals serious flaws in the use of bonding and attachment as practical tools in real-life child placement determinations by state courts; and (2) supports the notion that children can and do form multiple attachments and that having at least one secure attachment "buffers" a child from further developmental issues.

Use of Attachment Theory in Practice

Serious questions have been raised concerning the use of bonding and attachment to make child custody determinations. The concepts have been viewed by some judges and agency professionals as having "limitations" and "pitfalls" and of "limited use in juvenile and family court."[12] Some of the reasons for these conclusions are that

- the terms are used loosely and have different meanings for mental health care professionals, attorneys, experts, and judges;
- attachment theory tends to divide child and caregiver relationships into a limited number of types (gradations in attachment exist but some view it as present or not with no middle ground);
- the terms do not explicitly address the issue of different child and caregiver temperaments;
- over-reliance on signs of attachment can result in social workers mistaking dependence for developmental progress;
- attachment and bonding focus on security-seeking aspects of a child's relationship to a caregiver and disregard other important developmental needs;
- bonding studies assume that the bond with one adult does not change as the child develops, and

[12] David E. Arrendondo & Leonard P. Edwards, *Attachment, Bonding, and Reciprocal Connectedness*, J. CENTER FOR FAM., CHILD. & CTS. 109 (2000).

- the theory assumes that one primary attachment is the normative concept as opposed to recognizing that having several attachments may be healthier for the child.[13]

They note also that when recommendations are made, often a distinction is not made (but should be) between "temporary emotional pain" and "permanent emotional damage."[14]

These observations are supported by the findings of researchers who have concluded that the "use of attachment-related assessments provides no improvement in the scientific foundation of child custody evaluation."[15] The researchers note that the use of attachment theory in practice has passed from the hands of researchers to "inexperienced users who in many cases believe that there is far more evidence about attachment than actually exists."[16] In essence, many judicial decisions are based upon "misunderstandings of attachment theory and research" and "simplistic approaches to this complex aspect of development."[17] This "popularized" version can lead to analyses that tie all behavioral issues back to early childhood experiences, rather than recognizing behavior as an ongoing process of adaptation.

Another researcher described the best interests test as "vague" and the system as "deeply flawed" in part because of the "limited science" supporting these determinations.[18] The researcher further noted that the vagueness of the best interest concept leads to a "low scientific standard" for expert testimony.[19]

It is also worth noting that there is evidence that babies can and do form more than one attachment relationship.[20] As discussed previously, in indigenous communities it is often normal to have multiple attachments and for less reliance to be placed upon an attachment with a single caregiver. In addition, research shows that a secure attachment with at least one caregiver in early childhood buffers a child from the poor development that might otherwise follow with insecure attachment.[21] Thus, such children are better able to deal with change in a placement than children who have never had such an attachment.

Thus, while it is certainly true that there is some support for bonding and attachment as bases for child custody decisions in the literature, it is incorrect to think of these principles as sacrosanct. Indeed, there is reason to question about how often (as currently practiced in the courtroom) the decisions that are based upon bonding and attachment are actually in the long-

---

[13] *Id.*
[14] *Id.*
[15] Mercer, 7 SCI. REV. MENTAL HEALTH 37 (2009).
[16] *Id.*
[17] *Id.*
[18] Robert E. Emery et al., *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 PSYCHOLOGICAL SCIENCE IN THE PUBLIC INTEREST 1 (2005).
[19] *Id.*
[20] Eleanor Willemson & Kristen Marcel, *Attachment 101 for Attorneys: Implications for Infant Placement Decisions*, 36 SANTA CLARA L. REV. 439 (1996).
[21] *See id.*

term best interests of the children before the court, and specifically whether there is over-reliance by courts upon a short-term evaluation of the quality of the child's relationship with his or her caregiver when making decisions with long-term implications for the child. Certainly, broad generalizations regarding the impact of attachment and bonding theory upon a large population of children should be viewed with great skepticism.

Application of the Regulation

The regulation prohibits the consideration of the ordinary attachment or bonding that develops between a family and a child. If there is some extraordinary circumstance, e.g., a child with special medical needs, the regulation does not preclude consideration of that extraordinary circumstance. Thus, it is a carefully crafted regulation which balances the findings of the literature above, the intent of the Indian Child Welfare Act as defined by Congress, and the needs of Indian children.

Conclusion

The Bureau of Indian Affairs has proposed a regulation that would preclude classifying "ordinary bonding and attachment" occurring in a non-preferred placement as being the basis for a finding that the child has "extraordinary needs" that would justify a finding of "good cause" to place a child outside of the placement preferences. It has done this to encourage compliance with the placement preferences in the Act which Congress and the BIA have concluded will promote the best interests of Indian children in the vast majority of cases. This is an appropriate preventive measure that will result in more decisions in the best interests of Indian children, not fewer.

In addition, the literature suggests that the scientific validity of bonding and attachment as a component of the best interests test is weak, particularly as it is utilized in practice in the courtroom. Moreover, even if the test is viewed as having some probative value in the context of Caucasian children who are in family court, its application outside of the Euro-American culture from which it was derived has been seriously questioned as concepts of healthy emotional child development can vary significantly between cultures. For example, Native cultures tend to emphasize multiple caregivers, as opposed to the mother-infant dyad which is the focus of attachment theory.

For all of these reasons, the BIA's proposed regulation in terms of bonding and attachment is defensible as a mechanism to promote compliance with the ICWA.

This paper was prepared by the Association on American Indian Affairs pursuant to a contract with Casey Family Programs.