



# SOUTHERN UTE INDIAN TRIBE

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U.S. Department of the Interior  
1849 C Street NW MS 3642  
Washington, DC 20240  
Via email: [comments@bia.gov](mailto:comments@bia.gov)

Re: Comments on Proposed Indian Child Welfare Act Regulations

On behalf of the Southern Ute Indian Tribe, the Tribal Council offers the following comments on the Department of the Interior's proposed regulations relating to the Indian Child Welfare Act ("ICWA"). The Tribe offers these comments on the proposed ICWA regulations with the goal of strengthening the implementation of ICWA for the future.

As stated by Congress in ICWA, "the United States has a direct interest, as trustee, in protecting Indian children." 25 U.S.C. § 1901(3). The Tribe agrees that the proposed regulations promulgated by the Secretary of the Interior are intended to improve the implementation of ICWA and uphold "the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902. Therefore, the Tribe supports the proposed regulations and urges their swift adoption to improve ICWA's implementation and strengthen compliance with ICWA's mandates.

More specifically, however, the Tribe requests consideration of the following specific comments when finalizing the proposed ICWA regulations.

## **Section 23.2: Definitions.**

### **A. Active Efforts**

#### **1. Clarify the relationship between ICWA and ASFA:**

Include a section that states there are no time limits on "active efforts" to distinguish ICWA cases from other cases where the Adoption and Safe Families Act (ASFA) may impose timelines.

#### **2. Identify determining paternity as an active effort:**

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

**3. Require state social services agencies to work collaboratively with Tribes:**

Active efforts should include a requirement that state social services agencies collaborate with Tribes by freely sharing information with tribal representatives, consulting with Tribes prior to making major decisions with regard to the child and family, and otherwise working with Tribes to meet the ICWA goals.

**4. Require state social services agencies to actively engage in ICWA compliance:**

Active efforts should include affirmatively promoting the goals and objectives of ICWA by taking such actions as advocating for placements in accordance with the ICWA placement preferences, as opposed to waiting for the court to order this or for Tribes to take the lead in insuring ICWA compliance.

**B. Continued Custody**

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

By including this provision, the proposed ICWA regulations do not create a presumption that only a mother may have custody of a child, while a father does not. In addition, by including this provision, the proposed ICWA regulations will take into account that sometimes an Indian child's heritage may come from a father who is unknown or not established at the time of the child custody proceedings.

**C. Domicile**

**Change the second part of the domicile definition to state that the Indian child has the domicile of the custodial parent.**

This way the ICWA regulations take into account that a father or Indian custodian may have obtained custody of a child. As stated in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989), domicile for children and minors are "determined by that of their parents." In addition, it is only "[i]n the case of an illegitimate child" that the child's domicile "has traditionally meant the domicile of its mother." *Id.*

**D. Indian Child**

**Add a statement to the definition that “Indian child” includes people over the age of 18 who are still involved in pending ICWA cases if they became an “Indian child” prior to turning 18 years old.**

Some states allow courts to retain jurisdiction over children involved in child welfare cases who turn 18 while the case remains pending. In Colorado, for example, the court can retain jurisdiction over children until the age of 21 in certain circumstances. Where state courts retain jurisdiction over ICWA cases after a child turns 18, ICWA should continue to apply until the court loses jurisdiction.

**Section 23.103: When does ICWA apply?**

**A. Clarify that ICWA applies in the following situations to increase consistency between states and decrease confusion:**

- (1) Any domestic violence protection order proceeding in which the Court restricts the parent’s access to the Indian child during the minority of the child,
- (2) Any placement of an Indian child in foster care as the result of a juvenile delinquency proceeding in which a state court determines that it is not safe to return a child to the parental or guardian’s home, or that it is inconsistent with the rehabilitation of the child, and
- (3) Third party custody or guardianship actions; and termination of parental rights actions brought by the other parents, third parties, or Indian custodians, which are all actions when the child cannot be returned upon demand of the parent.

**Section 23.103(f): Voluntary Placements.**

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

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

**Section 23.109: Procedure for determining an Indian Child's Tribe when the child is enrolled or eligible for enrollment in more than one Tribe.**

- A. State expressly that it is the court that has an affirmative duty to identify the Indian Child's Tribe, not the agency.**

The court should be required to hold an evidentiary hearing to determine which Tribe has the more significant contacts with a child prior to determining an Indian Child's Tribe, in the event that Tribes cannot agree between them. Tribes who claim to be the Indian Child's Tribe would bear the burden of proof. The agency should remain neutral on this issue except to bring the issue to the attention of the court as an issue for decision. Further, agencies should be barred from taking any action to enroll a child in any Tribe prior to the court making findings and conclusions with regard to an Indian Child's Tribe. This would prevent agencies from playing Tribes against one another, supporting Tribes preferentially over other Tribes, or using enrollment as a mechanism to divest the court of jurisdiction over a Tribe the agency does not want to work with.

- B. In Section 23.109(c)(2)(ii)(F), delete the consideration of the availability of placements when determining an Indian Child's Tribe.**

The Tribe with the most available placements may have little connection or interest in the Indian Child.

**Section 23.110(a): When must a State court dismiss an action?**

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

Even when a State court does not have the jurisdiction to hear an emergency child custody proceeding, in order to ensure the safety and wellbeing of the child, these proceedings should not be dismissed until the Tribe has asserted jurisdiction. This must be conditioned on, however, that the Court is making every effort to contact the Tribe with exclusive jurisdiction, and that the State court will transfer jurisdiction immediately without delay once the Tribe has been contacted.

**Section 23.111(h): What are the notice requirements for a child custody proceeding involving an Indian child?**

**Include in this section the parents' right to have judicial review of an emergency removal of an Indian child that was not approved by a judicial officer.**

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

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

**Section 23.116: *What are the criteria and procedure for ruling on transfer petitions?***

- A. Amend 23.116(a)(1) to read: "*Either parent, unless that parent's rights have been terminated by tribal or state court order, has a right to object to transfer, provided that the child is not already a ward of the Tribal Court.*"**

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

- B. Amend 23.116(b) to read: "*The court should expeditiously provide all records related to the proceeding to the tribal court, and order the agency to provide all records in its possession related to the Indian child and family to the Tribal social services agency.*"**

The agency's case file will presumably contain valuable information that the Tribe's social services agency will need when assuming responsibility for the case.

**Section 23.117(e): How is a determination of “good cause” not to transfer made?**

**Add “clear and convincing evidence” as the standard for determining good cause.**

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

**Section 23.118: What happens when petition to transfer is filed?**

**Amend 23.118(b) to read: “If the tribal court accepts the transfer, the state court should promptly provide the tribal court with all court records, and order the agency to provide all records in its possession related to the Indian child and family to the Tribal social services agency.”**

The agency’s case file will presumably contain valuable information that the Tribe’s social services agency will need when assuming responsibility for the case.

**Section 23.121(d): Applicable standards of evidence for foster care placement?**

**Define or give examples of “non-conforming social behavior.”**

The term is sufficiently ambiguous so as to cause confusion.

**Section 23.122: Qualified expert witnesses**

**A. To Sec. 23.122(a), add the word “Child’s” between “Indian” and “Tribe” to clarify that the expert must be knowledgeable in the specific culture of the Indian Child’s Tribe.**

**B. To Sec. 23.122(b)(3), replace “layperson” with “any person.”**

**Section 23.127: Withdrawal of consent to voluntary adoption**

**In the first sentence of Section 23.127(a), delete the phrase “or adoption, whichever occurs later.”**

The sentence is not sensible from a legal standpoint as currently written, since once parental rights are terminated, the parent lacks the legal right to withdraw consent to adoption. The phrasing used in ICWA, 25 U.S.C. §1913(c), is more accurate and could be employed here.

**Section 23.129: What placement preference applies in adoptive placements?**

**Include a provision that allows consideration of the Tribe’s recommended placement for an Indian child.**

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

**Section 23.130: What placement preferences apply in foster care or preadoptive placements?**

**Include a provision that allows consideration of the Tribe’s recommended placement for an Indian child.**

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

**Section 23.131(c): How is a determination for “good cause” to depart from the placement preferences made?**

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

By adding this provision, the proposed ICWA regulations will take into consideration the Tribe’s placement preference. Tribes should have a say in determining the welfare of Tribal children.

**Section 23.135: When must notice of a change in child’s status be given?**

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

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

### **Conclusion**

Thank you for the opportunity to provide comments on the proposed ICWA regulations. We hope these recommendations are helpful to the Department of Interior in its commitment to creating nationwide standards for State Court and Agency compliance with the Indian Child Welfare Act.

Sincerely,



Clement J. Frost, Chairman  
Southern Ute Indian Tribal Council