

**Donaldson Adoption Institute Comments on  
Department of the Interior, Bureau of Indian Affairs  
Notice of Proposed Rulemaking  
Regulations for State Courts and Agencies in Indian Child Custody Proceedings  
Docket ID: BIA-2015-0001  
May 19, 2015**

The [Donaldson Adoption Institute](#) (DAI) respectfully submits the below recommendations in response to the March 20, 2015 Department of the Interior (DOI), Bureau of Indian Affairs' (BIA) Notice of Proposed Rulemaking on Regulations for State Courts and Agencies in Indian Child Custody Proceedings (Docket ID: BIA-2015-0001).

DAI was established in 1996 to meet the need for an independent and objective adoption research and policy organization to address the rights and interests of first/birth parents, adopted children and adults, and adoptive parents. DAI's mission is to better the lives of everyone touched by adoption through sound research, education and advocacy that improves laws, policies and practices.

DAI appreciates DOI and BIA's commitment, efforts and rulemaking to fulfill the Indian Child Welfare Act's (ICWA) goals to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture."<sup>1</sup> DAI unequivocally supports these objectives.

DAI is pleased that BIA's proposed rule to supplement its current ICWA regulations offers minimum standards and requirements for the removal and placement of Indian children, beyond the 1979 regulations' notice requirements, to enable State child welfare agencies and courts to apply ICWA consistently and effectively. DAI supports, for example, the comprehensive applicability of ICWA and removal of the "existing Indian family doctrine."

By providing additional specificity to the "uniform interpretation of key provisions [] necessary to ensure compliance with ICWA,"<sup>2</sup> DAI believes that the Department could enable States to implement ICWA more consistently, thereby increasing ICWA compliance in safeguarding the best interests of Indian children and preserving Indian families and tribes. DAI is concerned that some proposed provisions lack sufficient detail and parameters "to effectively carry out the provisions of ICWA,"<sup>3</sup> which the new regulations are intended to do. Addressing these limitations would prevent implementation of potentially weakened ICWA standards that could result in inadequate state Indian child welfare policy that is contrary to congressional intent. As BIA recognizes, ICWA provides DOI "a broad grant of authority ... to issue rules in order to ensure that the statute is fully and properly implemented."<sup>4</sup>

The NPRM states that the revised regulations are intended to enable States to uniformly and consistently interpret and implement ICWA, as well as apply its standards in concert with congressional intent, to prevent "arbitrary outcomes" and ensure the rights of Indian children, families and tribes are upheld.<sup>5</sup> To counter any remaining and residual "cultural ignorance and

biases within the child welfare system” and state “fail[ures] to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families” that Congress found to be “significant causes” of the removal of Indian children from their homes and placement in non-Indian homes,<sup>6</sup> it is critical for BIA to establish clear requirements and guidelines for state child welfare agency and court procedures and determinations, as well as oversight and enforcement mechanisms.

### **Requirements to Enable Indian Family Stability and Ensure Children’s Best Interests**

Given the sometimes uneven and ineffective application of ICWA by state agencies and courts that prompted this rulemaking, DAI urges the Department to consider incorporating the below practical implementation requirements to fulfill ICWA’s objectives of safeguarding the best interests of Indian children, enhancing the stability and security of Indian tribes and families, and ensuring that Indian children remain with their families and communities.<sup>i</sup>

DAI recommends that BIA and the Department (BIA/DOI) strengthen the proposed regulations by providing clear and consistent standards to guide states’ implementation of ICWA procedures, determinations and requirements, as outlined below.<sup>ii</sup> Though the regulations are intended to establish minimum federal requirements for states, specific standards are necessary and advisable, given the need for consistent and uniform ICWA interpretation and implementation and the history of abuses in state Indian child welfare proceedings.

While DAI proposes that BIA further describe standards and requirements with more specificity, it does not have the requisite expertise or experience in the field to make precise recommendations. DAI encourages BIA/DOI to consult with Tribes’ designated ICWA agents, BIA regional offices, other government entities, and individual and non-profit organization ICWA tribal child welfare experts to identify best practices and determine appropriate, reasonable and practical timeframes and documentation requirements, adjudication and review standards, and oversight and enforcement mechanisms that will safeguard the rights and interests of Indian children, families and tribes.

#### **Timeframes & Documentation**

Timeframe and documentation requirements are key accountability mechanisms to record and verify that agencies and courts comply with ICWA principles and requirements -- safeguarding the rights and interests of Indian children, parents, families and tribes. DAI recommends that BIA/DOI require reasonable timeframes, diligent efforts and documentation requirements to ensure that States follow the letter and intent of the law and regulations for all procedures, adjudications, proceedings and dispositions.

#### **Definitions**

Clear, standard definitions of terms of art would increase the likelihood of their intended and uniform application. Therefore, DAI recommends that DOI/BIA accept Casey Family Program’s recommendation to limit the use of the phrase “imminent physical harm” to emergency situations, and use the phrase “serious emotional or physical damage,” for non-emergency situations. DAI also proposes that DOI/BIA consider providing more clarity around what “placement preferences” mean for practical application purposes.

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<sup>i</sup> DAI joined letters submitted by Casey Family Programs and the North American Council on Adoptable Children in general support of the draft ICWA regulations, in addition to offering these specific comments

<sup>ii</sup> These recommendations are not exhaustive and lack of discussion of particular NPRM elements does not imply endorsement as is.

### Adjudication & Review Standards

Detailed, clear and uniform adjudication and review standards would provide state child welfare agencies with guidance in how to fulfill and document their compliance with ICWA procedural requirements and would allow courts to provide agencies criteria for meeting standards of evidence and review for court findings and determinations. DAI proposes that DOI/BIA ensure that appropriate standards of review are outlined and defined for all placement and removal determinations. DAI also recommends that DOI/BIA require:

- Translation of all proceeding elements, in addition to notices, when necessary,
- Addition of guardian ad litem and child (at a minimum age) to the list of those who can request a transfer to tribal court and petition to invalidate an action, and
- Change “should” to “must” in considering the placement preference of the Indian child or parent.

To fulfill ICWA’s objective to “promote the stability and security of Indian tribes and families,” DOI/BIA should include first/birth parent safeguards in voluntary proceedings, such as requiring representation by an attorney and written explanation of the consequences of consent.

### Oversight & Enforcement

Monitoring and oversight of agency and court compliance with ICWA standards, based on adherence to timeframe, documentation and review standard requirements, are key to ensuring states fulfill ICWA’s objectives of safeguarding the best interests of Indian children, enhancing the stability and security of Indian tribes and families, and ensuring that Indian children remain with their families and communities. Accordingly, DOI/BIA should include mechanisms for transparency, monitoring, evaluation and enforcement in the regulations.

We know how critically important laws and regulations are to protect the rights and interests of Indian children, families and tribes, and we also recognize that attitudes and behavior in conducting child welfare practice are vital to safeguarding child and family wellbeing. DAI is committed to improving policy and practice, as well as perceptions and outlooks.

Thank you for the opportunity to submit comments on BIA’s proposed regulations. Please feel free to contact us with any questions or for additional information.

April Dinwoodie  
Chief Executive  
Donaldson Adoption Institute  
(212) 925-4089  
[adinwoodie@adoptioninstitute.org](mailto:adinwoodie@adoptioninstitute.org)

Georgia Deoudes  
Policy Director  
[gdeoudes@adoptioninstitute.org](mailto:gdeoudes@adoptioninstitute.org)

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<sup>1</sup> 25 USC § 1902

<sup>2</sup> NPRM at p. 14881

<sup>3</sup> NPRM at p. 14881

<sup>4</sup> NPRM at p. 14881

<sup>5</sup> NPRM at p. 14881

<sup>6</sup> NPRM at p. 14881