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Dt: May 19, 2015

Re: Comments on Proposed Rule 25 C.F.R. Part 23

I. Introduction

We are a group of law professors and practitioners with a longstanding academic and practical interest in the Indian Child Welfare Act (ICWA). We have experience in litigating ICWA cases in state court. This group also has particular expertise in the nationwide application of ICWA and the use of the law at the appellate level in particular. We offer these comments on the Regulations with the goal of strengthening the implementation of ICWA for the future.

On February 21, 2014, Assistant Secretary Kevin Washburn sent a "Dear Tribal Leader" letter asking for comments on the Bureau of Indian Affairs Guidelines for the Indian Child Welfare Act. 25 U.S.C. §§ 1901 et seq. As a result of those comments and testimony, on March 20, 2015, the Bureau of Indian Affairs released a proposed rule that would add a new subpart to the Department of the Interior's regulations implementing ICWA. Specifically, this proposed rule would establish a new subpart to the regulation implementing ICWA at 25 C.F.R. Part 23 to address Indian child welfare proceedings in state courts. This tremendous step forward in ICWA enforcement is appreciated. The inconsistency in state court interpretation of ICWA provisions has led to burdensome litigation for ICWA attorneys and uncertainty for families. Federal regulations that strongly support the goals and intent of ICWA will strengthen implementation of the law by requiring nationwide uniformity.

Congress passed ICWA in 1978 to address the wholesale and routine practice of both state and private entities removing American Indian children from their homes. Throughout the 1960s and 1970s, American Indian / Alaskan Native children were six times more likely to be placed in foster care than other children. H.R. Rep. No. 95-1386, at 9 (1978). Congress found "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal *public and private* agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions . . . ." 25 U.S.C. § 1901(4) (emphasis added).

Congress enacted ICWA to

> protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes or institutions which will reflect the unique values of Indian culture.

H.R. Rep. No. 95-1386, at 8 (1978). ICWA thus articulates a strong "federal policy that, where possible, an Indian child should remain in the Indian community." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989) (citing H.R. Rep. No. 95-1386, at 24 (1978)).

Tribes have long been recognized as "distinct, independent political communities," *Worcester v. Georgia*, 31 U.S. 515, 559 (1832), with the inherent sovereignty to govern their own members. Tribal powers of self-governance are not granted by the federal government, but rather arise from tribal sovereignty that preexisted the United States. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically be regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."); *United States v. Wheeler*, 435 U.S. 313, 323-24 (1978); *U.S. ex rel. Davis v. Shanks*, 15 Minn. 369, 380 (1870) ("The Indians within our territory have always been considered and recognized by the United States as distinct political communities; and, so far as is essential to constitute them separate nations, the rights of sovereignty have been conceded to them."). Tribes have a unique government-to-government relationship with the federal government based on agreements, treaties, and the Constitution. *Cohen's Handbook of Federal Indian Law* 1 (Nell Jessup Newton et al. eds., 2005).

This relationship, congressional intent, and the broad delegation of power provides the Department with the authority to promulgate this prospective rule. This proposed rule addresses ICWA implementation by state courts and child welfare agencies, and private adoption agencies, including updating definitions and replacing current notice provisions. The proposed new subpart also addresses other aspects of ICWA compliance by state courts and child welfare agencies including, but not limited to, other pretrial requirements; procedures for requesting transfer of an Indian child custody proceeding to tribal court; adjudications of involuntary placements, adoptions, and termination of parental rights; voluntary proceedings; dispositions; and post-trial rights.

II. Regulatory Authority of the Bureau of Indian Affairs

The Indian Child Welfare Act states "[w]ithin [180] days after November 8, 1978, the Secretary shall promulgate such rules and regulations *as may be necessary* to carry out the provisions of this chapter." 25 U.S.C. § 1952 (emphasis added). Under

this section, the Secretary of the Interior is given a broad grant of authority to issue rules in order to ensure that the statute [ICWA] is fully and properly implemented.

In addition, the Secretary of the Interior is also charged with "the management of all Indian affairs and of all matters arising out of Indian relations," 25 U.S.C. § 2, and may "prescribe such regulations as [s]he may think fit for carrying into effect the various provisions of any act relating to Indian affairs." 25 U.S.C. § 9.

Congress passed ICWA pursuant to the "special relationship between the United States and the Indian tribes and their members" and recognized the "Federal responsibility to Indian people." 25 U.S.C. § 1901. Furthermore, as stated by Congress in ICWA, "the United States has a direct interest, as trustee, in protecting Indian children." 25 U.S.C. § 1901(3). The regulations promulgated by the Secretary of the Interior are intended to improve the implementation of ICWA and uphold "the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902.

These proposed regulations are not the first time the Department of the Interior has issued regulations. Following ICWA's enactment in July 1979, the Department of the Interior issued regulations addressing notice procedures for involuntary child custody proceedings involving Indian children, as well as governing the provision of funding for and administration of Indian child and family service programs authorized by ICWA. *See* 25 C.F.R. Part 23. In addition, the Bureau of Indian Affairs in 1979 also published non-binding federal guidelines for state courts for use in interpreting ICWA's requirements in Indian child custody proceedings. *See* Guidelines for State Courts in Indian Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 28, 1978).

Times have certainly changed since the original Guidelines were issued. Administrative law and the power of the federal government have shifted considerably in the past forty years. In addition, there was no way the federal government could foresee the dramatically different applications of ICWA across the fifty states. These new regulations are necessary because without them the application of the law is arbitrary, with Indian children treated differently depending on which state's courtroom they are in. Having disparate interpretations of ICWA was certainly not the intent of Congress in passing a federal law, and conflicts with the rationale of the Supreme Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 45-46 (1989) (describing the need for uniformity in defining "domicile" under ICWA). These regulations will provide a stronger measure of consistency in the implementation of ICWA and prevent the application of different minimum standards across the United States, contrary to Congress' intent.

Passing federal legislation that is enforced by state courts in the child welfare arena is not out of the ordinary. Nor is promulgating regulations pursuant to those laws. *See* 45 C.F.R. §§1355-57. While perhaps ahead of its time from the point of view of federal direction to state courts, ICWA is part of a long line of federal statutes that are applied in state courts daily. *See* Fostering Connections to Success and Increasing Adoptions Act, Pub. L. No. 110-351, 112 Stat. 3949 (2008); Keeping Children and Families Safe Act, Pub. L. No. 95-266, 2 Stat. 205 (2003); Child and Family Services Improvement and Innovation Act, 112 Pub. L. No. 34, 125 Stat. 369 (2011); Safe and Timely Interstate Placement of Foster Children Act, Pub. L. No. 109-239, 120 Stat. 508 (2006); Strengthening Abuse and Neglect Courts, Pub. L. No. 106-314, 114 Stat. 1266 (2000); Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997); Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272, 94 Stat. 500 (1980). The narrative that all family law is the exclusive purview of the states is simply no longer true, if it ever was. In her book on this topic, Professor Jill Hasday has written persuasively that "federal family law is extensive, wide-ranging, and well established." Jill Hasday, *Family Law Exceptionalism* 18 (2014). What does happen is that "localist narrative about family law is employed selectively against specific federal initiatives and not others." *Id.* at 17.

ICWA is not "general legislation" as defined by the Supreme Court in the area of domestic relations. *Mansell v. Mansell*, 490 U.S. 581, 587 (1989). It is specific and targeted legislation designed to protect Native children and balance the rights of tribal nations, the responsibilities of states, and the rights of parents. ICWA is "one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations." *Id.* at 587. Congress passed ICWA as a *remedial* statute, designed to address state court and agency violations of due process and abusive application of child welfare laws. ICWA provides a minimum federal floor, below which the states cannot go. Other provisions of the law work in concert with state law. *See In re Elliot*, 554 N.W.2d 32 (Mich. Ct. App. 1996), *In re Denice F.*, 658 A.2d 1070 (Me. 1995), *In re Roberts*, 732 P.2d 528 (Was. Ct. App. 1987). The proposed regulations to enforce ICWA's minimum standards and address the state court inconsistencies in interpretation are not an overreach of federal authority.

a. Agency Statutory Interpretation

Section 706 of the Administrative Procedure Act (APA) authorizes a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions" that are in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." Administrative Procedure Act § 6, 5 U.S.C. § 555 (2006). These proposed regulations are within a grant of authority from Congress, 25 U.S.C. § 1952, and directly address areas undefined by Congress, or which are enforced inconsistently by the states.

Under *Chevron v. Natural Resource Defense Council, Inc.*, the Court considers two questions when reviewing an Agency's interpretation of a statute. 467 U.S. 837 (1984). First, the Court asks whether Congress has spoken directly to the issue. *Id.* at 482. If Congress' intent is clear, the Court and the Agency must "give effect to the unambiguously expressed intent of Congress." *Id.* at 483. However, if Congress has not directly addressed the issue, and the "statute is silent or ambiguous," the Court determines "whether the agency's [interpretation] is based on a permissible construction of the statute." *Id.* When the Court is determining whether a statute is ambiguous, the Court uses two additional tests: the "plain meaning" test and the "statutory construction" test. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988); *Dole v. United Steelworkers of Am.*, 494 U.S. 26 (1990).

Under the "plain meaning" test, the Court "look[s] to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp.*, 486 U.S. at 291-92. This test refrains from using tools of statutory construction, such as legislative history or legislative intent. *Id.* Instead, "[i]f the statute is silent or ambiguous with respect to the specific issue addressed by the regulation, the question becomes whether the regulation is a permissible construction of the statute." *Id.* The Court will only grant deference to the Agency's interpretation of the statute if "the agency regulation is not in conflict with the plain meaning of the statute." *Id.*

Under the "statutory construction" test, the Court determines "congressional intent[] using traditional tools of statutory construction." *Dole*, 494 U.S. at 35. The Court's "starting point is the language of the statute," but "'in expounding a statute,'" the Court is "'not guided by a single sentence or member of a sentence, but look[s] to the provisions of the whole law, and to its object and policy.' " *Id.*; *see also Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)). The Court has also stated it would defer to the Agency's interpretation "unless the legislative history or the purpose or structure [of the statute] reveal a contrary intent on the part of Congress." *Chemical Mfrs. Assoc. v. Natural Res. Defense Council, Inc.*, 470 U.S. 116, 126 (1985).

In a recent case, the Court examined whether deference under *Chevron* would be given to an Agency's interpretation of the Agency's jurisdiction under an ambiguous statute. *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1864 (2013). The Court held that *Chevron* applied to all Agency interpretations, whether they were "jurisdictional" or "nonjurisdictional" interpretations. *Id.* at 1868. The Court found that no matter how the question is framed, "the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." *Id.* The Court also stated "[t]here is no case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support Chevron deference for an exercise of that authority within the agency's substantive field. A

general conferral of rulemaking authority validates rules for *all* the matters the agency is charged with administering." *Id*. at 1865.

These proposed regulations are well within the intent of Congress in passing ICWA, as most easily demonstrated in the Congressional findings:

> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
>
> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
>
> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. § 1901.

Where these regulations attempt to provide clarity to ambiguous provisions, that clarity is provided in line with these Congressional findings, and the intent of the law as demonstrated by the legislative history. *See generally* Getches et al., *Cases and Materials in Federal Indian Law* 650-54 (6th ed. 2011) (surveying the legislative history of the Act).

b. Congress and the Delegation of Legislative Power

The Constitution authorizes the delegation of rulemaking to agencies because Congress is given the power "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." U.S. Const. art. I, § 8. In addition, in regards to Indian Affairs, Congress also has specific authority under the Indian Commerce Clause, which states that "Congress shall have the power . . . [t]o regulate commerce with foreign nations, and among the several states, and *with the Indian tribes*." U.S. Const. art. I, § 8 (emphasis added).

In fulfilling the federal government's responsibilities, "Congress' authority over Indian matters is extraordinarily broad." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978). The plenary power of Congress in Indian affairs has generally been interpreted to mean an "absolute or total" federal constitutional power over Indian affairs. *Cnty of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985) (finding that "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law").

The Nondelegation Doctrine governs the separation of powers within the United States. *See Mistretta v United States*, 488 U.S. 361, 371 (1989). To safeguard the separation of powers established in the Constitution of the United States, "the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." *Id.* at 371-72. However, the history of the Nondelegation Doctrine reveals that Congress may delegate legislative power to Agencies, but such "delegated authority must be constrained by 'defined limits, to secure the exact effect intended by [Congress'] acts of legislation,' and 'the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.'" *United States v. Cooper*, 750 F.3d 263, 267 (3rd Cir. 2014) (alteration in original) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928)).

The *Hampton* case established the "intelligible principle" test, which states "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Hampton*, 276 U.S. at 409. Only on two occasions in the history of the Supreme Court has the Court "invalidated legislation based on the nondelegation doctrine, and both occurred in 1935." *Cooper*, 750 F.3d at 268; *see also Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 494 (1935).

In addition to these regulations, there are other examples of Acts that grant general regulatory delegation to the Department of Interior to develop regulations that go beyond simply defining the administrative duties of the agency. For example, the Native American Graves Protection and Repatriation Act (NAGPRA) regulations state "[t]he Secretary shall promulgate regulations to carry out this chapter within 12 months of November 16, 1990." 25 U.S.C. § 3011. Under this language, the Department of Interior has promulgated substantive regulations that govern other entities and interpret the law that applies to third parties and the courts. 43 C.F.R. § 10.

Specifically, the NAGPRA regulations apply to any "human remains, funerary objects, sacred objects, or objects of cultural patrimony that are: (i) in federal possession or control; (ii) in the possession or control of any institution or State or

local government receiving Federal funds; or (iii) [e]xcavated intentionally or discovered inadvertently on Federal or tribal lands." 43 C.F.R. §10.1(b)(1). In addition, "[t]hese regulations apply to human remains, funerary objects, sacred objects, or objects of cultural patrimony which are indigenous to Alaska, Hawaii, and the continental United States, but not to territories of the United States." *See* 43 C.F.R. § 10.1(b)(2). This language is very broad and allows the regulations to apply to the subject matter of the Act. Similarly, ICWA has a broad grant of authority: "[w]ithin [180] days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." 25 U.S.C. § 1952.

The original 1979 BIA Guidelines explain why the Department did not promulgate regulations at the time, noting that because "State and tribal courts are fully capable of carrying out the responsibilities imposed on them by Congress without being under the direct supervision of this Department." *See* Guidelines for State Courts in Indian Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 28, 1978). Unfortunately, within a few years, state courts, while capable, demonstrated an unwillingness to carry out these responsibilities; this unwillingness is most easily exemplified by the creation of the existing Indian family exception. *See infra* Section III(a). In addition, the introduction to the 1979 Guidelines states that "there is no indication that these state law definitions [residence and domicile] tend to undermine in any way the purposes of the Act." *See* Guidelines for State Courts in Indian Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 28, 1978). Within ten years, the Supreme Court weighed in on a case where the state law definition of domicile completely undermined the jurisdictional provisions outlined in the Act. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

Finally, the decision of the Department to now issue regulations, even if the issuance of the regulations is contrary to the 1979 Guidelines introduction is well within the Department's authority and subject to *Chevron* deference. According to the Supreme Court, "[a]gency inconsistency is, *at most*, a reason for holding an interpretation to be arbitrary and capricious change from agency practice under the Administrative Procedure Act." *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005)(emphasis added). As the rest of this comment demonstrates, these regulations are far from arbitrary and capricious because they directly address the nearly forty years of inconsistent case law and the rise of state ICWA laws, both of which demonstrate the areas of ICWA that need clarification with the force of federal regulations. These areas are discussed below in Section III.

III. Proposed Regulations: Addressing Inconsistencies in State Cases

a. Existing Indian Family Exception: §23.103(b)

The existing Indian family exception (EIF) is a prime example of the need for updated and enforceable federal regulations. Created by the Kansas Supreme Court, *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982), and then later rejected by that same court, *In re A.J.S.*, 204 P.3d 543 (Kan. 2009), this judicially created exception to ICWA allowed state courts to decide whether to apply the Act to protect a child based on that court's perception of the child's Indian-ness, rather than use the plain language of the act itself. Courts held that that "ICWA applies only in those situation where Indian children are being removed from an existing Indian family." *Rye v. Weasel*, 934 S.W.2d 257, 261 (Ky. 1996) (quoting *Matter of Adoption of D.M.J.*, 741 P.2d 1386 (Okla. 1985), though no such language or exception exists in the statute. Pursuant to the exception, "the courts have held that ICWA was not intended by Congress to be applied to cases where there is no existing Indian family or environment because the purpose and intent of Congress cannot be furthered by such applications of the Act." *Id.*; *see also Matter of Adoption of Crews*, 118 Wash. 2d 561 (1992), *Matter of Adoption of T.R.M.*, 525 N.E.2d 298 (Ind. 1988).

While the recent trend is in the courts is to reject the exception, a small minority of states continue to follow the exception. *Compare Thompson v. Fairfax County Dept. of Family Servs.*, 747 S.E.2d 838 (2013); *In re A.J.S.*, 204 P.3d 543 (Kan. 2009), *Cherokee Nation v. Nomura,* 160 P.3d 967 (Okla. 2007), *In re J.S.*, 177 P.3d 590 (Okla. Civ. App. Div. 1 2008), *In re N.B.* 199 P.3d 16 (Colo. App. 2007), *with In re N.J.*, 221 P.3d 1255 (Nev. 2009), *In re S.L.C.E.*, No. 2014-CA-000639-ME (Ky. Ct. App. Dec. 24, 2014), *In re D.C.*, 928 N.E.2d 602, 605 (Ind. App. 2010), *In re K.L.D.R.*, No. M2008-00897-COA-R3-PT, 2009 WL 1138130 (Tenn. Ct. App. 2009). In California, the state appellate courts are split as to the application of the exception. *See In re Vincent M.*, 59 Cal. Rptr. 3d 321 (Cal. App. 6 Dist. 2007) (disagreeing with *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Cal. App. 2 Dist. 1996) and rejecting the EIF exception). Promulgating federal regulations to clarify that there is no such exception to ICWA based on the existing Indian family exception falls squarely within the Department's authority to ensure consistent implementation of the federal law.

Finally, the recent United States Supreme Court decision, *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013), did not adopt the existing Indian family exception reasoning, even though the Court was presented with the argument. Petition for Writ of Certiorari at 11-15, Adoptive Couple v. Baby Girl, 133 S.Ct. 2552 (2013) (No. 12-399), 2012 WL 4502948. *See* Jack Trope & Adrian Smith, *The Continued Protection of Indian Children and Families After* Adoptive Couple v. Baby Girl*: What the Case Means and How to Respond*, 2 Am. Indian L.J. 434, 463-36 (2014); Marcia Yablon-Zug, *The Real Impact of* Adoptive Couple v. Baby Girl*: The Existing Indian Family Doctrine is Not Affirmed but the Future of ICWA's Placement Preferences is Jeopardized,* 42 Cap. U. L. Rev. 327 (2014). The regulation's rejection of the exception is not contrary to U.S. Supreme Court case law.

b. Notice and Determination of Indian Child: §23.11, §23.107, §23.108, §23.111, §23.123

The Indian Child Welfare Act requires that "[i]n any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe . . . ." 25 U.S.C. § 1912(a). If the identity or location of the parent or Indian custodian and the tribe cannot be determined, "such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe." *Id.* No foster care placement or termination of parental rights proceeding "shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary . . . ." *Id.*

The importance of the initial determination of whether the child in state court is an Indian child under 25 U.S.C. § 1903(4) cannot be overstated. Without that determination and notice, all other rights of the tribes and responsibilities of the state in an ICWA case cannot happen. Unfortunately, state courts and agencies continue to fail Indian children when it comes to determining their status and notifying the tribe. *See* Barbara Ann Atwood, *Children Tribes, and States: Adoption and Custody Conflicts over American Indian Children* 197 (2010). These two actions, determining status and notifying the tribe, are fundamentally intertwined, since only the tribal nation can confirm for certain that a child is, or is eligible to be, a tribal citizen.

While a court may adequately determine that a child is a citizen of a tribal nation based on evidence provided by the child's parent or Indian custodian, until the court receives confirmation of that child's citizenship or eligibility from the tribe, the court cannot be certain of the child's status. A foundational precept of federal Indian law is a tribal nation's right to determine its own membership. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146, at 10,153 (Feb. 25, 2015) [hereinafter *Proposed Regulations*]. Whether the parent is able to demonstrate citizenship or not is irrelevant—the right of the tribe to determine its citizenship, and the child's right to her relationship with the tribe must be confirmed by the tribe. *See infra* Section d on a child's rights and interest to her tribal citizenship.

California and Michigan both have a large number of appealed notice cases. Most recently, the Michigan Supreme Court addressed this issue head on in a unanimous opinion:

> While it is impossible to articulate a precise rule that will encompass every possible factual situation, in light of the interests protected by ICWA, the potentially high costs of erroneously concluding that notice need not be sent, and the relatively low burden of erring in favor of requiring notice, we think the standard for triggering the notice requirement of 25 USC 1912(a) must be a cautionary one. Therefore, we hold first that sufficiently reliable information of virtually any criteria on which tribal membership might be based suffices to trigger the notice requirement. We hold also that a parent of an Indian child cannot waive the separate and independent ICWA rights of an Indian child's tribe . . .

In re Morris, 815 N.W.2d 62, 64-65 (Mich. 2012).

Evincing the importance of notice, the California Supreme Court recently accepted a notice case, which may provide some guidance to the lower courts. Petition for Review Granted, *In re Isaiah W.*, No. S221263 (Cal., Oct. 29, 2014). At this point, however, the differences between counties and districts as to what triggers notice is wildly disparate. *Compare In re Robert H.*, No. A142091, 2015 WL 1383108 (Cal. Ct. App., Mar. 25, 2015), *with In re K.P.*, No. D066509, 2015 WL 1248943 (Cal. Ct. App., Mar. 17, 2015).

Because a court needs confirmation from a tribe of a child's citizenship, and because notice takes some time to do correctly, treating a case as an ICWA case from the beginning is the best practice. The person most harmed when notice is handled incorrectly is the child. Having to re-do a case because notice was not provided or was insufficient, is simply not a best practice. *See* In re Morris, 815 N.W.2d 62 (Mich. 2012) (remedy for no notice is conditional reversal until notice is completed successfully); *In re Justin S.*, 59 Cal. Rptr. 3d. 376 (Cal. Ct. App. 2007) (listing cases approving of conditional reversals in ICWA notice cases). There is no real penalty for the social workers or the judges who fail in this basic first step of an ICWA case. Until notice is done accurately and effectively as mandated by federal law, treating cases as ICWA cases until determined otherwise is simply what state courts must do for the best interest of Indian children.

c. Active Efforts, § 23.2, § 23.106

Under the Indian Child Welfare Act,

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

25 U.S.C. § 1912(d). The regulations now define active efforts, which though required by law, are undefined in the statute.

The new regulations give a definition of "active efforts" to provide uniformity and consistency for the state courts. Under the regulations, "active efforts" means actions "intended primarily to maintain and reunite an Indian child with his or her family or tribal community and *constitute more than reasonable efforts* as required by Title IV-E of the Social Security Act (42 U.S.C. 671(a)(15))." *Proposed Regulations* § 23.2 (emphasis added).

The regulations also define when active efforts must commence and include determining whether the child is an Indian child. The requirement to engage in "active efforts begins from the moment the possibility arises that an agency case or investigation may result in the need for the Indian child to be placed outside the custody of either parent or Indian custodian in order to prevent removal." *Proposed Regulations* § 23.106(a). Active efforts to prevent removal of the child must be conducted while investigating whether the child is a member of the tribe, is eligible for membership in the tribe, or whether a biological parent of the child is or is not a member of a tribe. *Id.* § 23.106(b). In addition, the regulations require that "[i]f there is reason to believe the child is an Indian child, the court must confirm that the agency used active efforts to work with all tribes of which the child may be a member to verify whether the child is in fact a member or eligible for membership in any tribe." *Id.* § 23.106(b)(2).

States have been divided in the meaning of active efforts, and what constitutes of active efforts has been the subject of litigation throughout the states. However, a clear majority of state courts have found that active efforts requires more than the normal services, or reasonable efforts, offered to non-Indian parents. *E.g.*, *In re J.S.*, 177 P.3d 590, 593-94 (Okla. App. 2008) ("[W]e decline to follow the minority and instead join the majority of other states' courts which have interpreted ICWA and held that the 'active efforts' standard requires more effort than the 'reasonable effort' standard in non-ICWA cases.") (citing *South Dakota ex rel J.S.B.*, 691 N.W.2d 611 (S.D. 2005); *In re Welfare of Children of SW*, 727 N.W.2d 144 (Minn. App. 2007); *Winston J. v. Alaska Dep't of Health & Social Servs.*, 134 P.3d 343 (Alaska 2006; *In re Interest of Dakota L.*, 712 N.W.2d 583 (Neb. App. 2006); *In re A.N.*, 106 P.3d 556 (Mont. 2005)). In choosing to follow the great weight of authority, the South Dakota Supreme Court relied upon "the policy behind ICWA, especially Congress' intent to achieve uniformity among the states where the interests of Indian children, parents and tribes are concerned . . ." *In re P.S.E.*, 816 N.W.2d 110, 115 n. 1 (S.D. 2012); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43-44 (1989) (noting that Congress intends uniform national application of its statutes).

The phrase "active efforts" in the context of preventive and rehabilitative governmental services to families and children in need is "unique in American law."

C. Eric Davis, Note, *In Defense of the Indian Child Welfare Act in Aggravated Circumstances*, 13 Mich. J. Race & L. 433, 442 (2008). As a result of its origins and its function in ICWA, "active efforts" has a "distinctly Indian character." Mark Andrews, *"Active" Versus "Reasonable" Efforts: The Duties to Reunify the Family Under the Indian Child Welfare Act and the Alaska Child in Need of Aid Statutes*, 19 Alaska L. Rev. 85, 87 (2002). The legislative history of the "active efforts" provision demonstrates that Congress intended to require state courts to affirmatively provide Indian families with substantive services, not merely to make those services available.

A comparison of the two versions of what would become 25 U.S.C. § 1912(d) is instructive. The Senate passed the first version of the statute that would become the Indian Child Welfare Act in 1977. Indian Child Welfare Act of 1977, S. 1212, 95th Cong., 123 Cong. Rec. 32,224 (1977). The provision in that bill did not use the phrase "active efforts." Instead, it used the phrase "made available." *Id.* at § 101(a)(2). The entire subsection read:

> No placement of an Indian child, except as provided in the Act shall be valid or given any legal force or effect … unless … the party seeking to effect the child placement affirmatively shows that available remedial services and rehabilitative programs designed to prevent the breakup of the Indian family *have been made available* and proved unsuccessful.

Id. (emphasis added).

In contrast, the final version of the bill, passed on October 14, 1978, reads:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that *active efforts have been made* to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

Indian Child Welfare Act, H.R. 1255, 95th Cong., 124 Cong. Rec. 38,110 (1978) (codified at 25 U.S.C. § 1912(d)).

The change is subtle, but significant. Congress moved away from requiring that services be made "available," to requiring that state agencies make "active efforts." In 1997, Congress stated that the "active efforts" language was specifically intended to remedy the "wholesale separation of Indian children from their families." Amending the Indian Child Welfare Act of 1978, S. Rep. No. 105-156, at 9 (1997) (quoting H.R. Rep. No. 95-1386, at 9 (1978)).

One area where state courts have encountered problems is the interaction between the Adoption and Safe Families Act (ASFA) and ICWA, specifically in the area of active efforts. The ASFA is silent on whether it applies to Indian children or amends ICWA. Though the states have split on this question, *compare J.S. v. State*, 50 P.3d 388, 392 (Alaska 2002) (relying on AFSA as support for its ruling that active efforts were not required under ICWA in cases of sexual abuse by a parent), *with In re J.S.B.,* 691 N.W.2d 611, 619 ("[W]e do not think Congress intended that ASFA's 'aggravated circumstances' should undo the State's burden of providing 'active efforts' under ICWA."), under the doctrine disfavoring implied repeals, AFSA's provisions simply should not apply to Indian children and families. *See In re J.L.* 770 N.W.2d 853, 862-63 (Mich. 2009) ("Because the ICWA establishes 'minimum Federal standards for the removal of Indian children from their families,' 25 U.S.C. 1902, and nothing in the ASFA indicates a congressional intent to supersede the ICWA, neither the ASFA nor its state law analogues relieve the DHS from the ICWA's 'active efforts' requirement, 25 U.S.C. 1912(d) . . . ."); *Morton v Mancari*, 417 U.S. 535 (1974) (relying upon the "'cardinal rule . . . that repeals by implication are not favored'" (alteration in original) (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497 (1936)); *see also* Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed. Reg. 4,020, at 4,029 (January 25, 2000) (interpreting AFSA and concluding that "nothing in this regulation supersedes ICWA requirements"). The proposed regulations clarify that active efforts are qualitatively and quantitatively different from reasonable efforts as codified at 42 U.S.C. § 671(a)(15).

d. Best Interests of the Indian Child and Placement Preferences, §23.128, §23.129, §23.130, §23.131

The best interest of the child standard has long been used by courts and workers to determine what should be done with a child in the state's care, even though "[t]he best interests of the child standard, by its very nature, requires a subjective evaluation of a multitude of factors, many, if not all of which are imbued with the values of majority culture." *In re S.E.G.*, 521 N.W.2d 357, 363 (Minn. 1994). An Indian child's best interests will include unique interests and needs. This does not mean that an Indian child's best interests are ignored in ICWA proceedings. Rather, it means that an Indian child's best interests also include the connection to her tribal community and her lifelong citizenry, not just the immediate impact of being removed from a long-term placement, an assessment often based on bonding and attachment. *Compare In re Alexandria P.*, 176 Cal. Rptr. 3d 468, 494-96 (Cal. Ct. App. 2014) (using best interests to deny placement with family members), *with In re C.H.*, 997 P.2d 776 (Mont. 2000) (discussing at length the difficulty with using bonding and attachment theory in family courts). *See also* David. E. Arrendondo & Leonard P. Edwards, *Attachment, Bonding, and Reciprocal Connectedness: Limitations of Attachment Theory in the Juvenile and Family Court*, 2 J. of the Ctr. for Families, Children & The Courts 109, 122-23 (2000).

A child's connection to her tribe not only protects her identity, language and cultural affiliation, it provides a very real property interest. H.R. Rep. No. 95-1386, at 24 (1978) ("These provisions [allowing adult adoptee receive information of her tribal relations] will help protect the valuable rights an individual has as a member or potential member of an Indian tribe and any collateral benefits which may flow from the Federal Government because of said membership."). The connection means she will be able to participate meaningfully in the political and cultural affairs of the tribe, receive services as a citizen of the tribe and benefit from her tribe's government-to-government relationship with the federal government. *See* Catherine M. Brooks, *The Indian Child Welfare Act in Nebraska: Fifteen Years, A Foundation For The Future*, 27 Creighton L. Rev. 661, 705 (1994).

In addition, as recognized by the Minnesota Supreme Court, "Congress, in conjunction with numerous Indian tribal governments and the Bureau of Indian Affairs, has carefully and thoughtfully set out the nation's policy to prevent the destruction of Indian families and Indian tribes and to protect the best interests of Indian children by preventing their removal from their communities." *In re S.E.G.*, 521 N.W.2d 357, 366 (Minn. 1994). In other words, an assessment of an Indian child's best interests considerations is necessarily broader and richer than a standard best interest analysis, and includes the Indian child's connection to her tribal identity and citizenry. Evelyn Blanchard, *The Question of Best Interest* 60, *in* The Destruction of American Indian Families (Steven Ungar ed. 1977).

Indeed, the Indian Child Welfare Act itself is designed to ensure that the best interests of the child includes the child's connection to her tribe. "Thus, the conclusion seems justified that, as one state court has put it, '[t]he Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected.'" *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 50 n.24 (1989) (quoting *In re Appeal in Pima Cnty. Juvenile Action No. S-903*, 635 P.2d 187, 189 (Ariz. Ct. App. 1981)).

Given the concerns that these regulations do not specifically mention the best interest of the child, the following language, drawn from the Michigan Indian Family Preservation Act, Mich. Comp. Laws § 712B.5, in addition to other state statutes, *see* Wis. Stat. Ann. 48.01(2), Iowa Code 232B.3, may be useful to include in the regulations:

> The best interests of the Indian child shall be determined, in consultation with the Indian child's tribe, in accordance with the Indian Child Welfare Act, and these regulations. Courts shall do both of the following: (1) Protect the best interests of Indian children and promote the stability and security of Indian children, tribes and families; and (2) Ensure the agencies use practices, in accordance with

> the Indian Child Welfare Act, these regulations, and other applicable laws, that are designed to prevent the voluntary or involuntary out-of-home care placement of Indian children and, when an out-of-home care placement, preadoptive, or adoptive placement, is necessary, place an Indian child in a placement that reflects the unique values of the Indian child's tribal culture and is best able to assist the Indian child in establishing, developing, and maintaining the lifelong political, cultural, and social relationship with the Indian child's tribe and tribal community.

The primary way ICWA addresses part two of the above definition is through its placement preferences. Under ICWA, "In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a). An "extended family member" is any person

> defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

25 U.S.C. § 1903(2). When a court applies the preference requirements under the ICWA, "the standards to be applied . . . shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties." 25 U.S.C. § 1915(d).

The United States Supreme Court held that the ICWA's placement preference for adoption of Indian children "does not bar a non-Indian family from adopting an Indian child when no other eligible candidates have sought to adopt the child." *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2564 (2013). The Court held § 1915(a)'s placement preferences "are inapplicable in cases where no alternative party has *formally sought* to adopt the child." *Id*. (emphasis added). The Court did not define "formally sought," and that concept now varies by state. *See Emergency Regulation: Adoption of Children Subject to the Indian Child Welfare Act*, 7 Alaska Ann. Code 54.600 (Apr. 15, 2015) (allowing a request by family member or tribe on behalf of family member by phone, mail, fax, email or in person as proxy for "formal petition for adoption"). The Court further stated that the placement preferences were inapplicable in this case "simply [because there] is no 'preference' to apply if no alternative party that is eligible to be preferred under § 1915(a) has come forward." *Adoptive Couple*, 133 S.Ct. at 2564. Again, the Court did not describe what "has come forward" would look like in state courts, but it will likely vary by state. In

addition, that case involved a mother's voluntary relinquishment and the father's opposition to the proposed adoption; it did not involve a proposed adoption within a state child welfare system. Finally, the opinion did not bar requiring a search for eligible placement preferences by agencies, as proposed in the new regulations. 25 C.F.R. § 23.128. *See also Nat'l Cable & Telemcommunications Ass'n v. Brand X Internet Services*, 545 U.S. at 982-3 ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.").

The proposed regulations also bar courts from considering ordinary bonding or attachment because a child may have spent considerable time in a non-ICWA compliant placement when moving a child to an ICWA compliant placement. Because an initial placement may not be ICWA compliant for a number of reasons (emergency; determination of tribal citizenship has not yet happened; no available Native homes; no initial diligent search for family), that initial non-compliant placement should not become a permanent placement. *See In re C.H.* 997 P.2d 776, 783-84 (Mont. 2000) (allowing normal emotional bonding to be considered good cause would "negate the ICWA presumption" that the statutory preferences are in the Indian child's best interests). These regulations attempt to balance the immediate judicial decision-making on a placement change with the lifelong implications of removing a child from family, tribe, and community.

e. Qualified Expert Witness §23.122

The Indian Child Welfare Act states

> No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, *including testimony of qualified expert witnesses*, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912(e) (emphasis added). In addition,

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, *including testimony of qualified expert witnesses*, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912(f) (emphasis added).

The qualified expert witness (QEW) is the *state's* witness, not the tribe's nor the parent's. The testimony of at least one QEW is required by law, but the QEW is not the only witness allowed at an ICWA hearing. Nothing in the law or these regulations limits the number of witnesses at an ICWA child welfare hearing. Simply put, the QEW provision requires the state or party removing the child to find someone who agrees with foster care placement or termination of parental rights after reviewing the case from the perspective of the Indian child's culture and community. Given the wholesale and routine removal of Indian children from their homes, as discussed *infra* in Section III(f), this provision in the law attempts to ensure that removal be done with the consideration of the cultural norms of the child's tribe, as opposed to mainstream, majoritarian, middle-class values. Though required by law, who can be a QEW is not defined, and as such the Department is within its purview to define who may considered as a qualified expert witness in ICWA cases. *See In re M.F.*, 225 P.3d 1177, 1185 (Kan. 2010); *In re K.H.*, 981 P.2d 1190, 1196 (Mont. 1999); *Matter of N.L.,* 754 P.2d 863, 868 (Okla. 1988).

f. Tribal Jurisdiction and Transfer to Tribal Court, § 23.115, § 23.116, § 23.117, § 23.118

Tribes have always exercised jurisdiction over their children. Though both the federal and state governments enforced horrific programs to separate Indian children from their parents, grandparents, extended families, tribes, and cultural heritage, tribes have worked continuously to maintain jurisdiction over their children. *See* Lorie M. Graham, *Reparations, Self-Determination and the Seventh Generation*, at 50, *in* Facing the Future: The Indian Child Welfare Act at 30 (Matthew L.M. Fletcher et al. eds., 2009). Ensuring tribal jurisdiction in cases involving Indian children is one of the primary motivating factors in establishing tribal judicial systems recognizable to state courts. Michael Petoskey, *Foreword* to *Facing the Future, supra*, at vii ("These kinds of cases are so important, in fact, that their existence has been the impetus for many tribes in the state of Michigan and elsewhere to embark upon the process of developing their own judicial and child protection systems.").

Tribal jurisdiction in the arena of domestic relations, including jurisdiction over Indian children, has long been recognized by the federal courts. *United States v. Quiver*, 241 U.S. 602 (1916) (internal domestic relations); *Fisher v. Dist. Ct.*, 424 U.S. 382 (1976) (jurisdiction over Indian children); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (regulating internal membership decisions); *Montana v. United States*, 450 U.S. 544, 564 (1981) ("Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members . . ."); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 889-90 (1986) (internal domestic tribal relations).

> In short Indian tribes are currently recognized as sovereign because they were, in fact, sovereign before the arrival of non-natives on this continent. The practical result of this doctrine is that an Indian tribe need not wait for an affirmative grant of authority from Congress in order to exercise dominion over its members.

Native Village of Venetie I.R.A. Council v. State of Alaska, 944 F.2d 548, 556 (9th Cir. 1991) (tribal jurisdiction over child custody determinations).

Therefore, ICWA does not grant jurisdiction over Indian children to tribes, but rather acknowledges the fact of tribal jurisdiction over Indian children. *See Fisher v. Dist. Ct.*, 424 U.S. 382 (1976); *Wisconsin Potowatomies v. Houston*, 393 F. Supp. 719 (W.D. Mich. 1973); *Wakefield v. Little Light*, 347 A.2d 228, 234-35 (Md. 1975); *In re Adoption of Buehl*, 555 P.2d 1334 (Wash. 1976). As the federal court wrote in *Wisconsin Potowatomies*, "if tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right . . . to provide for the care and upbringing of its young, a *sine qua non* to the preservation of its identity." *Wisconsin Potowatomies*, 939 F. Supp. at 730.

ICWA does delineate this jurisdiction. The law provides that tribal courts have *exclusive* jurisdiction over custody proceedings involving Indian children domiciled in Indian Country, 25 U.S.C. § 1911(a), and provides that tribal courts have *concurrent* and *presumptive* jurisdiction over Indian child custody cases where the child is domiciled outside of Indian Country. 25 U.S.C. § 1911(b); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989). The transfer of a case involving an Indian child to tribal court is an exercise of that concurrent and presumptive jurisdiction. The proposed regulations provide guidance for what does not constitute good cause when a state court chooses not to recognize that concurrent jurisdiction.

Among other provisions, these proposed regulations provide that the right to request transfer may occur at any stage of the proceedings, and with each proceeding. Previously, the 1979 Guidelines allowed the "advanced stage of the proceedings" to constitute good cause reason to deny transfer. Unfortunately, this provision caused confusion in the courts, and the disparate interpretation of this non-binding Guideline meant tribes were never sure when a transfer request would be granted or not. The regulations clarify this issue.

There is simply no consistent understanding of "advanced stage" across the states. Timeliness depends on which court is making the decision. *In re A.B.*, 663 N.W.2d 625, 633 (N.D. 2003) (transfer motion filed seven weeks after termination petition is filed is timely); *see also* Matthew L.M. Fletcher & Kathryn E. Fort, *Indian Children and their Guardians ad Litem*, 95 B.U. L. Rev. Annex 59, 59 n.5 (2013) (listing all appealed transfer cases). Since that publication, at least three more advanced stage

decisions have come down. *See Citizen Potawatomi Nation v. Dinwiddie Dept. of Social Servs.*, Nos. 1713-12-2, 1724-12-2, 1725-12-2, 1726-12-2, 2013 WL 4804901 (Va. Ct. App., Sept. 10, 2013) (affirmed denial of transfer); *Thompson v. Fairfax County Dept. of Family Servs.*, 747 S.E.2d 838 (Va. Ct. App. 2013) (reversed and denied transfer); *In re Jayden D.*, 842 N.W.2d 199 (Neb. Ct. App. 2013) (reversed and ordered transfer).

Sometimes the inconsistency is within the state. *Compare In re A.T.W.S.*, 899 P.2d 223 (Colo. App. 1994), *with In re J.L.P.*, 870 P.2d 1252 (Colo. App. 1994). In addition, tribes sometimes wait until the termination of parental rights has been completed at the state level before moving to transfer the case. *See In re R.M.B.*, 724 N.W.2d 300, 309 (Minn. 2006); *In re A.L.*, 442 N.W.2d 233 (S.D. 1989); *In re D.M.*, 685 N.W.2d 768, 772 (S.D. 2004); *In re S.G.V.E.*, 634 N.W.2d 88, 93 (S.D. 2001). States will even deny transfer due to the advanced stage of the proceedings when the state court created the advanced stage of the proceedings through insufficient notice. *In re J.J.*, 454 N.W.2d 317 (S.D. 1990); *In re A.L.*, 442 N.W.2d 233 (S.D. 1989). *But see In re M.S.*, 237 P.3d 161 (Okla. 2010).

There is a two-fold problem with the "advanced stage" of the "proceedings" good cause reasoning. First, ICWA defines four separate types of "proceedings": foster care, termination of parental rights, preadoptive placement, and adoptive placement. 25 U.S.C. § 1903 (1)(i)-(iv). While a petition to transfer might be filed late in a foster care proceeding, it would be considered early for an adoptive placement. Because the federal definitions of proceedings do not map onto each individual state proceeding neatly, there is need for the clarity provided by the proposed regulations. Second, tribes may be in agreement with state proceedings prior to termination, and work with the state for reunification of the family. However, when the parental rights are terminated, the tribe then has a reason to transfer jurisdiction and ensure the child stays within the community. What the tribe considers a reasonable decision-making process appears as indifference to the state court. *In re D.M.*, 685 N.W.2d 768, 772 (S.D. 2004). In *In re E.S.*, 964 P.2d 404 (Wash. App. 1998), for example, the Fort Peck Assiniboine Tribe intervened after receiving notice three years after the case began, and when the Tribe moved to transfer the case three months later, just before termination, the court held that this was an untimely motion to transfer jurisdiction. The Tribe explained that it was tribal policy to follow the case in the state court until the "matter goes beyond foster care placement." *Id.* at 411; *see also In re Robert T.*, 246 Cal. Rptr. 168 (Cal. Ct. App. 1988).

In addition to allowing petitions for transfer to occur at any stage of the proceedings, the proposed regulations also prohibit courts from considering three elements in their good cause analysis: the child's contacts with the reservation; socio-economic conditions or any perceived inadequacy of the tribal social service or judicial systems; or the tribe's prospective placement for the child. The last two

elements limit the state court's attempt to guess what the tribal court will do as reason not to transfer a case. This type of analysis by state courts sometimes falls under a best interests analysis when determining jurisdiction. *In re Robert T.*, 246 Cal. Rptr. 168 (Cal. Ct. App. 1988); *Thompson v. Fairfax County Dept. of Family Servs.*, 747 S.E.2d 838 (Va. Ct. App. 2013). The transfer provision of ICWA is a jurisdictional one, however, and should not implicate the best interests of the child. The transfer provision of ICWA recognizes that tribal courts are fully competent to determine a child's best interests. Accordingly, the proposed regulations prohibit using the perceived placement preference by the tribe as good cause to deny transfer.

> [B]y providing tribal courts with presumptive jurisdiction, Congress presumed that these courts would consider a child's best interests in adjudicating a termination of parental rights case. *People ex rel. J.L.P.,* 870 P.2d at 1258–59 (holding that the best interests of the child are not relevant in determining whether to transfer child custody proceedings to a tribal court); *In re Armell,* 194 Ill.App.3d 31, 39, 141 Ill.Dec. 14, 19, 550 N.E.2d 1060, 1065 (1990) (same); *T.W. v. L.M.W. (In re C.E.H.),* 837 S.W.2d 947, 954 (Mo.Ct.App.1992) (same); *State v. Elise M. (In re Zylena R.),* 284 Neb. 834, 848–53, 825 N.W.2d 173, 184–86 (2012) (overruling prior cases and holding that a child's best interests "should not be a factor in resolving the issue of whether there is good cause to deny a motion to transfer a case involving an Indian child from state court to tribal court"); *In re Guardianship of Ashley Elizabeth R.,* 116 N.M. 416, 421, 863 P.2d 451, 456 (N.M.Ct.App.1993) (holding the best interests of the child irrelevant to transfer decision); *Hoots,* 663 N.W.2d at 633–34 (same); *Yavapai–Apache Tribe v. Mejia,* 906 S.W.2d 152, 168–71 (Tex.App.1995) (reviewing conflicting authority and concluding that a child's best interests is not relevant to the transfer decision).

Id. at 850.

IV. Voluntary Proceedings, Parental Interests, Tribal Interests, § 23.123, § 23.129

Perhaps the most controversial aspect of these regulations have to do with their application to voluntary proceedings. However, the law is ambiguous in this area, specifically as it relates to the difference between voluntary termination of parental rights (by the parents) and adoption, and involuntary termination of parental rights (by the state) and adoption. These regulations address those ambiguities within the statutory intent and as illustrated in the legislative history. 25 U.S.C. § 1913 is titled "Parental rights, voluntary termination" and addresses the consent requirements of parents to voluntarily relinquish their children to foster care or for

adoption. However, this section does not address how it interacts with the other provisions of the Act, specifically the application of ICWA to *all* termination of parental rights and adoption proceedings, 25 U.S.C. § 1903(1)(ii) ("'termination of parental rights' which shall mean *any* action resulting in the termination of the parent-child relationship"), 25 U.S.C. § 1903(1)(iv) ("'adoptive placement' which shall mean the permanent placement of an Indian child for adoption, including *any* action resulting in a final decree of adoption") (emphasis added), the transfer of termination proceedings, 25 U.S.C. § 1911(b), tribal intervention in termination proceedings, 25 U.S.C. § 1911(c), and the placement preferences for adoptions, 25 U.S.C. § 1915(a) (placement preferences apply in *any* adoptive placement under state law).

However, the law also states that notice to the tribe is required in "any involuntary proceeding" that is a foster care placement or termination of parental rights. 25 U.S.C. § 1912(a). Notice in a voluntary proceeding is not required under the statute. A voluntary adoption requires, by law, the termination of parental rights. *See* MCL 710.23a(1). This means that a tribe may have a right of intervention and transfer under 25 U.S.C. § 1911, but not be notified of the case to exercise those rights. It also means that the placement preferences apply, but as a practical matter cannot be achieved without the participation of the tribe. These regulations clarify this ambiguity, requiring the notice of the tribe in both voluntary and involuntary proceedings.

Given Congress's concern about both state *and* private agency action in removing Indian children, this regulation is not outside of the authority of the Department. As the sponsor of the ICWA, Senator Abourezk, observed, "Partly 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. 21,043 (daily ed. June 27, 1977) (statement of Sen. Abourezk); *see also Problems that American Indian Families Face in Raising Their Children and How These Problems are Affected by Federal Action or Inaction: Hearings Before the Subcomm. On Indian Affairs, S. Comm. on Interior and Insular Affairs*, 93rd Cong. 146 (1974) (statement of Sen. Abourezk) [hereinafter 1974 Senate Hearing] ("[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 that 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, *supra* at 70 (statement of Bertram Hirsch, Counsel for the Ass'n on Am. Indian Affairs) (referring to the adoption system as a "grey market" because "there's tremendous pressure to adopt Indian children, or have Indian children adopted out"); *id.* at 161 (statement of Esther Mays, Native Am. Child Protection Council) (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"); *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the S. Select Committee on Indian Affairs*, 95th Cong. 359 (1977) (statement of Don Milligan, Dep't Social & Health Servs., State of Wash.); *id.* at 271 (statement of Virgil Gunn, Colville Indian Tribe Bus. Council) (noting that "[t]hrough 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," and that of 136 Colville adoptions in the last 10 years, only 20 went to Indian families and 31 were out-of-state); 1974 Senate Hearing, *supra*, at 147 (statement of Leon Cook, Dep't of Indian Work, Minneapolis, Minn.).

While a parent has a fundamental liberty right to care, custody, and control of their child, *see Stanley v. Illinois,* 405 U.S. 645 (1972); *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *In re Sanders*, 852 N.W. 524, 534 (Mich. 2014), adoptions remain subject to state court approval. *See, e.g.*, Mich. Comp. Laws §§ 710.21 et seq. State proceedings and approval of adoptions prevent parents from placing children in homes that may be considered unsafe or unfit. The parent's right to that placement is balanced against the interest of the state in the safety of the child. *Lindley v. Sullivan*, 889 F.2d 124, 131 (7th Cir. 1989) (holding that adoption is a statutory creation and directly involves state interests in the placement of children); *see also* Mich. Comp. Laws § 710.24 (detailing the contents for a petition for adoption, including a preplacement assessment described in Mich. Comp. Laws § 710.23(f). The tribe's interest in Indian children who are citizens is no less than that of the interest of a nation-state. In the case where the Court weighed the interest of a tribe and the interest of a parent in a voluntary adoption, the Court stated that the interest of the tribe in their children is different from, but on equal footing to, that of the parent. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52 (1989).

While ICWA and the proposed regulations make clear that tribal interest also flows from a tribe's sovereign status, as discussed *supra* in Sections I and III(f). That interest is reciprocal between the tribe and the Indian child. *See* Barbara Atwood, *Children, Tribes, and States* 46-55 (2010) ("Indian identity is a concept at the heart of federal Indian law but carries multiple meanings. It is a legal construct as well as a political status; it can denote a cultural affiliation and a sense of shared history as well as an enrollment entitling one to reap the benefits of tribal membership, including participation in a tribe's political life.") *Id.* at 54.

V. Conclusion

These proposed regulations will provide much needed guidance and consistency in state court proceedings involving Indian children. These regulations, supported as they are by ICWA and the great weight of federal Indian law, provide balance and clarity between competing interests, and are well within the authority of the Department of the Interior to promulgate.