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TO: Ms. Elizabeth Appel
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COMMENTS ON PROPOSED RULE ENTITLED
"REGULATIONS FOR STATE COURTS AND AGENCIES
IN INDIAN CHILD CUSTODY PROCEEDINGS"
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General Remarks

The drafting of the Indian Child Welfare Act ("ICWA") was primarily the work of three attorneys. The undersigned submits these comments as one of these three, originally working as staff counsel and later as outside counsel for the Association on American Indian Affairs ("AAIA"), and as one actively engaged, through representation of more than 200 tribes, tribal organizations, and national and regional Indian organizations, in seeking effective implementation of the Act from 1979 through the beginning of the first decade of this century. This included involvement in the development of the original Guidelines and regulations in 1979, a process that engaged large numbers of tribes and their members, in part through regional hearings arranged and supervised by the undersigned pursuant to a contract between the BIA and the Association on American Indian Affairs. It also involved representing tribes, mostly under AAIA auspices, in developing and securing State ICWA laws and regulations and tribal/State agreements, and in representing tribes and Indian families in both pre-ICWA and post-ICWA court cases in 35 States.

The BIA is to be commended for the proposed rule. It is long overdue and has long been needed for the reasons expressed at 54 Fed.Reg.14881. For many years following enactment, there was deliberate and aggressive non-compliance with the ICWA in a number of jurisdictions because the ICWA required changes in State practices and procedures that were opposed by certain agencies, courts and private attorneys. This resistance to compliance, although significantly muted from what it was in the 1980s and into the 1990s, continues to impede the ability of Indian children, tribes and families to obtain the benefit of ICWA provisions.

In general, the proposed rule advances the purposes of the ICWA in a way that is consistent with the statutory language, its legislative history and best practices

implementation that has occurred in one or another jurisdiction. However, this is not entirely the case and certain provisions require more clarity to avoid litigation over meaning and intent that should not be necessary.

In addition, in promulgating ICWA regulations and in reviewing comments on the proposed rule, this commenter would urge the BIA to consider the comments received in light of both pre-ICWA and post-ICWA history.

Pre-ICWA, the BIA, along with the almost universal support of adoption agencies and adoption attorneys, vigorously opposed ICWA enactment. In the years since enactment, this has dramatically changed. As is evident from the proposed rule, the BIA supports effective implementation of the Act as do most public agencies and most of the major private State licensed agencies. Almost standing alone in continued opposition is the private adoption bar, frequently represented by the American Academy of Adoption Attorneys ("AAAA"), an organization of 347 members nationally, a number of whom do not endorse the anti-ICWA positions taken by that organization. Members of this organization and other unaffiliated adoption lawyers have assiduously worked, since enactment, to undermine or destroy the ICWA whenever possible. Pre-ICWA, these same individuals or their predecessors in kind preyed on Indian children and families, had and continue to have no concern for the best interests of Indian children, and are principally interested in securing personal remuneration from marketing Indian children. Comments received in opposition to the regulations need to be reviewed with this in mind.

Every word, sentence and section of the ICWA was drafted to address a specific problem encountered by the undersigned in pre-ICWA practice, a time when the undersigned for years, 1972-1978, was the only attorney representing Indian families and tribes regularly and nationwide, from one end of the country to the other, in child welfare matters in State courts and involving State and State-licensed agencies. The drafting of the ICWA was also informed, of course, by years of testimony presented to the Congress by Indian tribes, parents and families and years, as well, of congressional investigation. The end result was the crafting of a law focused first and foremost on the welfare of the Indian child. That is why the title of the law is the "Indian Child Welfare Act." This may seem obvious. However, commenters who oppose the law frequently focus on the welfare of the parents of Indian children or on the welfare of prospective adoptive parents and, on occasion, the welfare of the agencies representing or working with these parents and prospective adoptive parents. Comments from such commenters emanate from agendas anathema to what the Congress was interested in and seek to shift the focus away from the congressional agenda. Because these commenters seek to resurrect or continue the very problems that gave rise to the ICWA, their remarks should only be considered if, after careful review, they contribute to advancing the national policy articulated in 25 U.S.C. 1902. In addition, those of their remarks that conjure up potential harm to Indian children from promulgation of one or another of the proposed rules should be scrutinized from the standpoint of whether the concerns flow from academic analysis or self-serving interests or, instead, from actual evidence of harm having been caused by rules that are the same or similar to a particular proposed rule. This commenter would suggest that, to

the contrary, Indian children have benefited from the ICWA and rules that are the same or similar to the proposed rules.
A case in point illustrative of the concerns expressed above is starkly provided by the April 13, 2015 comment submitted to the BIA by Laurie B. Goldheim, President of the American Academy of Adoption Attorneys and posted April 30, 2015 on www.regulations.gov, ID: BIA-2015-0001-0075. In this letter, Ms. Goldheim, after expressing support for the "intent and purpose" of the ICWA, then proceeds to attack the proposed rule because, purportedly, it would "put the rights of a tribe over" the rights of everyone else and "most importantly over those of children." She opines that this is contrary to the ICWA because, without providing any evidence, "in many instances [this] could be contrary to the best interests of children." Therefore, she posits that the proposed rule "far exceed[s]" the ICWA's intent and purpose. (In its April 19, 2015 submitted comments on the proposed rule ID: BIA-2015-0001-0046), AAAA does away with all niceties pertaining to support for the "intent and purpose" of the ICWA and just directly launches into its all out assault on this "intent and purpose.").

One would hope and expect that 37 years after enactment, the attempt to perpetuate this canard about the ICWA, because it is in fact the exact argument adoption attorneys have made and continue to make about the ICWA itself, would be treated for the drivel that it is. The Academy and others of like mind have been singing this song, and often getting away with having its lyrics accredited, for too long, i.e., for more than 37 years. It's time to get back to a recognition of first principles.

The ICWA had several objectives. As noted above, first and foremost is the welfare of Indian children, a welfare that the Congress expressly found had not been properly addressed by courts acting pursuant to State law. In fact, the Congress found that State courts and the way in which certain State laws were applied by these courts caused actual harm to Indian children. The harm, in part, is described as the "often unwarranted" breakup of "a high percentage of Indian families" and the "high percentage" of Indian children "placed in non-Indian foster or adoptive homes." The Congress found both of these circumstances to be "alarming," 25 U.S.C. 1901(4), an exceptionally unusual word in a federal statute that helps to better understand, and motivate giving effect to, the broad way in which Congress determined to address, ameliorate and, hopefully, eliminate the cause for "alarm."

To rectify the described harm to Indian children and families, the Congress determined that, whenever possible, tribes should adjudicate child custody proceedings because they have a parens patriae interest in the children who are members or eligible for membership in the tribe and also, at least, to the tribal member parents and extended family of these children, that is compelling and paramount to the parens patriae interest of any State. In circumstances, where tribes do not have the jurisdiction to adjudicate these proceedings, the ICWA not only provides tribes and tribal law with a substantial role in State child custody proceedings, it favors the transfer of such State proceedings to the jurisdiction of the Indian child's tribe. Thus, the ICWA recognizes that, just like States, when tribes adjudicate child custody proceedings or become involved in State child custody proceedings, they are acting in their sovereign capacity and, necessarily, in the best

interests of Indian children. To put this another way, the ICWA, rather than elevate the rights of the tribe "over" the rights of Indian children, defines the "best interests of the child" as maintaining and securing the right of the Indian child to remain connected to the child's tribe and in the custody of the child's biological family. In a general sense, each of the ICWA provisions supports, implements and provides an element of Congress's definition of what is "in the best interests" of an Indian child with the entirety of the ICWA filling out the definition provided in 25 U.S.C. 1902. The proposed rule does no more than implement these best interests.

In short, the ICWA incorporates a conclusive presumption that the interest of the Indian child's tribe is the "best interests of the [Indian] child" and, therefore, that this interest can never be antithetical to those "best interests" as Ms. Goldheim argues.
Ms. Goldheim states that while the Academy "recognize[s] that culture should be a consideration, it should never be controlling when its application would be to the detriment of the child's needs." This is quite an interesting position considering that pre-ICWA, adoption attorneys, in seeking, for example, to defeat an extended family placement always sought to portray residing within a tribal cultural environment as detrimental to the Indian child's best interests. Conversely, they always sought to portray non-Indian culture as providing superior opportunities for Indian children. No wonder that pre-ICWA, Indian children were almost always placed with non-Indian families. No wonder that both the ICWA and the proposed rule seek to implant and enforce a repositioning that favorably treats placement within the tribal culture. 25 U.S.C. 1902 and 1905(d); proposed rule sections 117(d) and 131(d).

Ms. Goldheim's statement is utterly ridiculous because it is unsupported by a reference to anything in the proposed rule that would require a consideration of tribal "culture" when doing so would harm a child or be "to the detriment of the child's needs." More important, this statement completely ignores the express ICWA declaration that the "best interests of Indian children" are "protect[ed]," even when there is a need for foster care or adoptive placement, when Indian children are placed "in homes which will reflect the unique values of Indian culture." 25 U.S.C. 1902. Of course, it goes without saying, that the overarching best interests of Indian children, when there is no need for foster care or adoptive placement, is to have these children remain in the homes of biological family which, presumably, also "reflect the unique values of Indian culture." The ICWA focuses on securing this outcome whenever possible, reserving out-of-family placement as "a last resort." 25 U.S.C. 1931(a) and ICWA, *passim*. Again, the proposed rule does no more than implement these best interests.

Cutting through the absurd notion, that somehow a consideration of tribal culture can ever be harmful to a child, exposes the actual position that underlies Ms. Goldheim's/the Academy's point of view, namely, that whenever a non-Indian family, represented by an Academy attorney or like attorney, has set its sights on adopting an Indian child, it would always be contrary to the best interests of the child and, therefore contrary to the ICWA, to apply the ICWA in a way that could deny such adoption. In other words, a placement based on "considering" a non-Indian cultural placement over a tribal cultural placement should be "controlling" in such circumstances. This is the position consistently advocated

by the Academy, its members or like-minded attorneys from the time prior to enactment of the ICWA to the present. Pre-ICWA, in the face of an exhaustive legislative history documenting the need for congressional action to fix what the Congress described as a "crisis" causing demonstrable harm to Indian children, families and tribes, adoption attorneys professed that such a problem either did not exist or the evidence of such a problem was overblown and could readily be addressed under State law. They apparently were never bothered about the post-adoption consequences of their advocacy, consequences that included many failed adoptions and, as the Congress heard in testimony and found, many adoptions by non-Indian families that caused serious physical and/or emotional harm to Indian children.

Sadly, the Academy position on best interests, the rights of Indian children and tribes, and on culture, expressed by Ms. Goldheim, dominated outcomes pre-ICWA. ICWA aimed precisely at rejecting this position. Post-ICWA, the position has no credibility and should be treated as such.

It is truly pathetic that post-ICWA, adoption attorneys have invested their energies to defeat the ICWA while continuing to argue that there never was a problem justifying congressional intervention in the first place. Post-ICWA, they have sought to render ICWA implementation ineffective and, having had some success in this regard, they now argue, in the face of documented ample evidence of the critical need for regulations to assure or, at least improve, effective implementation, that implementation has been adequate and, therefore, that the proposed rule is unnecessary. Simply, in the view of these attorneys, the ICWA is the problem, not the solution to a problem and the proposed rule would only compound the problem ICWA created. This is no surprise given that certain of the problems Congress addressed in the ICWA were caused by the practices of adoption attorneys who never have and never will acknowledge that their practices often were not and are not in the best interests of Indian children.

In reviewing the comments presented by AAAA and others in opposition to the proposed rule, it is important, in understanding and putting in perspective the scope, intent and purpose of the ICWA, to grasp the political context in which the ICWA was enacted. Prior to enactment, the decimation of Indian tribes through the loss of their children to out-of-home and out-of-tribal placement had been going on for decades. The Bureau of Indian Affairs participated in this as did other federal and many state agencies as well as private actors. The extent of the decimation was first revealed in 1968 by the Association on American Indian Affairs (AAIA) when it conducted and publicized a national survey revealing the numbers of Indian children in non-Indian foster homes, adoptive homes and institutions. The effort to secure a federal law to address the issues presented by these placements began at that time. Ultimately, legislation was introduced and considered in three Congresses, the 93rd, 94th and 95th. The legislation was controversial and exceptionally difficult to pass. When it finally did pass on the final day of the 95th Congress, it did so over the opposition not only of many nongovernmental persons and entities and members of Congress but also over the opposition of the Departments of Interior, Justice and Health, Education and Welfare and the Office of Management and

Budget. Each of these cabinet level agencies recommended that the President veto the legislation.

After enactment of the ICWA, the AAIA, NCAI, the undersigned and numerous others argued vigorously for regulations to be promulgated along the lines of the proposed rule. Not surprisingly, the Department of the Interior, having strongly opposed enactment, did not agree to do this. However, it did agree to issue Guidelines formulated after significant consultation and input from tribes and tribal organizations. AAAA now relies on selected portions of these 1979 Guidelines in support of various of its objections to the proposed rule. Needless to say, the portions AAAA selects were opposed by those advocating enactment. In the beginning, page 3, of its 45-page excoriation of the proposed rule, AAAA proclaims that the "authors of the 1979 *Guidelines*…were intimately involved in the drafting and passage of the federal ICWA…." This statement, repeated on page 20, is just plain wrong. While the Guidelines do include provisions advocated by and on behalf of tribes and tribal organizations, the Guidelines were drafted entirely by lawyers in the Office of the Solicitor of the Department of the Interior. See 44 Fed. Reg. 67584 noting that "[m]any of these Guidelines represent the interpretation of the Interior Department of certain provisions of the Act" and specifically identifying the Guidelines pertaining to "good cause" as the Department's interpretation.

None of the drafters of the Guidelines were ever "intimately involved in the drafting and passage of the ICWA." As noted, the Department opposed and did whatever it could to defeat passage. Changes in the legislation proposed by the Department, for the most part, were not included because they were contrary to congressional goals. In short, the congressional committees and the drafters of the ICWA did not consider Department personnel to be constructive contributors to the development of the ICWA and, therefore, their involvement in the drafting was marginal.

Also, in reviewing the comments presented by AAAA and others in opposition to the proposed rule and in determining the scope of regulations to adopt to better effectuate ICWA implementation, it is vital to put the narrow, constricted and niggardly AAAA (and its like-minded commenters') interpretation of the ICWA in proper context. AAAA's overall approach to the ICWA and its implementation, if credited, would gut and eviscerate ICWA's life force, its raison d'etre. An understanding of context should render this ICWA strait-jacketing approach impermissible.

The ICWA legislative history documents several years of evolving statutory language expressing the goal, primarily of the Chairman of the Senate Indian Committee, James Abourezk, and the Chairman of the House Interior and Insular Affairs Committee, Morris Udall, to enact a comprehensive bill that would address the breadth of issues, encountered by Indian children, families and tribes in State voluntary and involuntary child custody proceedings, causing Indian children to be placed in non-Indian settings. In furtherance of this goal, the ICWA embodies concepts that define and inform each provision. These are: (1) recognition that tribes, acting in their sovereign parens patriae capacity with respect to their member children, parents and families, wherever located, are best suited and positioned to exercise jurisdiction over and determine child custody

proceedings, (2) when States exercise jurisdiction over child custody proceedings, requiring that the State court's child custody decision must be based on a recognition of national policy defining the best interests of Indian children, include tribal involvement, apply tribal law or custom in certain circumstances, and make out-of-home placements consistent with tribal child-rearing practices and family organization, and (3) biasing the procedures governing State child custody proceedings in favor of maintaining children in the custody of their parents and families and connected to their tribal communities, and in favor of facilitating the reunification and reconnecting of placed children with their families and tribes.

The concepts embodied in the ICWA have no precedent in federal law or in the relationship between the United States and tribes. The ICWA dramatically upends the legal status quo ante with a breadth that is jaw dropping and under-appreciated 37 years after enactment.

The ICWA is the only federal statute that defines the trust responsibility of the United States as including a trust responsibility to tribal people and to protecting their "essential tribal relations," not just, for example, a trust responsibility with respect to tribal funds, lands and natural resources. 25 U.S.C. 1901(3) and (5).

The ICWA is the only federal civil rights law ever enacted that specifically protects the rights of Indian children, families and tribes in proceedings occurring in nontribal jurisdictions. It provides for both procedural and substantive due process protections that are different from, in conflict with and greater than those otherwise available under State law. In other words, in child custody proceedings that would otherwise proceed pursuant to State law, the ICWA requires State courts to apply federal law that rejects and preempts State law.

An examination of 25 U.S.C. 1911 underscores the historic dimension of the ICWA. 25 U.S.C. 1911(a) confirms federal recognition of Indian child custody proceedings over which tribes have exclusive jurisdiction. Prior to this subsection, it was common for State agencies and courts to unlawfully exercise jurisdiction under State law over child custody proceedings involving parents, extended family and Indian children domiciled or resident on a reservation. It was also not that unusual for non-Indian private actors to actually or virtually kidnap Indian children from a reservation and proceed in a State court with a petition for permanent custody. This subsection also importantly recognizes the legitimacy of tribal court child custody determinations and prescribes that they must be respected by State courts, something that rarely occurred pre-ICWA. Significantly, the subsection incorporates an affirmation that raising children on a reservation is not harmful. Pre-ICWA, the reservation environment itself was often denigrated in State court child custody proceedings and used as a basis for separating children from their tribes and on-reservation families.

25 U.S.C. 1911(b) is a truly extraordinary provision. It recognizes that tribes, throughout the United States, have concurrent jurisdiction with State courts over voluntary and involuntary child custody proceedings involving tribal children not domiciled or resident

on the tribe's reservation. Moreover, the subsection incorporates a presumption in favor of tribal jurisdiction over such proceedings and, like subsection (a), stamps a federal imprimatur on the legitimacy of tribal courts as adjudicatory fora for child custody proceedings as well as a federal affirmation of reservations as salutary environments in which to raise Indian children . This extra-territorial reach of tribal sovereign authority has no precedent and, subsequent to the ICWA, has never been extended to any other area of tribal off-reservation sovereign interest. Needless to say, pre-ICWA, tribes were almost always prevented from exercising jurisdiction over off-reservation children and families even though on the rarest of occasions comity allowed for this to happen. Even the one or two times pre-ICWA that a court recognized that tribes could have concurrent jurisdiction over an off-reservation child custody proceedings, no presumption favored tribal jurisdiction and the State court precluded tribal jurisdiction because the matter was pending in the State court first.

25 U.S.C. 1911(c), in line with ICWA's recognition of the sovereign parens patriae interest that tribes have with respect to their children and families, establishes that tribes have a right to intervene in voluntary or involuntary State child custody proceedings that are not transferred to a tribal court. Pre-ICWA, a small number of State judicial decisions recognized that a tribe's interest in its children and families satisfied the requirements under State law for intervention as of right. Subsection (c) nationalizes these holdings. Pre-ICWA, tribes were not typically recognized as having an interest in State child custody proceedings that would even permit permissive intervention.

25 U.S.C. 1911(d) is also unprecedented in providing a federal mandate that full faith and credit must be given to tribal laws and court orders pertaining to child custody proceedings. Pre-ICWA, with the rarest of exceptions, State courts did not extend full faith and credit to tribal laws or court orders. In addition, this subsection also provides that a tribe's laws and court orders related to child custody proceedings be given full faith and credit by the United States and other tribes. This, too, is unprecedented.

The historic dimension of the ICWA is also clearly articulated in 25 U.S.C. 1915. This section is the only provision in federal law that expressly recognizes that tribes and tribal families are entitled to raise children according to customary tribal rearing practices and are entitled to maintain their traditional and customary family organization. State courts are generally precluded from applying the standard State law construct which typically recognizes that a family consists only of biological or adopted children and their parents. Pre-ICWA, extended family child-raising was often considered by State courts and agencies to be detrimental to the best interests of children and, especially when combined with the disparagement of the on or off-reservation tribal way of life, was used as a justification for placing children in non-Indian foster and adoptive homes.

AAAA and some of its members bristle at the handcuffing requirements imposed by 25 U.S.C. 1913 which governs voluntary placements. They wish the clock could be turned back to pre-ICWA practice under State law where parents of Indian children typically signed consents to placements in an agency office or the office of a lawyer representing a prospective non-Indian adoptive parent(s), were misinformed, not informed or informed

in a way not understood, regarding what they were signing or even that it was a consent to "voluntary" placement, were permanently precluded by law, almost from the moment of execution of the consent, from revoking or withdrawing the consent regardless of whether the consent was secured through fraud or under duress, were rarely informed that they were consenting to a termination of parental rights or adoption, were almost always not represented by counsel, did not have tribal involvement in the voluntary relinquishment either because tribes were not informed about the matter and were not able to intervene or seek a transfer of jurisdiction, and were not advised that the proceeding could occur, if the parent wished, in a tribal court. The ICWA changed all of this and, based on testimony presented to the Congress, sought to surround voluntary placements with a number of due process protections for the consenting or relinquishing parent(s), including tribal and extended family involvement.

The foregoing description of the political and textual context of the ICWA is offered to suggest that the Bureau of Indian Affairs is well-grounded in deciding to develop implementing regulations, to protect the welfare of Indian children and the sovereign interest of tribes in their children, that, in certain respects, demonstrate the same expansive vision adopted in the statute and in deciding to reject recommendations that would sap the ICWA of its potency. A case in point, as discussed below in the comments on proposed rule 23.111, concerns the AAAA recommendation that there should be no notice to the Indian child's tribe of any voluntary child custody proceeding and, most particularly, of a voluntary preadoptive placement or adoption proceeding because tribes, AAAA contends, do not have an ICWA right to intervene in such proceedings. See pages 23-24 of AAAA's comments. Another case in point, discussed in the comments below on proposed rule 23.115, is AAAA's recommendation that tribes should not have any right to petition for the transfer of voluntary preadoptive or adoption proceedings to the jurisdiction of the Indian child's tribe. See pages 25-26 of AAAA's comments.

Remarks on Specific Proposed Provisions

23.2 Definitions

Active efforts

The definition of "active efforts" is excellent because it requires the types of actions that the drafters of 25 U.S.C. 1912(d) had in mind to remediate the general pre-ICWA practice of State and State-licensed agencies, documented in testimony, of providing virtually no effort, much less an active effort, to prevent Indian family breakup. Pre-ICWA and since, the all-too-common agency practice is to provide usually poor, unskilled, unrepresented parents, untutored in the skills needed to find a job or adequate housing, for example, with a checklist of goals to achieve in order to prevent child removal or secure the return of a removed child. The parent is then left to his or her own devices to satisfy the goals. This is more than unrealistic and, not surprisingly, often results in agency action to separate parents and children. The "active efforts" requirement was included in 25 U.S.C. 1912 to address and reverse this practice by mandating that agencies engage in hands-on assistance to parents in performing the tasks the agency

assigns. The drafters intended more than "reasonable efforts." As House Report 95-1386, page 22, makes clear the main focus of the "active efforts" mandate is to require public or private agencies to provide "remedial measures prior to initiating placement or termination proceedings." The proposed definition draws support from the way in which state ICWA statutes and tribal/state agreements have defined this term. Various of the examples of "active efforts" provided in the 15 subparagraphs should be clarified. These are:

Subparagraph (8) where the term "Indian child's family" is used. This term is not used in the ICWA and is not defined. The apparent intent of this subparagraph is to assess the circumstances of those who had custody of the Indian child. However the language requires clarification because it could encompass a broader group of individuals. The clarification is also needed so that there is no dispute regarding the family intended for "safe reunification."

Subparagraph (9) where "and any Indian custodian" should be added after "extended family members. "Indian custodian" is an ICWA defined term and when there is an "Indian custodian," such a person or persons squarely fit within the notification and consultation purposes of this subparagraph.

Subparagraph (10) where the term "family interaction" is used without elaboration as to who is included in "family." "Family" is not an ICWA defined term. However, consistency with subparagraph (1) and like subparagraphs supports the clarification that "family" in this subparagraph means, where appropriate, parents, siblings, extended family members and any Indian custodian.

Subparagraph (11) where "or any Indian custodian" should be added after "extended family." See subparagraph (9) comment above.

Subparagraph (13) where "alternative ways" of addressing the needs is unelaborated as is "providing consideration." Without elaboration, this provision will largely be ignored and will be meaningless where "services do not exist" or "existing services are not available." At the least, the subparagraph should require some diligent effort to identify services that are available elsewhere and that can be made available. This diligent effort should include consulting with the Indian child's tribe, any professionals involved with the child, the parents, the extended family and any Indian custodian. Lastly, "or any Indian custodian" should be added after "extended family." See subparagraph (9) comment above.

Subparagraph (14) where reference is made to "trial home visits." This phrase should be further described with respect to the identity of the "home." The trial home visits should not necessarily be limited to the "home" from which the child was removed. The "home visit" should include, as appropriate, the home of extended family members and any Indian custodians in addition to the home of a child's parents or adult siblings.

Subparagraph (15) where “post-reunification… monitoring” is included in “active efforts.” While the need for this “monitoring” could be beneficial and would appear obvious, in situations where children were removed due to alleged neglect or abuse and were then returned, Indian families once in the non-Indian judicial or social services system have all too often experienced targeting aimed at finding fault with child-rearing that the tribal community finds unobjectionable and using this to again remove children or to keep a family in the cross-hairs in a way that never permits the living of a normal life. “Monitoring” assumes good faith. The ICWA was drafted the way it was because of bad faith or at least bad practices by state agencies. To protect against abuse in the provision of post-reunification services and monitoring, the proposed rule should state that these post-reunification activities should include the Indian child’s tribe, extended family members, and any legal representatives of the child, the parents and any Indian custodian.

Continued custody. “Indian custodian” should be added after “parent” in order for this term to not only be in accord with 25 U.S.C. 1912(e) and (f) but also for the term to be consistent with its usage in proposed rule 25 C.F.R. 23.121 (a) and (b). Otherwise, the definition is in accord with the purposes and intent of the referenced ICWA subsections where the term is used.

Domicile – In subparagraph (1) of this definition, add “or Indian custodian” after “parent”. In subparagraph (2), first sentence, “Indian custodian” should also be be added after “parents”. Also, subparagraph (2) of this definition is too narrow and not in accord with standard legal constructs of this term. When parents are unmarried, the child’s domicile should be determined by the father if the father is the custodial parent. Further, the child’s domicile should be determined by the domicile of whoever has custody.

Upon demand - After “expenses” add “and without having to resort to legal proceedings”.

23.101 The purpose of the regulations is stated as “clarifi[cation] of the minimum federal standards governing implementation of the Indian Child Welfare Act.” This statement of purpose is incomplete and insufficient. Since 1978, judges, and there have been and still are many who disagree with ICWA requirements or have a hostile reaction to federal intrusion on what they consider to be their prerogatives under state law, and lawyers, representing parties in whose interest it may be to avoid, undermine or otherwise seek a toothless application of the ICWA, have sought refuge and, too often, found refuge in an appeal to the “best interests of the child” under state law. Of course, in their estimation, ICWA application would thwart these “best interests.” It is precisely because, pre-ICWA, state law “best interests of the child” applications were responsible for the findings in 25 U.S.C. 1901(4) and (5) that Congress expressly provided a federal definition for the term “best interests of the child” as that term applies to Indian child custody proceedings. 25 U.S.C. 1902 states that the ICWA “protect[s] the best interests of Indian children … by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children….” Accordingly, the standards provided in 25 U.S.C. 1911-1917 and 1920-1922, as well as the national policy

articulated in 25 U.S.C. 1902, that any foster or adoptive homes in which Indian children are placed, "reflect the unique values of Indian culture," are the "minimum Federal standards" that define what is in the "best interests of Indian children." These are not take-it-or-leave-it standards that are in the discretion of state courts to either apply or deviate from; rather they are mandatory standards that supplant any state law or application of state law to the contrary. This subsection should be augmented by stressing this point. Doing so, will immediately garner an enhanced compliance with the ICWA's requirements. This point should also be briefly reiterated in section 23.105(a) of the proposed rule as recommended below.

This section should also state that the minimum Federal standards do not supplant State laws and regulations and Tribal/State agreements applying standards requiring more than the minimum. This point may seem obvious but, as discussed further in the comment below on section 23.105, if this point is not made, supplanting higher or more elaborated standards may be the outcome produced by these regulations.

23.103(a) The way in which the application of the ICWA to proceedings involving status offenses or juvenile delinquency is addressed in this subsection is not correct. By stating that the ICWA applies to a "proceeding that results in the need for placement" or results in "termination of parental rights" allows for delay in application of the Act to a later point in the proceedings beyond where ICWA application should commence. The ICWA should apply whenever the proceeding is or becomes a "child custody proceeding" requiring application of the requirements of 25 U.S.C. 1911, 1912, 1915, 1916 and 1920-1922.

23.103(f) This subsection should be deleted. It is unnecessary, confusing and opens up the possibility that adoptive placements that should be governed by the ICWA won't be. The only ICWA section that uses the term "upon demand" is 25 U.S.C. 1903(1)(i). The purpose of including this term in the "foster care placement" definition was to exclude from ICWA coverage the very common custom and practice of Indian parents entrusting the care of their children to extended family members or Indian custodians. The drafters did not want to compel legal proceedings to legitimize these types of informal arrangements. The proposed rule, however, is expansive, excluding both foster care and adoptive placements that are "voluntary" from ICWA coverage provided that the parent can have the child returned "upon demand." The proposed rule then states how such placements should be made even though such placements are outside the scope of the ICWA and, therefore, presumably beyond BIA rulemaking authority. At least the "how" is stated in terms of "should" because these arrangements are not typically arranged by persons conversant with preparing "agreements" nor do such persons typically ever consider consulting professional assistance before entering into a "return upon demand" agreement even when such assistance is readily available which, often, is not the case.

In the context of voluntary placements, proposed 25 C.F.R. 23.103(g) is sufficient. It accurately states what the ICWA provides in 25 U.S.C. 1913. Moreover, it clearly and correctly provides that voluntary adoptive placements are covered by the ICWA. Proposed 25 C.F.R. 23.103(f) is in contradiction when the voluntary adoptive placement

permits a parent to secure return of the child "upon demand." This could open the door to parents being presented with a consent to adoption agreement to sign that states that the parent can have the child returned upon demand, something already guaranteed by 25 U.S.C. 1913(c), and then proceeding as though the ICWA no longer applies. Long experience with the adoption attorney bar informs the undersigned that this prospect is more than likely to occur if subsection (f) remains. Consents to adoption, even with the protection of section 1913(c), are extremely difficult to undo; there is no need to add another layer of complexity to this or another avenue by which Indian children can be hurried through the adoption process before there is any opportunity for an Indian parent to act on a reconsideration.

Because 25 U.S.C. 1913(b) and (c) effectively make both voluntary foster care and adoption placements subject to a return to parent "upon demand" requirement, the withdrawal of consent proposed regulations, 25 C.F.R. 126 and 127, as augmented by the recommendations below regarding those provisions, are sufficient, together with proposed rule 25 C.F.R. 103(g), to address which "voluntary placements" are governed by the ICWA.

23.105(a) The subsection should be reworded as follows: "To ensure compliance with ICWA, these regulations provide minimum Federal standards for the best interests of Indian children applicable in all child custody proceedings." If not reworded, at the least, delete "in which ICWA applies." Since the ICWA applies in all child custody proceedings, this final phrase is redundant and adds confusion. Although obvious, this subsection should also state that the minimum Federal standards preempt any State laws that conflict with them.

23.105(a) and (b) Since enactment, there have been numerous and varied actions at the State level to assure effective implementation of the ICWA. These include State ICWA's, State regulations, State court rules or bench books, and Tribal/State agreements entered into pursuant to 25 U.S.C. 1919. Many of these include provisions that mirror the proposed rule and many contain requirements that provide a significantly "higher standard of protection," governing certain ICWA provisions, than the proposed rule. Each of these types of actions in any given State were achieved through vigorous and prolonged advocacy and negotiations by tribes and Indian organizations. It is important for the proposed rule to acknowledge these actions and state that, when not inconsistent with the ICWA or the regulations, the greater protections afforded pursuant to these actions govern child custody proceedings. In addition, the regulations should encourage States, in coordination with tribes, to continue to engage in actions that will advance ICWA implementation beyond what is required by the regulations. Without such acknowledgment and encouragement to do more, there is the danger that what is intended to be "minimum Federal standards" will become, instead, maximum Federal standards, the regulations acting as a deterrent to further actions at the State level on the premise that the regulations occupy the field and nothing more needs to be done.

23.106(a) This subsection would be strengthened and better stated if "in order to prevent removal" is moved to the very beginning of the subsection, i.e., "In order to prevent removal, the requirement to engage…."

23.107(a) While section 107 applies, as it should, to both voluntary and involuntary proceedings, the subsections are largely proposed in a way more applicable to involuntary proceedings. This should be changed. In subsection (a), the "must obtain verification" requirement is limited to "agencies." (This "must obtain" is contradicted by 23.107(b)(2) which only requires "active efforts…to verify.").

When there is reason to believe that a child is an "Indian child," any party to a child custody proceeding, not just agencies, should be required to obtain verification that the child, in fact, is an "Indian child." See 23.107(b) requiring State courts to ask "each party to the case." However, mandatory "verification" in writing from all tribes where the child may be a member or eligible for membership should not be required. Without question, this kind of verification should be sought and is the optimal way in which to verify a child's status as an "Indian child." However, the ICWA does not provide for any specific method for verifying that a child is an "Indian child" and regardless of whether there is tribal verification, the ICWA applies when an "Indian child" is the subject of a child custody proceeding.

When whether a child is an "Indian child" is undisputed, there really is no need for verification, although in a child custody proceeding, the basis for applying the ICWA to such a child should be presented in pleadings or in evidence. When there is a dispute, in practice, the parties to a child custody proceeding have been free to produce, pursuant to the applicable rules of evidence, whatever verification is available and the trier of fact, a judge, then determines whether the evidence suffices to determine whether a child is an "Indian child." This section should not mandate more, especially because there are circumstances where a tribe does not respond to a request for verification or responds too late for the verification to be used or chooses not to become involved in a particular case. In such cases, the parties should not be limited to the type of verification required by subsection (a) and there should be no implication that verification from the tribe in writing is the only form of verification that is sufficient, a risk that the proposed language imposes.

Most problematic is the way in which subsection (a) begins, i.e., "Agencies must ask". What does this mean? Who is being asked? Is it sufficient to simply pose the question to agency clients, members of a child's family, or lawyers involved? If those "asked" state that there is no reason to believe that the child is an "Indian child," does that end the duty to "ask"? The way this is framed could easily lead to Indian children being treated as non-Indian children. The concern, here, is partially alleviated by subsection 27.107(c) which defines "has reason to believe." However, with the exception of subsection 27.107(c)(5), subparagraphs (a) and (c) in combination do not impose any active requirement on the agency or any party to "discover" whether there is reason to believe that a child is an "Indian child." Such an active requirement should be included.

23.107(b) This subsection suffers from the same omission as subsection (a) with respect to an active requirement to discover whether there is "reason to believe." Under this subsection, each party must "certify on the record whether they have discovered or know of any information…." The on the record certification requirement is to be applauded. However, because there is no requirement to "discover" or to do anything to "know of any information," it would be easy for parties, not interested in having the ICWA apply, to do nothing to "discover" or to "know of information" and then truthfully certify that they have no "information that suggests or indicates the child is an Indian child." That this possibility is real gains further support from subparagraph (b)(1) which describes evidence that a court "may wish to consider" but is not mandated to consider and subparagraph (b)(2) which, like subsection (a), requires "active efforts" only after "there is reason to believe the child is an Indian child." This commenter recognizes that the proposed rule is premised on an assumption that there will be good faith application of the regulation, i.e., an application that seeks to apply the ICWA where it legitimately should apply. However, the ICWA itself and post-enactment practice over the past 37 years precludes this assumption. Pre-ICWA, as found by the Congress in 25 U.S.C. 1901(4) and (5), numerous Indian children were wrongly separated from their tribes and families by non-tribal actors. Post-ICWA, some of these same actors and new entrants have sought to undermine the ICWA at every turn. Sadly, this has included certain State courts and judges who have refused to give full force and effect to the ICWA simply because they do not agree with the national policy adopted by Congress in this law. Good faith implementation of the regulations cannot be assumed. If one could assume good faith, regulations, as the "Background" observes, 80 Fed.Reg.14881, would not be necessary at this time.

In Section 23.107(b)(1), after "requiring the agency", insert " and, when an agency is not involved, each party,". This would extend the provisions of this subparagraph to voluntary placement proceedings or proceedings not involving an agency.

In Section 23.107(b)(1)(ii), after "Indian custodian is", insert "or has been". As is obvious, parents or Indian custodians who, at present, are not domiciled or resident on a reservation or in an Indian community may have been so in the past.

In Section 23.107(b)(2), after "confirm that the agency", insert " and, when an agency is not involved, each party,". This would extend the provisions of this subparagraph to voluntary placement proceedings or proceedings not involving an agency.

Also, in Section 23.107(b)(2), another term should be substituted for "active efforts." "Active efforts" is a defined term in these regulations. The context here is completely different from the context addressed in the definition. To avoid all misunderstanding and to better express the intent in this subsection, this commenter recommends that the court confirm that the agency "actively sought" to work with all tribes.

In Section 23.107(c), after subparagraph (5), insert a new subparagraph as follows: "(6) The child is or has been a ward of a tribal court."

23.107(d) This subsection is an invitation to ICWA non-compliance. First, it is important to note that nothing in the ICWA allows for a parent's desire for anonymity to trump the application of the ICWA to an Indian child, an application that necessarily involves verifying that the child is an "Indian child." While this commenter has no problem with accommodating a parental request for anonymity to the extent practical, the ICWA, as its title emphasizes, is about the welfare of the Indian child, first and foremost, and not, first and foremost, the welfare of the parent. As provided in Section 23.111, tribes must be notified regarding voluntary proceedings. Providing this notice necessarily entails some disclosure in conflict with maintaining total anonymity. In this commenter's 40 plus years of law practice representing more than 200 tribes, the undersigned has never encountered a tribe that would certify or verify that a child is a member or eligible for membership in the tribe in the absence of identifying information pertaining to the child's family, i.e., identifying information pertaining to the parents, grandparents or both. A parent's desire for anonymity cannot be posited as an insurmountable barrier to securing verification that a child is an "Indian child." If it is posited in this way, adoption attorneys and agencies who seek to place an "Indian child" with a non-Indian family will routinely manipulate parents of Indian children to request anonymity, thereby enabling placement proceedings to go forward without application of the ICWA.

This subsection, as drafted, also could potentially interpose a conflict with 25 U.S.C. 1915(c) which only requires a court or agency to "give weight" to a parental request for anonymity. The request for anonymity, therefore, is limited to the manner in which the placement preferences are to be applied. And, under section 1915(c), if the preferences can be applied only if anonymity is not permitted, the preferences nevertheless still need to be applied and, therefore, the weight given to the request for anonymity does not supersede the statutory requirement for placement within the preferences.

Application of the placement preferences occurs after a child has already been determined to be an "Indian child." The proposed rule would now expand this to inject the request for anonymity into the process for verifying whether a child is an "Indian child." Moreover, the way in which this subsection is framed, if notice does not result in tribal verification, the request for anonymity may very well upend the requirement for verification. This conclusion is buttressed by the peculiar phrasing in the first sentence of the subsection – "In seeking verification" – as juxtaposed to the phrasing in the second sentence regarding an ongoing "obligation to obtain verification." Is the requirement only to "seek" or is it to "obtain." As noted earlier, "obtaining" verification, in any event, could be problematic at times even when there is no request for anonymity.

In a voluntary placement situation, the ICWA presents parents who desire anonymity with only three options: (1) attempt to secure anonymity in the context of applying the placement preferences or in securing verification from the tribe that the child is an Indian child, (2) where anonymity cannot be achieved because providing anonymity either conflicts with the ability to place within the preferences or the ability to secure tribal verification, proceed with the voluntary placement and without anonymity, or (3) if anonymity is more important than placement, do not proceed with the voluntary placement.

Even where it is possible to accommodate a parent's request for anonymity while complying with the verification or placement requirements, the subsection should be amended to state that the requirement for the court to keep certain documents confidential and under seal is not a requirement that denies access to these documents by a tribe or by any party who needs access to the documents in order to be able to effectively, fully and properly present the party's position to the court in the child custody proceeding. The tribe especially should have access, whether or not it is a party, whenever the tribe needs the documents to take an action in its sovereign capacity. As the legislative history of the ICWA makes clear, the Congress recognized that tribes stand in a parens patriae relationship to their children. When acting in this capacity, the State sovereign acting through its courts, should not be enabled to disable the tribal sovereign from protecting the interests of its children and its sovereign interest in its children. Just as no parent in a child custody proceeding has an anonymity interest that supersedes a State's sovereign interest in protecting children, no parent should be able to defeat a like tribal sovereign interest.

The foregoing commentary is offered in the event that subsection (c) is retained. This commenter would prefer that the entire subsection be deleted. In the years since ICWA enactment, the "problems" that this subsection seeks to address have not been evident. Therefore, there is no need to address a "problem" when there has not been a "problem."

23.108 This section is too narrow because it fails to take into account tribes that make membership determinations based on a biological grandparent being a member of the tribe. With DNA analysis, it may also be possible to determine membership entitlement through siblings or other blood relatives. While this commenter does not know of any tribe that presently uses DNA analysis as part of making a membership eligibility determination, this method should not be foreclosed. The point is that when, under any tribal process for verifying that an applicant satisfies the tribe's requirements for membership, a child is determined to be a member of a tribe, that determination should be conclusive and binding on any "other entity or person" and on any "State court."

23.110(b) This subsection requires that when a state court proceeding is dismissed "all available information" regarding the proceeding should be transmitted to the tribal court. This subsection does not address the circumstance of a tribe not having a tribal court. Where the tribe is determined to have exclusive jurisdiction, the information about the state court proceeding should be transmitted to the tribal court or to any other person or entity authorized by the tribe to receive it.

23.111 See comments for section 23.107(d) above where it is noted that the section 23.111 notice requirements are not necessarily compatible with the section 23.107(d) proposed way to accommodate a parent's desire for anonymity. As noted in the section 23.107(d) comments, when a parent desires anonymity in a voluntary placement situation, accommodating this desire cannot be accomplished by foregoing full application of critical components of the ICWA and these regulations. The notice provisions in this section are critical to achieving any meaningful compliance with the

ICWA. If full compliance with these notice provisions can only be achieved by not accommodating, or being less than accommodating with respect to, a parent's desire for anonymity, the ICWA mandates the full compliance.

23.111(a) and (c)(4)(iii) These subsection require that tribes be provided with notice of voluntary and involuntary child custody proceedings. The latter subsection provides that the notice include a statement regarding the tribe's right to intervene in a State court foster care placement or termination of parental rights proceedings. AAAA objects to these subsections arguing first that 25 U.S.C. 1911(c) does not provide for notice of any voluntary child custody proceedings and, in any event, the right to intervene provided in that ICWA subsection does not pertain to voluntary preadoptive placement or adoption proceedings. AAAA is correct that subsection 1911(c) does not provide for notice and limits the tribal right to intervene to foster care placement and termination of parental rights proceedings. The only question, then, is whether the proposed rule is "necessary to carry out the provisions of this chapter," 25 U.S.C. 1952, and does it permissibly carry out the "direct interest [of the United States], as trustee, in protecting Indian children." 25 U.S.C. 1901(3). See 80 Fed. Reg. at 14881. After 37 years of significant non-compliance with ICWA mandates, especially when it comes to voluntary placements, the answer to this question is emphatically affirmative.

An understanding of the political textual contexts of the ICWA as described above and an examination of specific provisions of the ICWA supports the conclusion that the notice requirements in the proposed rule are reasonable "to improve the implementation" of 25 U.S.C. 1911(c). See 80 Fed. Reg. 14881. At the outset, it is important to recognize that whether a child custody proceeding is voluntary or involuntary, the compelling governmental interest of tribes that supports tribal intervention as of right in such proceedings is the same. This understanding, alone, further supports providing tribes with notice of voluntary proceedings so that tribes have the same opportunity in voluntary proceedings to protect its sovereign interest in tribal children as it has in involuntary proceedings. In addition, notice to tribes of voluntary proceedings is also supported by recognizing that the welfare of Indian children, broadly defined in the ICWA as maintaining the relationship between Indian children and their tribes and biological families regardless of whether out-of-home placement occurs, is the same whether the child custody proceeding is voluntary or involuntary.

More specifically, notice to tribes of all child custody proceedings is needed to enable tribes to secure and have the benefit, on behalf of tribal children and families, of a number of ICWA protections. These include:

1. To exercise jurisdiction over reservation domiciled or resident Indian children and children who are wards of the tribal court. With notice, a tribe can determine whether a voluntary child custody proceeding in State court actually falls within exclusive tribal jurisdiction,

2. To effectuate the ICWA right to intervene in voluntary foster care placement and termination of parental rights proceedings and to provide tribes with the opportunity to

petition a State court for intervention as of right or permissive intervention under State law. 25 U.S.C. 1911(c) provides for a tribal right to intervene in voluntary foster care placement and termination of parental rights proceedings but, without notice, tribes will commonly not be able to take advantage of this right. Tribes should also have a right to notice of an adoption proceeding when, as commonly occurs under State law, termination of parental rights is decreed as part of the adoption proceeding. Similarly, tribes have a right to petition to intervene in State preadoptive and adoption proceedings pursuant to State law. Notice is necessary to enable a tribe to petition for intervention in these proceedings under State law,

3. To assure that tribes can exercise the their concurrent but presumptive jurisdiction over voluntary foster care placement and termination of parental rights proceedings under 25 U.S.C. 1911(b) and to enable a tribe to exercise its right to petition a State court to transfer a preadoption or adoption proceeding to the tribal court premised on comity considerations. In addition, as noted, termination of parental rights often occurs, under State law, as part of an adoption proceeding. Without notice, tribes will not be able to seek transfer of such a proceeding,

4. To ensure, where applicable, that State courts give full faith and credit to tribal law and court orders as required under 25 U.S.C. 1911(d). Without notice, tribes will not have the opportunity to secure the benefit of this ICWA subsection on behalf of tribal families and children,

5. To guarantee that, when a parent or Indian custodian, not having English as a first language, voluntarily consents to a placement, an interpreter is provided as required by 25 U.S.C. 1913(a). Typically, the Indian child's tribe will be most able to provide a qualified interpreter,

6. To carry out the monitoring and compliance mechanism in 25 U.S.C. 1914. Under this section, tribes can seek invalidation of a State court child custody proceeding upon showing a violation of 25 U.S.C. 1911, 1912, or 1913. Section 1914 expressly includes voluntary proceedings, including voluntary adoptions. (25 U.S.C. 1913(c) and (d) expressly reference voluntary adoptions and Sections 1911 and 1913(a) do so indirectly by, at least, covering termination of parental rights proceedings that occur as part of an adoption proceeding.). Again, without notice, tribes will be unable to monitor voluntary child custody proceedings for compliance and, either on their own or through assisting Indian children, parents or Indian custodians, where appropriate, file a petition to invalidate such proceedings pursuant to 25 U.S.C. 1914,

7. To effectively carry out 25 U.S.C. 1915. Since enactment, there has been exceedingly poor compliance with this critical ICWA section. The section clearly applies to voluntary foster care, preadoptive and adoptive placements. With notice, a tribe will be able to actively engage with those making voluntary placements to assist in identifying suitable preferred placements and assisting prospective placements with the procedures that must be followed to secure placement. Section 1915 explicitly provides for voluntary foster care, preadoptive and adoptive placements to be made within an order of preference

specified by the Indian child's tribe and, with respect to voluntary foster care and preadoptive placements when the tribe has not specified an order of preference, the Section includes, among the preferred placements, placements licensed or approved by the Indian child's tribe. Without notice to the Indian child's tribe and the tribe's active involvement, it is likely for non-compliance to occur because nontribal agencies or persons will have little capacity, incentive or ability to identify, contact and effectively work with preferred placements.

In addition, Section 1915(d) requires that voluntary foster care, preadoptive and adoptive placements be made in accordance with the "prevailing social and cultural standards" of the "Indian community" where the parents or extended family either reside or maintain social and cultural ties. Tribal notice of voluntary child custody proceedings is necessary if a State court, often far from the applicable "Indian community," is to have any ability to apply the requirements of this subsection to a voluntary foster care, preadoptive or adoptive placement. The tribe is best positioned to provide the State court or agency with the information it needs respecting the Indian community's "prevailing social and cultural standards," standards that may be incorporated in tribal law,

8. To facilitate compliance with 25 U.S.C. 1915(e). This subsection requires a State, for each placement, to provide the Indian child's tribe with the complete record of the State's efforts to comply with the order of preference for both voluntary and involuntary foster care, preadoptive and adoptive placements including, if applicable, the tribe's order of preference. It makes little sense to provide this information after a placement is complete and open up the possibility of litigation over non-compliance when notice to the tribe at the beginning of the placement process would hopefully avoid non-compliance and the disruption that litigation could cause to a child.

Notice to tribes of voluntary child custody proceedings and placements would also help to secure improved compliance with other ICWA provisions. However, the analysis above more than suffices to underscore the justification of the position expressed in the proposed rule on this issue.

Finally, notice of ICWA voluntary child custody proceedings is already a requirement included in the laws of several States and in a number of tribal/State agreements entered into under 25 U.S.C. 1919. The proposed rule's nationalization of this requirement makes sense in the interest of having a uniform national implementation of the ICWA as well as an implementation that provides equal treatment on this issue across jurisdictions.

23.111(c)(4)(iii) The sentence is unfinished. After "parental right", insert "to an Indian child.".

23.111(c)(4)(iv) and (v) and 23.111(f) In the ICWA, the section 1912(b) right to counsel and the section 1912(a) right to 20 additional preparation days apply only in involuntary child custody proceedings. These subsections appear to also make these rights applicable in voluntary child custody proceedings. This needs to be clarified.

23.111(c)(4)(vi) After "The right" insert "parent or Indian custodian or the Indian child's tribe". This recommendation incorporates the language in 25 U.S.C. 1911(b) and, as section 23.115 already does, would more clearly inform those receiving notice as to who can exercise the right.

23.111(f) Again, the right to counsel and the right to have additional time to prepare appear to be applicable to both voluntary and involuntary child custody proceedings under this subsection. See comment above.

23.111(g) An interpreter should also be provided in every instance requiring active efforts where a parent or Indian custodian has "limited English proficiency."

23.111(i) While this subsection appears to impose an obvious requirement not requiring inclusion in these regulations, because of the possibility that a placement pursuant to the Interstate Compact may be viewed as eliminating the need to notify and verify, the explicit statement, in this subsection, that a Compact placement must comply with all ICWA requirements is important.

23.112 This section should be clarified to make clear that it applies only to involuntary child custody proceedings with the exception of subsection (d) which could also apply to voluntary child custody proceedings.

23.113 Emergency removals of Indian children were a major area of abuse pre-ICWA for a number of reasons. These reasons are addressed in 25 U.S.C. 1922 and include: (1) justifying emergency removal based on a child's circumstances that were other than "imminent physical damage or harm," and, therefore, not an emergency, (2) failure to terminate the emergency removal "when such removal or placement is no longer necessary to prevent imminent physical damage or harm," and (3) failure to initiate dependency or neglect proceedings when it was deemed that the child should not be returned to the parents. Basically, "emergency removal," whether in a true emergency or not, commonly transformed into permanent removal and, ultimately, termination of parental rights. This was a process laden with violations of the due process rights of both parents and children. In addition, these State actions were frequently undertaken with respect to children who were within tribal exclusive jurisdiction. Unfortunately, post-ICWA, in some jurisdictions, the pre-ICWA due process abuses continued and still continue.

The proposed rule is a good one but needs some tightening.

A large majority of the time, within 72 hours of an emergency removal, returning a child to a parent or Indian custodian would not result in "imminent physical damage or harm" to the child. This proposed rule should assure, to the extent possible, that an emergency removal ends when there is no longer an emergency, i.e., there is no longer "imminent physical damage or harm" to the child in returning the child to the parent. Allowing for a "temporary emergency removal" to possibly last for as long as 30 days does not accomplish this and typically biases agency and court actions in favor of continuing out-

of-home placement long after an emergency has ended. The longer a child remains in out-of-home placement, the return of the child to parental custody becomes increasingly more difficult to achieve often due to the combination of agency practice and the consequential trauma experienced by parents as a result of separation from their children and having to deal with agency dictates and court proceedings.

To carry out the intent of 25 U.S.C. 1922, an emergency removal of an Indian child should be supported by a court order as soon as possible following the removal and, in no event, should such a removal continue for more than 72 hours without a court order. In most cases, it is likely that any emergency will have ended within 72 hours. If not, the court order should extend the removal for the shortest time while active efforts are engaged in to end the emergency and return the child to parental custody together with services, if necessary, to prevent recurrence of an emergency. An extension of removal should be closely monitored and renewed for no more than three additional 72-hour periods. If the emergency persists, the agency, at that time (12 days following the emergency removal), should initiate a child custody proceeding pursuant to 25 U.S.C. 1912 while continuing to engage in active efforts to return the child to parental custody.

Whenever a child, removed from parental custody due to an emergency, is returned to parental custody because there is no longer a situation of "imminent physical damage or harm" to the child in doing so, the proposed rule should require active efforts to prevent family breakup if such efforts continue to be needed to preclude a child custody proceeding. The proposed rule, sections 23.106(a) and 23.120, already requires this but the connection between what should occur when an emergency removal ends and these sections should be made explicit in section 23.113 to assure that sections 23.106(a) and 23.120 are properly applied to the timeframe immediately following the end of an emergency removal. This connection also needs to be made because, generally, current agency practice does not provide these services once a child is returned to parental custody following an emergency removal.

Also of critical concern, there is nothing in section 23.113 that applies the placement preferences to emergency removals even though it is clear that an emergency removal is a "foster care placement" as that term is defined in 25 U.S.C. 1903(1)(i) and the parallel definition of this term in section 23.2 of the proposed rule. Section 23.128 of the proposed rule also is clear that the placement preferences apply to emergency removals. See comment below for that section recommending that this be made more explicit. Placement in accordance with the preferences rarely occurs when an Indian child requires an emergency placement. Unless the proposed rule explicitly mandates that preferred placements apply when there is an emergency removal of an Indian child, the general failure to use preferred placements in such situations will persist.

Obviously, it is not always practical or appropriate to the child's needs to apply the placement preferences when there is an emergency. However, section 113 should require that "whenever practical and appropriate, any placement following an emergency removal should be made, initially or as soon as possible, in accordance with the placement preferences in section 23.130."

23.113(a)(1) This section employs language that is unclear and which, therefore, could thwart the intent of section 23.113 to limit removals to emergencies and to work to end emergency removals as quickly as possible. The unclear or vague language is determining whether the removal or placement is "proper" and whether the removal or placement "continues to be necessary." What these terms mean and how a proper determination of these issues is made are not elaborated. These terms are wide-open to culturally biased interpretation or otherwise subjective definition. Clearly, the statutory language dictates that when "physical damage or harm" to the child is no longer "imminent", there is no longer an emergency justifying ongoing removal. In practice, whether there is "imminence" has social and cultural content and, consequently, it is not uncommon for the removal of Indian children by non-Indian agencies to continue long after the tribal or Indian community views the "imminence" as having dissipated. In order to assure appropriate implementation of this section, the indicated investigation, whenever possible, should involve in the determination of "proper" and "continues to be necessary" a qualified expert witness, participation by persons designated by the tribe and where, appropriate, members of the child's extended family who are not connected to or involved in the emergency that caused the removal but who have knowledge of and a relationship with the child.

23.113(a)(2) Whenever an agency believes the emergency has ended and there has been no court order placing the child, the child should promptly be returned to the parent or Indian custodian without the need to hold a hearing. In circumstances where the agency takes the position that there is no longer an emergency justifying ongoing removal, a hearing should be held only when a court order entered in connection with the emergency removal needs to be vacated or dismissed. This approach is clearly encompassed in the options provided to the agency in 25 U.S.C. 1922.

23.113(a)(3) Same comment as in 23.113(a)(2)

23.114(b) This subsection implements, in part, 25 U.S.C. 1920. AAAA opines in their comment on this proposed rule, page 25, that the "imminent physical damage or harm" standard is "deplorable" and that a State "best interests of the child" standard should be substituted. Truly "deplorable," however, are the circumstances that impelled the Congress to enact Section 1920 and those who endorse the reinstatement of those circumstances.

Section 1920 was drafted by the undersigned and was aimed at the pre-ICWA all-too-common event of Indian children being improperly, that is, unlawfully separated from the custody of a parent or Indian custodian. Such improper actions, affecting parents and Indian custodians who had not been adjudicated as neglectful or abusive to their children, often resulted in a permanent loss of custody under spurious applications of State "best interests of the child" law. Section 1920 deliberately divested State courts from jurisdiction to hear the petition of a person or entity who improperly acted to separate an Indian child from its parent or Indian custodian unless the child would face, as the proposed rule states slightly differently from Section 1920, "imminent physical damage

or harm," the same standard provided in 25 U.S.C. 1922. In the years since ICWA enactment, evidence that this standard has harmed Indian children has not emerged.

Although the proposed rule standard is much the same as the "substantial and immediate danger or threat of such danger" standard provided in Section 1920, it is probably best to follow the statutory language which obviously avoids the State "best interests of the child" standard. Section 1920's standard was quite deliberately selected and should be followed.

23.115 The proposed rule would recognize the right of a parent, Indian custodian or tribe to petition for the transfer of a child custody proceeding, including preadoptive placements and adoption proceedings, to a tribal court. AAAA comments correctly that under 25 U.S.C. 1911(b), a transfer may be requested with respect to a voluntary or involuntary foster care placement or termination of parental rights proceeding. However, as noted above, it is common under State law for a termination of parental rights to occur as part of an adoption proceeding. In such circumstances, Section 1911(b) would support a transfer of the adoption proceeding. Also, under State law, an adoption proceeding may be transferred to a tribal court pursuant to comity considerations. Such a transfer could provide a "higher standard of protection to the rights of the parent or Indian custodian of an Indian child." 25 U.S.C. 1921. It is also clear that the tribal/State agreements authorized under 25 U.S.C. 1919 broadly and explicitly encompass "agreements… respecting care and custody of Indian children" and agreements that would allow for tribes to transfer voluntary and involuntary preadoption and adoption proceedings to tribal jurisdiction. House Report 95-1386 also lends support to encompass preadoptive placements and adoption proceedings in the proceedings that can be the subject of transfer from a State court to a tribal court. In discussing the purpose of 25 U.S.C. 1911(b), the House Report, page 21, states: "Subsection (b) directs a State court, having jurisdiction over an Indian child custody proceeding, to transfer such proceeding…to the appropriate tribal court…." There is no mention of limiting transfer to foster care placement and termination of parental rights proceedings.

This commenter believes it is reasonable to adopt a regulation that extends the right to petition for transfer to preadoptive placements and adoption proceedings, especially given that transfer can always be defeated by objection from either parent or good cause considerations as delineated in proposed rule 23.117. When neither parent objects and, in fact, either or both parents could be the petitioners seeking transfer, the tribe supports transfer or petitions for transfer without parental objection, and there is no good cause basis for denying transfer, there is little justification for not transferring a preadoption or adoption proceeding. Even when a prospective placement might object, such a placement does not have ICWA rights like those accorded to parents, Indian custodians and tribes and, in a voluntary placement situation, the parents, Indian custodian or tribe seeking transfer over the objection of a prospective placement can probably eliminate the objection by either withdrawing consent to the placement or disapproving the placement.

23.115(a) The intent of the "each distinct" in this subsection is unclear. Is this intended to cover proceedings that are not covered in subsections (b) and (c) of this section? If so,

then the meaning of "each distinct" should be elucidated. If not, then it should be clarified that "each distinct" is intended to be coextensive with the proceedings described in subsections (b) and (c). The intent is more clearly stated in Guideline C.1, 80. Fed.Reg. 10156. Basically, in accordance with the 25 U.S.C. 1911(b), it seems as though subsection 23.115(c) expresses the entire intent of the section 23.115. Therefore, consideration should be given to deleting subsections (b) and (c) and amending subsection (a) as follows:

> "(a) Either parent, the Indian custodian, or the Indian child's tribe may request, orally on the record or in writing and at any stage of an Indian child custody proceeding, including during any period of emergency removal, that the State court transfer the child custody proceeding to the jurisdiction of the child's tribe."

Subsection 23.115(d) would then be relettered as "(c)".

Also, see comments immediately below with respect to Section 23.116(b) pertaining to the 25 U.S.C. 1911(b) requirement that a petition request transfer "to the jurisdiction of the tribe", not to the "tribal court." Section 23.115(a) should follow the statutory language for the reasons stated below.

23.116(a) This subsection should be amended to include language from Section C.3(c) of the Guidelines, 80 Fed. Reg. 10156, not elsewhere included. The suggested amended language is:

> "(a) Upon receipt of a petition to transfer by a parent, Indian custodian or the Indian child's tribe, the best interests of the Indian child presumptively favors granting the petition and the State court, accordingly, must transfer the case unless any of the following criteria are met:"

Inclusion of this language is clearly consistent with and would greatly improve compliance with 25 U.S.C. 1911(b) because, in a number of state jurisdictions, courts have denied transfer based on the idiosyncratic belief of the judge that, based on State law and personal notions, transfer is not in the best interests of the Indian child. Often these judges just do not agree with the purposes of the ICWA, have disdain for tribes, tribal laws and tribal courts and simply have an abiding belief that because they know what is best, federal law should not intrude. These judges are pleased when they can find any basis for avoiding or minimizing ICWA application. Even with the change recommended above, the task of representing clients in front of such judges will continue to be difficult but, at least in some cases, it will be made easier.

23.116(b) This subsection does not address the circumstance of a tribe not having a tribal court. Where a petition to transfer jurisdiction is granted, the information about the state court proceeding should be transmitted to the tribal court or to any other person or entity authorized by the tribe to receive it. 25 U.S.C. 1911(b) provides for a petition to "transfer such proceeding to the jurisdiction of the tribe;" nothing is stated limiting

transfer only to the "tribal court." This was quite deliberate because in 1978, when the ICWA became law, most tribes did not have tribal courts. Today, there are still many that do not. How and through what means a tribe chooses to exercise its jurisdiction is a matter for internal tribal decision-making. Tribes lacking tribal courts or judicial systems nonetheless have laws and customs pertaining to child custody matters and traditional child custody decision-making mechanisms and these should be recognized and respected. Tribal laws and customs pertaining to Indian child welfare are explicitly referred to in 25 U.S.C. 1903(2), (6), (10) and (12) and are further alluded to in 25 U.S.C. 1915(b)(ii), (c) and (d). "Tribal jurisdiction," regardless of whether there is a tribal court, is recognized and acknowledged in 25 U.S.C. 1911(a), 1918(a), 1919(a) and 1922.

23.117(d)(2) For the reasons noted above, after "social services," insert ", laws" and after "judicial systems," the subsection should add "or any other tribal child custody decision-making mechanisms."

23.117(d)(3) This subsection should exclude from consideration a tribe's, rather than the tribal court's, prospective placement. As noted, some tribes may not have tribal courts. In any event, the tribal court acts as an institution of and on behalf of the tribe and may not be the only tribal institution involved in developing or identifying or ordering a prospective placement.

23.118 As noted above, because the ICWA focus is on transfer of jurisdiction to the tribe, this subsection should be expanded to require notification to the tribe especially where a tribe does not have a tribal court.

23.121 Subsections (c) and (d) reference the "serious emotional or physical damage to the child" element of 25 U.S.C. 1912(e) and (f). However, subsections (a) and (b) limit the damage or harm to the child to "physical," omitting "emotional." This appears to be a drafting inadvertence and should be corrected by adding "emotional or" after "serious" in subsections (a) and (b).

23.122 This definition of the term "qualified expert witness" in this section is excellent, consistent with the way in which this term has been defined in various State statutes implementing the ICWA and in various tribal/State agreements, and certainly accords with what the drafters had in mind. As House Report 95-1386, page 22, notes, the term is "meant to apply to expertise beyond the normal social worker qualifications."

The term, included in 25 U.S.C. 1912, is derived directly from this commenter's pre-ICWA court experience. For example, in one South Dakota State court case, an unmarried male, non-Indian caseworker, who had recently graduated college with a major in art history, was permitted to provide "expert" testimony in support of the agency's petition to terminate the parental rights of an unwed Indian mother with two children. The tribe considered extended family to be suitable caregivers and extended family, in fact, were actively assisting with the care of the children. The caseworker admitted that the children were not neglected because of the care provided by the extended family but went on to testify that termination was justified because the mother

was not fulfilling what the caseworker considered to be her (and her's alone) parental responsibilities to feed, clothe, house and otherwise provide, unassisted, for the emotional and physical well-being of her children.

The above case description is offered to provide dimension and perspective to the inclusion of the "qualified expert witness" requirement. Much the same or similar qualifications, accorded "expert" standing in the above case, were typical pre-ICWA, typical in many jurisdictions post-ICWA and continue to this day. The proposed rule will significantly increase the likelihood that child custody proceedings are based on the kind of evidence intended by the drafters.

The proposed rule is also essential because, even though the ICWA does not in any way preclude a court from considering "expert" testimony from individuals who are not ICWA "qualified expert witnesses," it is often the case that such "experts," for example, are caseworkers with no degree in social work but who are loosely denominated "social workers," persons who have a bachelor's degree in social work with no clinical experience, persons who have a master's degree in social work but no clinical experience, or mental health professionals with no background in tribal child-rearing practices, family organization or way of life and who often have a one-size fits all point-of-view in evaluating what is in the best interests of children, i.e., culture is either not a consideration or more commonly, if it is, it is culture seen through a State law or Western lens that admits no other possibly illuminating cultural perspective.

23.123(b) The language of this subsection should be amended as follows: "…executed consents, their right to intervene under section §123.111, and their right to petition for transfer of jurisdiction under section §123.115 of this part." Section 123.115 correctly does not limit the right to petition for transfer jurisdiction to involuntary child custody proceedings. 25 U.S.C. 1911(b) makes transfer applicable to both voluntary and involuntary child custody proceedings and this subsection should reflect that. See also the proposed rule 23.111 comments above pertaining to AAAA's position on notice of a right to intervene in voluntary proceedings, a position that AAAA repeats in its comments on proposed rule 23.123.

23.124(a) This subsection would be much clearer if it begins "Any voluntary consent to…." Section 23.124 is extremely important. Both pre-ICWA and post-ICWA voluntary consents have been used by agencies and adoption attorneys to essentially trick Indian parents and extended family into unwittingly permanently giving up their custodial rights. Often, these consents were executed in a lawyer's or an agency offices. Even when executed in court, little was provided by way of explanation to those consenting as to what exactly they were consenting to, what the legal ramifications of the consent were, and what post-consent rights, if any, they retained. 25 U.S.C. 1913 was designed to address specific abuses that were prevalent in the pre-ICWA era. One of the most important components of section 1913 is the requirement that the consent be "recorded before a judge." This is essential to protecting the right of all parties by, if it is done expertly by a judge, eliminating the possibility of dispute over intent or over what was

understood, a dispute that otherwise could produce prolonged litigation, and emotional trauma for children, parents and prospective parents.

23.124(b) In line with 23.124(a), this subsection should be clear that the required explanation be on the record. The reference in this subsection to “timing limitations” and “the point at which such consent is irrevocable” could lead to an incorrect application of the law because both consents to foster care placement and adoption are lumped together. In a foster care placement circumstance, the ICWA provides no time limitation for withdrawing consent and the consent is never irrevocable. In an adoption, proposed rule 25 C.F.R. 127 provides that withdrawal may occur at any time prior to the entry of a voluntary decree of termination of parental rights or adoption, whichever is later. Therefore, the time limitations and irrevocability issues are addressed and, perhaps, should be cross-referenced here. The present wording of this subsection, without cross-referencing either proposed 25 C.F.R. 126 or 127, leaves open the possibility that state law withdrawal of consent provisions may be applied when they are inapplicable.

Most important, this subsection should include a requirement that any court accepting a consent explain the right to withdraw and the procedure for withdrawing consent to either voluntary foster care or adoption placement.

23.124(d) In most jurisdictions, family court proceedings are “closed” but are nonetheless on the record. The ICWA requires consent to be “recorded before a judge.” This would typically mean in court or in chambers. Stating that consent “need not be” in “open court” is confusing and might lead to a conclusion that consent need not be “recorded before a judge” when confidentiality concerns are involved. This subsection should be amended to make clear that consent need not be given in a court session open to the public but otherwise must be given in accordance with 23.124(a), (b) and (c). State law rules that govern closing a proceeding should prevail.

23.125(a) A consent to adoption should include the same additional information that 23.125(b) requires for foster care placements, i.e., “the name and address of the person or entity by or through whom the placement was arranged” and “the name and address of the prospective adoptive or preadoptive parents, if known at the time.” In a voluntary consent situation, where the parent or Indian custodian has the right to revoke consent at any time prior to the entry of a final decree of adoption, this additional information is necessary if the parent or Indian custodian is to have a meaningful opportunity to revoke consent, especially if the circumstances turn adversarial. Without this information, the parent or Indian custodian, after revoking consent, could be placed in a position where securing return of custody, which is their right post-consent withdrawal, is rendered far more difficult and easier to thwart or delay, contrary to 25 U.S.C. 1913(c).

With respect to 23.125(a) and (b), the information contained in the consent document should also include details of the legal right to withdraw consent, the timeframes for withdrawing consent, and a form for withdrawal of consent. The form is particularly important if the filing requirements provided for in sections 123.126 and 123.127, discussed below, are retained. Consents are typically given by persons having no legal

representation and limited understanding of legal requirements. Therefore, if the withdrawal right is to be meaningful, the exercise of this right, when desired, should be made as easy as possible. In addition, the information included in the consent document or in a supplemental document should include, to the extent known at the time, the timing of adoption proceeding events and court dates, and foster care court dates. This information, too, is essential if a parent or Indian custodian is to have any meaningful opportunity to exercise the right to withdraw consent.

Also, for the reasons discussed below in the comment on section 23.127(b), the parties who have legal custody of the child post-consent and prior to a final decree of adoption, should be required at the time of consent to identify for the court the physical location of the placement. In addition, whenever this physical location changes, the parties who have legal custody should be required to provide the child's new location to the court certifying the consent. Likewise, if legal custody changes post-consent and prior to a final decree of adoption, the court certifying the consent should also be provided with the identity of the person or entity having legal custody. The updated information should be provided within 15 days of any changes. For the right to withdraw consent to be exercised effectively, it is necessary to have this information available to a parent or Indian custodian at the court in which the consent was certified.

23.126 25 U.S.C. 1913(b) does not specify that a withdrawal of consent must be "filed" or that it must be done in court. The section, as proposed, evokes the need for legal procedure, lawyers, and paperwork and implies, at least, that a court proceeding may be necessary. The ICWA was intended first and foremost to have Indian children raised by their own families. In line with this, the intent was to make it as easy and least burdensome as possible for individuals, in a voluntary consent situation, to revoke that consent and secure the return of their children. There should be no need for the revoker to have to "file" anything although surely the court should note the revocation in the record. Most revokers are individuals with limited understanding of the law, limited access to legal resources and perhaps limited ability to express themselves, especially in writing. A revoker should be able to revoke in any way where the revocation intent is clear be that in a letter to the judge or Clerk of Court, a letter to an attorney involved in a voluntary consent case, orally in court, a formal pleading "filed" in court or by way of any other reasonable means. As an attorney, I recognize what is optimal and what would be most desirable from the standpoint of protecting the interests and rights of all concerned. However, after many years of representing individuals in so-called voluntary consent situations, I also know what is practical given the reality of the lives of the individuals commonly involved in these circumstances. Effective implementation of the ICWA should make the process for revocation as user-friendly as possible and not unnecessarily impose potentially onerous burdens as the current proposed language does. If "filing" remains, however, as a requirement, then judges recording consents should be required to provide consenters, at the time of consent, with an already filled-in form for revocation and instructions for signing and dating it and dropping it off at the court clerk's office in the event they choose to revoke at a later time.

23.127 Comments with respect to this section are along the same lines as the comments concerning withdrawal of consent to a foster care placement. As an attorney, this commenter well appreciates the rationale for requiring the filing of an instrument executed under oath. 25 U.S.C. 1913(c), of course, does not require this. The omission was deliberate because the drafters of this section of the ICWA, the undersigned included, were seeking to make it as easy as possible for a consenter to withdraw consent and secure the return of a child. This meant not requiring a formal legal procedure. Again, as noted above, there is no reason for a withdrawal of consent to be restricted to a specified format such as an "instrument executed under oath" that is filed. A withdrawal can be done orally in court, before a judge, by a letter to the court, by a letter to an agency involved, by a letter to any attorney involved in the consent procedure or other such reasonable means. This is especially critical in adoption situations where the court where the consent was given may be in another state from the state where the parent or Indian custodian resides or far distant in the same state. If "filing" remains, however, as a requirement, then judges recording consents should be required to provide consenters, at the time of consent, with an already filled-in "instrument" for revocation and instructions for signing it under oath or before the clerk of court, dating it and dropping it off at the court clerk's office in the event they choose to revoke at a later time.

Also, it is important that the language of subsection (a) be changed from requiring that the instrument assert an "intention to withdraw such consent" to asserting, instead, that "consent is herewith withdrawn."

The BIA is to be especially commended for drafting a proposed rule that eliminates the confusion that the "as the case may be" language in 25 U.S.C. 1913(c) has aroused. The prerequisites for adoption proceedings vary from state-to-state. In some states, adoptions are preceded by a voluntary relinquishment of custody or termination of parental rights by a parent which, in fact, is hardly voluntary when many states make this irrevocable immediately or after an extremely short time. Other states precede adoption proceedings with a consent to adoption while others allow for either procedure also with very restricted rights to revoke consent. In drafting this provision of the ICWA, the drafters, the undersigned included, were seeking to craft language that would work nationwide while not limiting a parent's right to end a possible adoption and secure return of the child. The intent was to make this as easy as possible because the overarching goal of the ICWA was to have Indian children raised by their own parents and/or extended family and connected to their tribes. If a consenter decided prior to a final decree of adoption that adoption was a mistaken decision, the drafters wanted to make it as easy as possible for the consenter to reverse this decision, something that was next to impossible under state law. The "as the case may be" statutory language was nothing more than the drafters then understanding that if an adoption process was preceded by a voluntary termination of parental rights, that process could be ended by withdrawing consent to such termination prior to a final decree of adoption and, similarly, if an adoption process was preceded by a consent to adoption (with termination of parental rights then typically occurring as part of the final adoption decree), the adoption process could be ended by withdrawal of the consent to adoption prior to a final decree of adoption. (The subsection (a) "whichever occurs later" language is not quite in sync with adoption procedure

because the final decree of adoption always occurs later than the final decree of voluntary termination of parental rights, either because the termination decree occurred earlier or because voluntary termination of parental rights was incorporated in the final decree of adoption.). From hindsight, the drafting of ICWA Section 1913(c) could have been more artful but the proposed rule "whichever occurs later" language correctly understands and construes the intent of this section.

In addition, 25 U.S.C. 1913(c) was also intended to address withdrawal of consent to a voluntary termination of parental rights in circumstances where no adoption placement was contemplated or made or finalized. This is yet another reason for the "as the case may be" language. The proposed rule covers this situation as well.

The circumstance where a voluntary termination of parental rights occurs as part of an adoption plan or where there is a consent to adoption raises another important concern when, as happens, an adoption never occurs. In such a circumstance, the consenting parent or Indian custodian may never know that an adoption did not occur and, therefore, may never know that the right remains to revoke consent and secure return of the child. Therefore, it is recommended that this section include a requirement that, within 15 days of the entry of a final decree of adoption, the court notify the consenting parent or Indian custodian of the date of such entry so that they know there is no longer a right to revoke consent. Also, in the circumstance where adoption plans fall through and the child is not placed for adoption, the parent or Indian custodian should receive notice from the agency or, when there is no agency, the court so that the continuing right to revoke consent can be exercised if desired. Accordingly, it is recommended that this section include a requirement for notification of the consenting parent or Indian custodian every 120 days following the execution of a consent so that the parent or Indian custodian is kept informed as to the status of the child and the progress of any adoptive placement or proceeding.

23.127(b) The ICWA, 25 U.S.C. 1913(c), does not provide that when a consent to adoption is withdrawn, the child "must be returned to the parent or Indian custodian as soon as practicable." The 1913(c) language is the same as the language in 25 U.S.C. 1913(b) governing return of a child when a voluntary foster care consent is withdrawn. This commenter understands the rationale for the proposed language in terms of logistical considerations. However, this rationale can be accommodated, where appropriate, by inserting after "Indian custodian," "immediately or, if not practicable,."

Another difficulty with implementing this subsection concerns placing the burden on the clerk of court to provide the notice of the filing of the withdrawal of consent to the party by or through whom the adoptive or preadoptive placement was arranged. This is probably not a problem when an agency is involved. However, when the placement was arranged by private parties, the court where the consent and withdrawal of consent occurred may no longer have jurisdiction over the child or over the persons with whom the child was placed and may have no information as to how to locate these individuals. Therefore, a requirement should be added to section 25.125 that, when the court where the consent was filed is not the court where further proceedings involving the adoption of

the child occur, the court certifying the validity of the consent be kept informed as to the physical location of the child and prospective adoptive parents from the time of placement through the final decree of adoption, if any. The requirement should include a provision that whenever this location is changed, the consent certifying court must be immediately notified as to the child's new location and that if this does not occur within 15 days of any such change, the consent of the parent or Indian custodian will be subject to invalidation.

23.128(a) This subsection states that section 23.128 is applicable to "the agency or court effecting the placement." The term "agency" is defined in section 23.102. It would be easy for those untutored in the ICWA or for those who seek to thwart the preferences to posit that this section applies only to involuntary placements. Under 25 U.S.C. 1915, the placement preferences for foster care, preadoptive and adoptive placement apply to both voluntary and involuntary placements as does the tribe's order of preference under 25 U.S.C. 1915(c). To avoid confusion and unnecessary adversary proceedings as well as to assure maximum compliance with the ICWA placement preference requirements, this subsection should be amended to insert "voluntary or involuntary" after "In any."

In the voluntary placement context, especially with respect to adoptive placements, the "effecting" of the placement is often accomplished by an attorney representing prospective adoptive parents. Since prospective adoptive parents and their attorneys often do not proceed through an agency and are not included in the definition of "agency," it is also important to make clear that they have a legal duty to also comply with the placement preference requirements.

This subsection should also insert after "foster care placement," ", including, whenever practical and appropriate, an emergency removal pursuant to section 23.113,". See comments above with respect to section 23.113.

23.128(b) As discussed in more detail below, in connection with the comments on section 23.131, this subsection and subsection 23.128(b) are commendable provisions because, without challenging the erroneous holding in *Adoptive Couple v. Baby Girl*, 570 U.S. ___(1913), 133 S.Ct. 2552, 186 L.Ed.2d 729 (2013), with respect to 25 U.S.C. 1915, these subsections and subsections 23.129 to 23.131, when applied in practice, will significantly mitigate the Court's error and improve the ability to effectuate the intent of Section 1915.

As with the comments above pertaining to subsection 23.128(a), an "agency" is not always involved in voluntary placements, especially voluntary adoptive placements. In such a case, the attorneys involved or the court should be required to fulfill the duties specified in this subsection. Whenever an agency, the court or a party through an attorney or otherwise undertakes the "diligent search" required by this subsection, the subsection should provide that the search seek to include the assistance of the tribe, the BIA, or other appropriate sources. When no agency is involved, the court can also enlist the assistance of a public or State-licensed agency and the Indian child's tribe in carrying out the "diligent search."

The notifications required by the subsection do not include the full range of those included in the preferred placements specified in sections 23.129 and 23.130. Although expanding the list of those notified is likely not practical, when there is no suitable placement identified from within the pool of persons or families, notified, the agency or court or attorney should be required to send the notice described to other members of the Indian child's tribe or other Indian families known to the agency, court or attorney because they have been identified, or can be reasonably ascertained, as families interested in the foster care placement, preadoptive placement or adoption of Indian children. In other words, one round of notices should not be a sufficient basis for departure from the preferences; there should be a second round that seeks to reach persons in other preferred placement categories not included in the first round.

Lastly, whenever a tribe has adopted its own order of placement preference, the notices and explanation required under this subsection should be sent to all persons within that order whose identities and addresses are known or, through the assistance of the tribe, the BIA, or other appropriate sources, can be reasonably ascertained.

23.128(b)(4) This subsection is framed in a way that does not appear to carry out its intent. As worded, the subsection would require not only a search with respect to the designated foster homes but "notification of the placement proceeding and an explanation of the actions that must be taken to propose an alternative placement" to each of these foster homes. Notification to each of these homes is impractical and unwise except in circumstances where one or more of these homes is actively under consideration for placement. What is now in subsection (b)(4) should be recast as subsection (c) with the subsequent subsections relettered accordingly. The new subsection as recommended would read: "(c) In the case of a foster care or preadoptive placement, a search must include:…." However, what is now subsection 23.128(b)(4)(i) should be amended, in conformity with section 23.130(b)(2), to add after "Indian child's tribe" ", whether on or off the reservation." In addition, in subparagraph "(ii)" of this subsection, after "Indian child's State of" insert "residence and, if different,". In the context of foster care placement, the States of residence and domicile may be different and, depending on the child's circumstances, foster care placement in the State of residence may be more appropriate and in the child's best interests than placement in another State where the child may be domiciled. Alternatively, what are now subsections 23.128(b)(4)(i) and (ii) can be amended as follows: "(i) All foster homes licensed, approved, or specified by the Indian child's tribe, whether on or off the reservation, and which are being considered for placement of an Indian child; and (ii) All Indian foster homes located in the Indian child's State of residence and, if different, domicile that are licensed or approved by any authorized non-Indian licensing authority and which are being considered for placement of an Indian child." This, then, would limit the notification and explanation requirements to homes being considered for placement, a more practical, sound and pragmatic approach.

Also, consistent with subsection 23.130(b)(3), this subsection should add a new subparagraph "(iii)" as follows: "All Indian foster homes located in any State that are

licensed or approved by any authorized non-Indian licensing authority and that are available through the Interstate Compact on the Placement of Children or through any other child placement resource exchange available to the agency." States and their licensed agencies routinely place children out-of-state and, therefore, this option should be included in any search when an in-State placement, in accordance with the placement preferences, cannot be made. Lastly, this subsection should add a new subparagraph "(iv)" that incorporates the language in section 23.130(b)(4). The institutions referenced in this language are included as foster care and preadoptive placements in 25 U.S.C. 1915(b).

23.128(e) This subsection provides for the "maintenance at the agency" of various placement related documents. The subsection does not elaborate on the term "maintenance" with respect to what maintain means in this context. In what manner are these documents to be maintained and for how long? Who is to have access to these documents and under what circumstances and procedures? Without further explanation of this requirement, the ends to be achieved by the requirement are unclear.

In addition, when a voluntary placement does not involve an agency, the section should provide for the "maintenance at the court" or "maintenance at an agency under the supervision of the court" of the records described in the subsection. Often, where an agency is not involved, state law requires that a home study attesting to the suitability of the placement be prepared by an agency and submitted to the court. In such circumstances, this subsection could require that the documents required by this subsection be maintained at the agency.

23.129 An additional subparagraph should be added to this section as follows: "(c) When the Indian child's tribe has established a different order of preference, that order supplants the order of preference provided in subparagraph (a) of this section."

23.130 An additional subparagraph should be added to this section as follows: "(c) When the Indian child's tribe has established a different order of preference, that order supplants the order of preference provided in subparagraph (b) of this section."

23.131 This section, in general and together with sections 23.128-130, provides a good and salutary implementation of 25 U.S.C. 1915. Pre-ICWA, the vast numbers of Indian children who were placed in foster care or adoptive placement, whether due to voluntary or involuntary placements, were rarely placed with extended family or in Indian homes. Post-ICWA, the placement of Indian children in Indian homes has not occurred with the frequency intended or anticipated by the drafters. This, despite the fact that as long ago as 1988 the Supreme Court noted that Section 1915(a) is "[t]he [ICWA's] most important substantive requirement imposed on state courts." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1988). Quoting House Report 95-1386, *Holyfield* explains that under Section 1915(a), in the "absence of good cause," the welfare of Indian children, i.e., the best interest of Indian children "mandates" that "'the rights of the Indian child as an Indian'" be protected by assuring "'that, where possible, an Indian child should remain in the Indian community.'" *Id.* at 37. The Supreme Court's recent decision

in *Adoptive Couple v. Baby Girl*, 570 U.S. ___(1913), 133 S.Ct. 2552, 186 L.Ed.2d 729 (2013), will undoubtedly compound non-compliance with Section 1915(a). This decision completely misunderstands and misconstrues Section 1915(a). The Court determined that, if an adoption of an Indian child is sought by non-preferred prospective adoptive parents, Section 1915(a) need only be applied when "an alternative [preferred] party has formally sought to adopt the child." 133 S.Ct. at 2564. The Court also opined, in dicta, that a biological father whose parental rights were involuntarily terminated could be an eligible placement for an Indian child if the father is "now reformed," the tribe includes the father in "a different order of preference by resolution" and the father, then petitions to adopt his child. 133 S.Ct. at 2564 n. 11. (The Court, in dicta, states that Section 1915(a)'s "good cause" provision applies to the tribe's "different order of preference" established under Section 1915(c). *Id.* This, too, is completely erroneous. The undersigned drafted subsection 1915(c) of the ICWA to be consistent with other ICWA provisions deferring to tribal decision-making and providing a default, i.e. Section 1915(a), only in the absence of tribal law or custom. Section 1915(c) was drafted, in part, specifically and expressly to eliminate the good cause requirement by mandating that "the agency or court…shall follow such [tribal] order [of preference]…").

As for a presumptively fit unwed biological father, whose custody of the child is opposed by the custodial mother and whose rights, then, will be terminated as part of a final decree of adoption, the Court's decision, although not directly addressing this issue, opens the door to requiring such a father to petition for adoption in order to be considered for placement, especially if such father never had physical custody or legal custody under State law. 133 S.Ct. at 2564-2565. Under these circumstances, the father's adoption petition, it appears, would be considered as a petition in competition with the petition of non-preferred prospective adoptive parents.

The BIA now has taken the opportunity, consistent with its advocacy before the Supreme Court in *Baby Girl*, to lessen the deleterious impacts of this decision pertinent to Section 1915. This is exactly the correct course of action because it is in accord with the ICWA while also not conflicting with the Supreme Court's decision.

Whether an Indian child requires placement as a result of a voluntary or involuntary child custody proceeding, it is imperative that persons, especially extended family members, who are preferred for placement be informed regarding their eligibility for placement and have an opportunity to petition for placement or otherwise apply for placement pursuant to applicable procedures. Proper application of Section 128(b) should assure this result. See comment below for section 23.121(c)(4) for a recommendation on strengthening the language with respect to this assurance.

23.131(c) The "must be based on" language in this subsection is problematic because it biases a decision in favor of a finding of good cause when the circumstances in any one of the four subparagraphs exist. The language could result in an automatic application of the good cause exception when the intent of 25 U.S.C. 1915(a) and (b) is to establish a presumption in favor of a preferred placement and, only in exceptional circumstances such as those described in section 23.131(c)(2),(3) and (4), to deviate from that

presumption. Regulatory implementation of these statutory sections should make this clear and allow for a determination to deviate from the preferences to be based on the sound exercise of discretion by a court after concluding that the evidence justifies deviation to protect "the best interests of the child" as those interests are considered within and circumscribed by the context of the overall purposes of the ICWA.

23.131(c)(1) This subparagraph is a substantial improvement over its predecessor in the 1979 Guidelines. Commentary F.3(a)(i), 44 Fed.Reg. 67594. However, in the context of an involuntary removal of a child from parental custody, there is no rationale for acceding to a parental request for an out-of-preference placement unless the planned preferred placement was either complicit in the circumstances that gave rise to the involuntary child custody proceeding or is otherwise shown by the requesting parents to be unsuitable for the child. Even if the planned preferred placement does not meet with the approval of the parents and the disapproval rationale is accepted by the agency, there are so many potential placement options within the preferred categories that parental objection to one or another proposed placement should simply result in the child being placed in another preferred placement. A decision that the parental rationale for rejecting any one placement applies with equal force to all potential preferred placements is farfetched if not ridiculous.

In the context of a placement after or in contemplation of a termination of parental rights, this subparagraph leaves the door wide open to what already occurs with frequency, namely, absolute obeisance to a parental objection to a preferred placement. The subparagraph does this by simply requiring parental "review" of preferred placement options and, then, permitting a parental objection to be the sole basis for deviating from the preferences regardless of the basis for the parental objection or whether that basis has any merit in terms of the welfare of the Indian child as that welfare is articulated by the Congress in the ICWA. This is not a correct implementation of 25 U.S.C. 1915(a) and (b). As 25 U.S.C. 1915(c) makes clear, it is only "[w]here appropriate, [that] the preference of the …parent shall be considered." The drafters of this subsection, the undersigned included, intended for parents to have a role in suggesting a suitable placement when doing so would be in accordance with the overall purposes of the ICWA. This intent is made clear in House Report, 95-1386, page 24, where it is explained that even when there is a parental request for anonymity, the request "should be given weight" in determining whether to apply a particular preferred placement but that, nonetheless, an anonymity request does not "outweigh the basic right of the child as an Indian." All too often, however, a desire for anonymity becomes the basis for finding that it is "appropriate" to consider the parent's suggestion for an out-of-preference placement as dispositive even when a suitable preference order placement is available. The original Guidelines, Commentary F. 1, 44 Fed. Reg. 67594, take this position much to the applause of the AAAA, April 19, 2015 comment on proposed rule, page 20. The undersigned and most other commenters on the Guidelines opposed Commentary F. 1 as contrary to the intent of the ICWA.

It is also noteworthy that, even in the absence of the ICWA, there is no State law that permits, without review or any other legal restraint, much less requires placement in

accordance with parental directives. And, contrary to what AAAA proclaims, pages 19-20 of its comments, parents do not have a constitutional right to dictate a specific adoptive placement for a child.

Under the laws of every State, the court, as the agent of the State for carrying out the State's parens patriae responsibility, is mandated to determine whether a proposed placement is suitable and in the best interests of the child. A court will not approve an unsuitable placement regardless of parental desires to the contrary. Put another way, parents do not own their children and when the circumstance arises where a parent is permanently relinquishing parental rights, the parent gives up any right to control the future destiny of the child. That right passes to the State which acts pursuant to its laws. The ICWA placement preferences are underpinned by the same rationale, i.e., when a parent relinquishes custody, placement of an Indian child is to be made in accordance with federal law defining what is in the best interests of Indian children.

As noted above, whether the placement need emerges from a voluntary or an involuntary placement, that a parent can reasonably object to a placement within the vast categories of placement options identified in 25 U.S.C. 1915(a) and (b) and the parallel provision of the proposed rule, is chimerical. The proposed rule should be changed to give parents a voice "where appropriate" but even "where appropriate," this voice should not be dispositive as to the deviation issue unless the circumstances in one of the other subparagraphs of subsection (c) exist.

If subparagraph (1) is retained, where parents "attest that they have reviewed the placement options," a review that should be clarified to mean actual families and not just categories required by law, and still object to any of the proposed preferred placements, the agency or court first should be required to explore and determine whether there are other available preferred families before concluding that there is good cause to place outside the preferences.

23.131(c)(3) This commenter had planned to refrain from commenting on the way in which this subsection treats the bonding issue. For decades, bonding and what should be the consequences of bonding in respect to child custody determinations has been a continuously debated and contentious issue. The positions of those concerned with this issue are cemented in place and immune to a meeting of the minds between those taking opposite positions. Many mental health professionals have taken the position that once bonding has established a "psychological parent" relationship between the a non-biological person or persons with custody, disturbing that relationship could be detrimental to the child, a detriment that perhaps can be alleviated or eliminated with a careful therapeutically informed transitioning back to custody of the biological parent or family. Some of these mental health practitioners have even taken this point of view to the extreme of arguing that a kidnapped child who has been with the kidnapper for a substantial time should remain with the kidnapper who has become the child's "psychological parent." Although most would not go this far, mental health professionals who are opposed to disturbing a relationship between a child and a "psychological

parent" generally endorse not disturbing this custody even when the child was unlawfully or otherwise inappropriately or unnecessarily removed from biological family.

Many lawyers, with the obvious exception of adoption attorneys who have commented on the proposed rule, take the position that when a child was removed from biological family contrary to law, the law must be followed and the child returned to biological family even when there is a "psychological parenting" relationship between the placement family and the child. This point of view stems not only from advocating the interest of a particular clients who want custody of their biological child but, in a larger perspective, from the imperative to retain the credibility of the law itself and proper legal procedures in order to suppress flouting of the law and to ensure that the law is applied to other children as intended.

Debating the merits of either position is pointless because it will not change minds. It is of singular importance, however, that the ICWA embraces the adherence to the law approach regardless of whether this means that a child is removed from the custody of a "psychological parent." The proposed rule does no more than plainly express what various ICWA provisions require anyway. The adoption attorney's efforts to have the Bureau of Indian Affairs now revisit this issue is too late.

The ICWA did not arrive at its approach unguided by child welfare or mental health considerations or misguided by the advocacy of the undersigned and numerous others who endorsed this approach or, for that matter, easily.

Pre-ICWA, in 1973, Albert Solnit, M.D., a child psychiatrist and pediatrician and then Director of the prestigious and influential Yale Child Study Center, published, along with his luminary colleagues Dr. Joseph Goldstein and Dr. Anna Freud, Beyond the Best Interests of the Child. It was this book that described "psychological parenting" and strongly recommended that courts not disturb the relationship between a child and the child's psychological parent. Dr. Solnit advocated the premise of this book in testimony in a number of trials that occurred in the years following publication. The book and his advocacy were quite effective, resulting in courts in many parts of the country adopting the "psychological parent" thesis to deny a return of custody to biological family. It took many years before many courts came to an understanding, based on countering theses, that a knee-jerk obeisance to the psychological parenting thesis could be harmful to children. (This is not to suggest that Dr. Solnit ever advocated knee-jerk obeisance; he did not. Courts and adoption attorneys did.).

Beyond the Best Interests of the Child, pre-ICWA, compounded what already had been the staggering removal of Indian children from their biological families and tribes. Now, there was a mental health justification for the ongoing racist application of the child abuse and neglect laws. Dr. Solnit did not foresee or intend this. The adoption attorneys took full advantage of this and succeeded in adding to the unwarranted placement of Indian children in non-Indian adoptive homes.

In the mid-1970s during the development of the ICWA, William Byler, the Executive Director of the Association on American Indian Affairs (the person who originated the idea for an ICWA and who is probably more responsible than any other single person for its enactment) and the undersigned, as Staff Counsel for the Association, visited Drs. Solnit and Goldstein at Yale for several hours to discuss the deleterious and pernicious impact of the psychological parenting and bonding premises on Indian children, families and tribes.

The outcome of the meeting and telephone followup was an acknowledgment by Drs. Solnit and Goldstein that, in writing their book and developing the psychological parenting theory, they had not considered the impact or implementation of this theory as it would apply to placement of a child cross-culturally or transracially. They agreed that when there is a cross-cultural or transracial placement, other critical psychological factors affect whether to permit bonding to prevent reunification with biological family. They promised to address this in subsequent writings. They did so. Dr. Solnit also modified his psychological parenting premise in court testimony when the case involved a cross-cultural placement. The Yale Child Study Center did not submit testimony on the ICWA.

Importantly, Mr. Byler and the undersigned pointed out to Drs. Solnit and Goldstein that whether parenting is caring and nurturing or non-caring and not nurturing or even harmful, bonding and psychological parenting can occur. They agreed and certainly did not intend for a placement to continue just because of bonding when the placement clearly was not in a child's best interests. As the Congress found, harmful bonding was the all too common experience of Indian children, if not the most common experience, when Indian children were placed in non-Indian foster and adoptive homes. The adoption attorneys have tunnel vision; they appear to assume that the placements for which they advocate are always best for the child. Evidence to the contrary usually emerges years later when they are long removed from involvement with the child or adoptive family.

The ICWA approach that emphatically favors keeping Indian children with their biological families or returning Indian children to their biological families, whenever possible and regardless of possible bonding with a non-Indian family, was not arrived at lightly, without debate or without thoughtful consideration and ample support in the testimony included in the legislative history. Most of the witnesses addressed this issue in one way or another. However, for present purposes, it suffices to point out that the congressional decision rejecting both the pre-ICWA and post-ICWA position of the adoption attorneys was based, in significant part on the testimony of many distinguished mental health practitioners, with a depth of experience working with Indian children and families, including:

1. The American Academy of Child Psychiatry as presented by Dr. Alan Gurwitt, Associate Clinical Professor of Child Psychiatry of the Yale Child Study Center and co-Chair of the Academy's Committee on the Indian Child and Dr. Carl Mindell, a former psychiatrist with the Indian Health Service on the Pine Ridge Indian Reservation, Professor of Psychiatry at Albany Medical College and co-Chair of the Academy's Committee on the Indian Child.

2. Dr. Robert Bergman, psychiatrist and Chief, Mental Health Programs, Indian Health Service and Dr. George Goldstein, psychologist and Director of Program Development and Evaluation for Mental Health Programs, Indian Health Service.

3. Dr. Carl Hammerschlag, Indian Health Service psychiatrist.

4. Dr. Carolyn Attneave, psychologist and President of Psychiatric Outpatient Centers of America.

5. Dr. Joseph Westermeyer, psychiatrist and Professor of Psychiatry, University of Minnesota Hospitals.

6. Dr. James Shore, Professor of Psychiatry at the University of Oregon Medical School and formerly Chief of Mental Health Programs for the Indian Health Service northwest area.

7. Dr. Marlene Echohawk, clinical psychologist and member of the Committee on the Indian Child of the American Academy of Child Psychiatry,

8. Evelyn Blanchard, M.S.W. and Albuquerque Assistant Area Social Worker, Bureau of Indian Affairs and member of the Committee on the Indian Child of the American Academy of Child Psychiatry.

9. Leon Cook, M.S.W., Department of Indian Work, State of Minnesota and former NCAI President.

10. Jere Brennan, M.S.W. and Superintendent, Ft. Totten Agency, Bureau of Indian Affairs.

The Supreme Court, in *Mississippi Band of Choctaw Indians v. Holyfield* , specifically noted the testimony of Dr. Westermeyer and the American Academy of Child Psychiatry, 490 U.S. at 33 n. 1 and 49 n. 24, describing the serious socio-psychological developmental problems encountered by Indian adolescents who, as much younger children, had been placed in non-Indian homes.

The ICWA, in the Indian context, treats the bonding issue in much the same way as federal law and the States treat this issue when non-Indian children are involved. Like the ICWA, these other federal and State laws require that separation from the biological family be a last resort and, that when separation occurs, efforts at reunification must be made. Applying the adoption attorney's position, reunification efforts should virtually never occur when the child has bonded with a "psychological parent." This approach would assure non-compliance with the ICWA because it would be easy enough, as adoption attorneys have demonstrated so well both pre-ICWA and post-ICWA through prolonged litigation and related tactics at which they excel, to make certain that an Indian child is first placed in a non-Indian placement and, then, remains there long enough to

enable an argument, that bonding requires that the child not be moved, to be successful. This may support the emotional needs of non-Indian adoptive parents and the wallets of adoption attorneys but it has little to do with the best interests of Indian children which the ICWA protections are all designed to secure.

23.131(c)(4) This subparagraph is quite appropriate except for the “applicable agency” limiting language. The preferred placement requirements of 25 U.S.C. 1915(a), (b) and (c) are not limited to agency placements. These requirements apply even when no agency is involved. Therefore, this subparagraph should make clear that when no agency is involved, the court or the appropriate party is responsible for complying with the duties described in the subparagraph.

In addition, to more clearly articulate the purpose of incorporating section 23.128(b) into this subsection, after “applicable agency” insert “it has conducted a diligent search for a preferred placement”.

23.132 This section correctly gives effect to the intent of 25 U.S.C. 1913(d). There is a typo where the language refers to “termination of paternal rights” instead of “termination of parental rights.”

23.134 Other than subsection (a) of this section, which repeats the language in 25 U.S.C. 1917, this section, as presently framed, is unhelpful because it will thwart implementation of 25 U.S.C. 1917 and, in certain jurisdictions will undermine an established practice of opening adoption-related records for Indian adoptees that are otherwise closed to non-Indian adoptees.

25 U.S.C. 1917 was drafted by this commenter. Since enactment of the ICWA, this commenter has represented numerous adult Indian adoptees who, pursuant to section 1917, sought access to sealed adoption records. Although this has not been universally the case, none of this commenter’s clients were ever denied access to identifying information in sealed adoption records. This has been the case even in states with the strictest application of sealed records laws, like New York.

At the time of enactment of the ICWA, almost all of the States sealed adoption records. This sealing was generally supported by adoption agencies. In the years since, adoptees and their supporters, which now number the majority of all major adoption agencies, have advocated for laws opening adoption records to adult adoptees. As a consequence, there are now 15 States that permit adult adoptees to access identifying information in sealed adoption related records and another 9 States that allow this access for adoptions occurring prior to or after a specified year.

Sealing never was absolute and, even now, in the States that continue to seal adoption records, adult adoptees can seek access based on “good cause.” Of course, the application of “good cause” can be very idiosyncratic from State-to-State and even within States because the outcome depends on the discretion of the judge determining the petition for

access, a discretion that may or may not be informed by appellate construction of the applicable statute.

In the final drafting of Section 1917, the "good cause" element of sealed records laws was deliberately omitted because, under the "good cause" standard, petitions by adult adoptees for access to sealed adoption-related records were denied much more often than they were granted. Instead, the Section 1917 requirement is the mandatory and unqualified "shall inform."

Proposed subsections 23.134(b) and (c) probably would change the existing ability to access sealed adoption records by signaling to States retaining laws that seal adoption-related records that nothing in Section 117 necessitates the opening of such records unless, as has happened albeit rarely, a court were to determine that the ICWA itself establishes the "good cause" required to open sealed records under State law. If records that can now be opened are hereafter closed because of the regulatory interpretation provided by these subsections, established precedent beneficial to the best interests of Indian children would essentially be overturned and the impact of Section 1917 considerably lessened, contrary to congressional intent.

Section 1917 was designed to achieve the opening of records, including otherwise sealed records, for adult adoptees. During the drafting process, because of intense opposition from adoption agencies to requiring disclosure of identifying information from sealed adoption records to adult adoptees, a decision was made by the drafters to delete the explicit inclusion of this requirement in the statutory language and, instead, explain in legislative history that such disclosure should occur when necessary to carry out the purposes of section 1917.

The obvious purpose of section 1917, consistent with the overall purpose of the ICWA, is to "protect the best interests of Indian children and…promote the stability and security of Indian tribes and families…." 25 U.S.C. 1902. After premising the ICWA on a finding 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," 25 U.S.C. 1901(4), and on further findings concerning the harm caused to these children by such actions, including harms described to the Congress in testimony by Indian adoptees who had been adopted by non-Indians or raised in non-Indian institutions under circumstances that did not work out.

Section 1917 was one of the many ICWA provisions designed to protect the welfare of the Indian child, first and foremost. In the context of Section 1917, this meant not subordinating the interest of adult Indian adoptees to reconnect with their families and their tribes to the policies embodied in State laws sealing adoption records or to concerns about parental privacy rights. Testimony presented to Congress by adult Indian adoptees, the biological families of Indian adoptees and tribes supported opening the sealed adoption records to enable adult Indian adoptees to reconnect with their families and tribes. Even without considering that tribal cultures do not subscribe to the privacy rationale that underlies State sealed records laws, a rationale that has little rationality to

cultures that traditionally employ an open adoption process, many Indian adoptees were involuntarily removed from their families. In these circumstances, the families had no interest in privacy. Their interest was in retaining custody of their child, an interest that they often pursued for years even post-adoption.

And, often in voluntary relinquishments of parental custody, the "voluntary" was in name only as the process was loaded with questionable ethics and little to no due process. (Absent the ICWA, this would still commonly be the case for Indian parents making a voluntary placement.). Moreover, even when an adoption was premised on a voluntary relinquishment, many biological families engage in searches for the child who was adopted or otherwise do not assert an interest in privacy protection from their own child. This is borne out by the successful campaigns, to change the sealed records laws in a number of States in recent years, in which biological families testified in support of unsealing and, post-enactment, almost universally did not exercise their statutory right to opt out of the unsealing. This serves to underscore that the State sealing laws, mostly enacted between 1920 and 1950, were not about privacy protection for children and biological families but, rather, about protection for adoption agencies and adoptive parents, a protection that they now either no longer seek or, if they do, is being increasingly viewed with skepticism by State legislatures especially when the access to such records is sought by adult adoptees.

As noted above, the right to access identifying information in sealed adoption records was made explicit in the Section 1917 legislative history. United States Senate Report No. 95-597, 95th Cong. 1st Sess. (November 3, 1977), at page 11 explains section 1917:

> An Indian child who has been placed in adoptive, foster care, or other setting is authorized upon obtaining the age of eighteen to obtain information regarding his or her placement as may be needed to qualify for enrollment in his or her tribe of origin and for other benefits and property rights to which he or she may be entitled because of Indian status.

The Report further explains, at page 18 (emphasis added):

> As originally drafted, this section automatically entitled the child to learn the actual names and addresses of his natural parent or parents. It is the intent of this section [sec. 1917] as amended to authorize the release of 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.

See also, Senate Report at page 9, explaining that, under the section, "all nontribal public or private agencies shall make available" to "a previously placed Indian child over the age of 18, all information which he needs to establish enrollment and obtain those benefits to which he is entitled as a tribal member." House of Representatives Report No. 95-1386,

95th Cong. 2d Sess. (July 24, 1978), at page 24, similarly states that section 1917 is "aimed at"

> help[ing to] 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 such membership...[and] help[ing to] protect the rights and interests of an Indian tribe in having its children remain with or become a part of the tribe.

Section 1917 is one of the few sections of the ICWA that remained substantially unaltered from the original Senate version in the 95th Congress to the House version ultimately enacted. Therefore, the Senate Report explanation is determinative of the scope and intent of the Section with respect to the right to access identifying information when needed to establish any rights, including the right to tribal membership, flowing from the Indian adoptee's tribal relationship.

23.134(b) In view of the foregoing discussion, this subsection should be deleted. Section 1917 preempts any State law prohibiting the revelation of the identity of the biological parent when such revelation is needed in order to secure tribal membership. If tribal membership can be secured without such revelation, then there is also no need for this subsection. In addition, to offer the assistance of the BIA in helping an Indian adoptee to secure tribal membership is untoward when the BIA, as experience indicates, does not have the ability to assist in this way. (The Commentary on Section G.2 in the 1979 Guidelines offers to have the BIA certify to a tribe that an individual "meets the requirements for tribal membership." Since 1979, such certification and tribal acceptance of such certification has likely occurred rarely if ever.). Lastly, the federal Privacy Act has no application to determining access to State adoption records. This is entirely a function of State law, including, if applicable, State privacy law.

23.134(c) This subsection should also be deleted for the reasons stated above, namely, that State laws "closing" adoption records do not bar Indian adoptees from securing, pursuant to Section 1917, the information they need to obtain tribal membership. In any event, the reference to "relevant agency" is unclear. The term "agency" is defined in section 23.102. Is the reference in this subsection a reference to the adoption agency that placed the child? The subsection is unworkable. The direction that the "agency should communicate" provides no assurance that the agency "will" communicate. There is also an underlying assumption in this subsection that agency records will identify tribal affiliation and that agency personnel will then be able to communicate with the appropriate tribe. In reality, agency records are often sketchy. They may provide, for example, only a last name. Certain last names might identify a possible tribe but an agency will not be aware of this and typically has no resources to investigate on behalf of an adoptee or spend much time and energy assisting an adoptee. In addition, it is not uncommon for a tribe to be identified that has tribal communities in multiple locations. Again, agencies typically do not have the resources to track down the right tribe. This is precisely one of the reasons why Section 1917 is constructed so that the adult Indian adoptee is the applicant and, under the Section, it is the adult Indian adoptee to whom the

information must be directly provided without an intermediary. It is the adult Indian adoptee who has the motivation to take what is often very limited information and from that develop the facts that are needed to secure tribal membership.

Also, of course, nothing in this subsection addresses the circumstance where an adoption occurred without the involvement of an adoption or other agency. In that circumstance, the information needed to secure tribal membership may be available in the court adoption records or in the records of the State agency that did an adoptive home study or in the records of a State or county registrar of vital statistics, the entity that issues an amended birth certificate post-adoption after receiving a copy of the final decree of adoption. These agencies are not authorized to or in a position to carry out the agency function described in this subsection.

It should also be noted that, under State sealed records laws, agencies are typically barred in any case, absent a court order, from disclosing information directly to a tribe. Agencies of the State or licensed by the State do not go to court to secure an order authorizing them to disclose the contents of sealed adoption records. Rather, these agencies are ordered to make such disclosure only when an adoptee's petition for access is granted.

23.134(b) and (c) Instead of these subsections, this commenter recommends that the regulations give effect to 25 U.S.C 1917 by including the explanation provided in the legislative history of the section. The subsection can be reframed as follows:

"(b) When knowledge of the names and addresses of biological parents is needed by an Indian individual who has reached age 18, and who was adopted, to protect any rights resulting from the individual's tribal relationship, the court which entered the final decree of adoption must provide this information to such individual. When the adoption records maintained by the court do not contain this information or information pertaining to the individual's tribal affiliation or any other information needed to protect any rights resulting from the individual's tribal relationship, the court should seek to obtain such information from any public or State-licensed agency that may have the information in its records or from any attorney or law firm that may have the information."
In addition, because many of the records pertinent to an adoption are usually not sealed under state law until the final decree of adoption is entered, 25 U.S.C. 1917 can also be more effectively implemented by adding a subsection that requires certain records to be provided to the tribe prior to sealing. Suggested language follows:

"(c) Prior to the entry of a final decree of adoption, any agency involved in an adoption or the State registrar of vital statistics or the court must provide the Indian child's tribe with a copy of Indian child's original certificate of birth. After the entry of a final decree of adoption, any agency involved in the adoption or the State registrar of vital statistics must provide the Indian child's tribe with a copy of the Indian child's amended certificate of birth. Whenever State law prohibits disclosure to the Indian child's tribe of a final decree of adoption absent a court order, any agency or, if there is no agency, other party involved in an adoption proceeding must request an order

permitting such disclosure and, upon entry of such an order, provide the Indian child's tribe with a copy of the final decree of adoption."

Inclusion of the above recommended subsection (c) would enable adult Indian adoptees who seek tribal membership to easily secure such membership, provided they have information about their tribal affiliation, without the need for lengthy investigations or costly court proceedings.

23.135(c) Section 23.135 seeks to implement 25 U.S.C. 1916. This commenter drafted 25 U.S.C. 1916. The statutory section, 1916(a), pertains to failed adoptions and providing parents or prior Indian custodians with an opportunity, when an adoption has failed, to petition for a restoration of custody or a restoration of parental rights regardless of whether the original loss of custody stemmed from a voluntary or involuntary child custody proceeding. In fact, the section is derived from a pre-ICWA Montana case where the parental rights of this commenter's client were involuntarily terminated after a felony conviction and where, after serving the sentence imposed, said client was able to secure a restoration of parental rights. To state the intent of Section 1916(a) another way, the section presumes that when an adoption fails, it is in the best interests of Indian children to be returned to the custody of fit biological parents and that this is the preferred option for such children when fit biological parents want their custody restored. This Section is yet another of the ICWA provisions that expresses one of the overarching goals of the law, namely, whenever possible, Indian children should be raised by their biological families.

The notice waiver provision provided in subsection 23.135(c) would undermine the purposes of Section 1916(a) to protect the welfare of the Indian child in the statutory manner provided. Section 1916(a) provides a parent or prior Indian custodian with the right to "petition for return of custody" which the court "shall grant" unless the parent or prior Indian custodian is unfit. As noted, this creates a presumption in favor of return of custody.

If the notice waiver provision is retained, it is predictable that biological parents, at an extremely vulnerable time when they are relinquishing custody and are commonly without legal representation, will be routinely presented by agencies and adoption attorneys with a notice waiver form to execute, along with all of the other documents which they may be asked to sign at the same moment, and they will do so without a full understanding of the legal right they are waiving, their right not to waive the right to notice, or the process for revoking the waiver. (The subsection recites the right to revoke consent at any time "by filing with the court…." However, just as it is not clear in which court the waiver is to be filed, it is also not clear as to in which court the revocation is to be filed. Most importantly, the subsection does not require that a parent or Indian custodian be informed of the right to revoke the notice waiver.).

If the notice waiver provision is retained and the Indian child is the subject of a voluntary termination of parental rights by the adoptive parents without any agency involvement,

any attorney involved in a subsequent adoption of the child should also be required to provide the notice required by subsection 23.135(a).

And, if the notice waiver provision remains, the last sentence of subparagraph (c) should be amended to insert “completed” after “does not affect any.” Without this clarification, when a revocation of the waiver of the right to receive notice occurs while proceedings are in progress and no permanent custody decisions have yet been made, the revocation may be given no effect, i.e., no notice will be provided regarding such a proceeding. This outcome would clearly conflict with Section 1916(a).

To give real effect to Section 1916(a), rather than including a waiver provision in the regulations, the regulation should require notice to parents, prior Indian custodians and the Indian child’s tribe whenever an adoption fails. The notice should inform those notified of the procedure for petitioning the court for a return of custody. The notice should be provided no later than 5 days following the entry of any court order terminating the parental rights of the adoptive parents or vacating or setting aside the adoption.

A notice provision would not only help to accomplish the purposes of Section 1916(a), it would accomplish the purposes of a waiver as well because, upon receiving notice, the parent or prior Indian custodian can make a knowing decision as to whether to petition for a return of custody. If such a return is not wanted, there will not be a petition and this will occur without the need for an advance waiver of rights.

The notice waiver provision in subsection 23.135(c) is also made applicable to removals of an Indian child from a foster home for placement in another foster home or institution or preadoptive or adoptive placement, a circumstance covered by 25 U.S.C. 1916(b). A notice waiver in these circumstances is particularly problematic because it raises serious due process implications when a parent’s rights have not been terminated and there may be ongoing active efforts aimed at reunification. When the removal of an Indian child from foster care to another placement occurs post-termination of parental rights or post-termination of an adoption, the concerns expressed above, pertaining to an effective implementation of 25 U.S.C. 1916(a), apply. The notice waiver provision serves no purpose other than to alleviate courts, agencies and attorneys from extending and expending the little extra effort that notice would entail. The ICWA, in its entirety, is intended to expand and extend due process to Indian parents, prior Indian custodians and tribes with respect to child custody proceedings; the notice waiver provision would contract such due process to no useful end and should be discarded.

23.136(a) This section essentially incorporates 25 U.S.C. 1951(a). The clear purpose of Section 1951 of the ICWA is to provide another mechanism for implementing 25 U.S.C. 1917 in circumstances where an adult Indian adoptee does not know and is unable to learn the identity of the court that decreed the adoption. Section 1951 also has the purpose of enabling foster parents of a minor Indian child and the adoptive parents of an adult or minor Indian child to assist the Indian child to become a member of a tribe. Lastly, Section 1951 has the purpose of facilitating tribal decision-making with respect to an application for tribal membership by or on behalf of an Indian child who has been

placed in foster care or in an adoptive home. Even when the identity of the child placing court is known, the court may be at a great distance from where the adoptee or Indian foster child resides and it may be beyond the financial means of foster or adoptive parents to petition the court for the needed information.

The intent of the drafters of Section 1951 was to make often difficult to obtain records and information available in a central location for easy access by the adult Indian adoptee, foster or adoptive parents of an Indian child and the Indian child's tribe. 25 U.S.C. 1951(b) expresses the purpose and intent of Section 1951(a).

The proposed rule, however, only states the provisions of Section 1951(a), leaving this subsection of the proposed rule with no purpose other than a meaningless information and record gathering. Nothing is stated about what is to be done with the records filed with the Secretary, who may access these records, what the procedure is for gaining access, and the timeframe for the Secretary to respond to any request for the records or information maintained by the Secretary pursuant to subsection (a) of the proposed rule.

For subsection 23.136 to have any purpose or meaning, it is vital to add a subsection that incorporates the provisions of 25 U.S.C. 1951(b) together with the procedure, including the responsive timeframe, for access to the information and records. Without such an addition to the regulations, 25 U.S.C. 1951 which, since 1978, has not been implemented by the Secretary will continue to not be implemented.

There also should be a mechanism for securing the information required by subsection 23.136(a) when a state court fails to comply with this subsection and the like statutory requirement. One way in which to secure the same information is to require the State registrar of vital statistics, of the State where the child was born, or social services agency, of any State involved in the adoption, to provide the information to the Secretary.

When the records transmitted to the Secretary contain an affidavit from the biological parent or parents requesting anonymity, such an affidavit should not preclude disclosure of identifying information to a tribe when the tribe requests the information in order to determine whether to approve an application for tribal membership. When a tribe acts to determine membership eligibility, it is an act vital and critical to tribal existence as a political entity and, therefore, is undertaken in an entirely sovereign capacity. It is an act also undertaken in furtherance of the federal interests expressed in 25 U.S.C. 1902. When an affidavit of anonymity impairs or impedes this determination, it should be honored only if a tribe informs the Secretary that it is able to make its membership determination under circumstances that preserves, wholly or in part, the requested anonymity even if the identifying information is provided. If a tribe is unable to make the membership determination while preserving the requested anonymity, the Secretary should nonetheless disclose the identifying information requested by the tribe.

When the records transmitted to the Secretary contain an affidavit from the biological parent or parents requesting anonymity, this subsection should make clear that the affidavit of one parent does not extend the anonymity request to the other parent. The

subsection should also make clear that when there is an affidavit requesting anonymity, all non-identifying information will still be disclosed to an applicant, including, for example, the name and tribal affiliation of the child and the identity of any court or agency having files or information relating to the adoptive placement. In addition, the subsection should state that the names and addresses of the adoptive parents will be disclosed to an applicant because the statutory provision excepting disclosure when there is an affidavit requesting anonymity pertains only to biological parents.

In order to facilitate the ICWA purpose of maintaining the connection between Indian children and their tribes whenever possible, this subsection should also provide for notification of foster and adoptive parents by the Secretary of their right, and the right of their adoptive child upon reaching age 18, to apply for the records of the adoption held by the Secretary pursuant to this subsection. When there is an affidavit of anonymity, the subsection should also provide for notification of the biological parent(s) by the Secretary acknowledging that their request for anonymity has been received and will be honored and informing them of the procedure for withdrawing this request and allowing identifying information about them to be disclosed. If an application is made, pursuant to 25 U.S.C. 1951(b), prior to the withdrawal of an affidavit of anonymity, this section should also require the Secretary to inform the applicant when a subsequent withdrawal is received and advise the applicant that a renewed application for disclosure of identifying information can be submitted.

A subsection should also be added that authorizes the release of the records maintained by the Secretary to any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe upon a showing that the records are needed as evidence in an action, pursuant to 25 U.S.C. 1914, to invalidate a placement made in violation of 25 U.S.C. 1911, 1912, or 1913 or in an action to invalidate a placement made in violation of 25 U.S.C. 1915.

Respectfully submitted,

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