

**NWX-DEPT OF INTERIOR NBC**

**Moderator: Elizabeth Appel  
May 11, 2015  
12:00 pm CT**

Coordinator: Welcome and thank you for standing by. At this time all participants are in a listen only mode. During the Q&A portion of the call if you would like to ask a question, you may press star 1.

Today's conference is being recorded. If you have any objections, you may disconnect at this time. I'd now like to turn the call over to your host, Mr. Larry Roberts. Thank you. You may begin.

Larry Roberts: Thank you and good afternoon everyone. This is Larry Roberts. I'm the principal deputy assistant secretary for Indian Affairs. Thank you for joining us on this tribal consultation this afternoon.

This is only for consultation with tribal governments or their representatives. And so it's you're a member of the public with the press, we would ask that you join us for the call tomorrow that we have scheduled from 1:00 to 4:00. That is for public meeting and you can participate then.

For those of you that are with tribes - tribe leaders are tribal representatives, we have a short outline that we're going to go through this afternoon. You can

follow along on our Web site, [www.BIA.gov](http://www.BIA.gov). From there, if you go to who we are, and if you find the Office of Regulatory Affairs and Collaborative Action, you will see a link to our material, and there is a PowerPoint on that site.

So what we expect is that we're going to go through a PowerPoint that will take roughly 15 to 20 minutes and then we're going to open the floor up to you for your comments.

We ask that before you make your comments, that you clearly state your name and the try that you're speaking on behalf of so that, as the operator said, this is being recorded. This consultation will be transcribed and then made available on or Web site.

We have a number of folks here at the Department of the Interior that are participating on this tribal consultation. And so I'm just going to go around the table and they're going to introduce themselves very quickly and then will get started.

(Gina Jackson): Hello, everyone. (Gina Jackson), senior fellow (advisor) with the Assistant Secretary's Office of Indian Affairs.

(Debra Burton): Hello, (Debra Burton). I'm a social worker for equal policy in Indian services at BIA.

(Pinkey Ortiz): Hi everyone. This is (Hankey Ortiz), Deputy Bureau Director, Office of Indian Services for the (Bureau) of Indian Affairs.

(Rebecca Crispen-Skee): Hi. This is (Rebecca Crispen-Skee) with the Solicitor's Office, Division of Indian Affairs.

(Sara Walters): Hi, this is (Sara Walters), counselor to the assistant secretary of Indian Affairs.

(Liz Apple): Hi, this is (Liz Appel) with the Office of Regulatory Affairs and Collaborative Action.

Larry Roberts: Great. So like I said, the PowerPoint, you can find on our Web site, [www.BIA.gov](http://www.BIA.gov). If you go to the link across the top of who we are and click the Office of Regulatory Affairs and Collaborative Action, there is a link for the Indian Child Welfare Act and the PowerPoint is found there.

So in ways - in terms of background, the Indian Child Welfare Act was enacted in 1978 to address an alarmingly high percentage of Indian families that were being broken up by the removal, often unwarranted, of their children.

Congress enacted (unintelligible) to protect the best interest of Indian children, to promote the stability and security of Indian tribes and families and by establishing minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes.

And it's particularly a strong federal policy that, where possible, an Indian child to remain in the Indian community. So in 1979, the Department issued guidelines for implementation of ICWA and we also issued regulations on ICWA notice.

Since that time, we have had a number of (state cohorts) interpret ICWA's provisions in a variety of ways. And then in 2014, the Department set out on some listening sessions with tribes on the '79 guidelines and how our guidelines, and perhaps regulations, could be improved and implemented.

We also had the Attorney General's advisory committee task force on children exposed to violence recommend that the Department look at improving both guidelines and regulations.

Earlier this year, and February, after those listening sessions and based on the comments that we received, we issued updated guidelines and we issued that proposed regulations that we're talking about today in March of this year.

So we're going to go over a number of different areas of the proposed rule generally. So we've added new and updated definitions in the proposed rule. We've added a new sub-part which will talk about in the course of this consultation.

The sub-part addresses pretrial requirements, procedures for making requests to transfer to tribal courts, adjudication of the involuntary placement, adoptions or termination of parental rights, involuntary proceeding dispositions and post-trial rights and record-keeping.

In terms of definitions, we are seeking comment from tribes in the public on a number of definitions that we've added including active efforts, custody, imminent physical danger or harm and voluntary placement.

And our general provisions of the proposed rule, our goal is consistent with ICWA implementation in all states. The proposed rule makes clear that ICWA applies whenever there is an Indian child - is the subject of a child custody proceeding.

This includes (status) offenses and juvenile delinquency proceedings if placement or termination is possible. Our proposed regulation also makes clear that there is (no so-called) existing Indian family exceptions.

The proposed rule provides for agencies and state courts that they must ask whether the child is an Indian child at the earliest possible point in the proceedings. And if there's any reason to believe that a child is an Indian child, they must treat that child as an Indian child unless and until it is determined that the child is not an Indian child.

In terms of - it also addresses voluntary placements and that ICWA if the parent consents to placement or termination. But ICWA does not apply if the parent or the custodian may regain custody of the child upon demand.

We also have, in the general provisions, (steps) to contact and tried to provide notice or verify membership of the child. And so with that, going to turn it over to (Sara Walters) to talk about pre-trial requirements.

(Sara Walters): Good afternoon. Again, this is (Sara Walters), counselor to the Assistant Secretary for Indian Affairs. I'm going to talk a little bit about some of the determinations that must be made by agencies and courts prior to the trial portion of an Indian child welfare proceeding.

The court is required to determine whether the child is an Indian child. And, as Larry mentioned, the court and the agency have to ask whether the child could be or is an Indian child.

If there's reason to believe that the child is an Indian child, they must obtain verification from the try. If there's reason to believe that the child is an Indian

child, the court must confirm that the agency's active effort to maintain the Indian family intact.

Active effort is a standard that is above the reasonable efforts that are required by - in all Indian child welfare proceedings. So also an involuntary proceeding, if a consenting parent wants anonymity, then the agency or court has to keep all relevant documents under seal.

They, however, have to also provide notice and obtain verification from the parent's tribe even if there is a request for anonymity. Active efforts have to begin as soon as the case or investigation may result in placement of a child outside the home.

And it applies while investigating, whether the child is an Indian child. So that means that they have to treat the child as an Indian child until it is determined that the child is or is not an Indian child.

Only tribes can determine whether a child is a member or eligible for membership in the child which is different than the determination of whether the child is an Indian child that the court has to make. Only tribes can decide their memberships.

So that's - so agencies have to notify all the tribes in which the child is a member or eligible for membership or may be eligible for membership to get that verification that the child is or is not a member or eligible for membership in this tribes.

State courts have to dismiss actions as soon as it determines that it lacks jurisdiction. That is, in the case of a trial court - a tribal court having inclusive

jurisdiction which happens when an Indian child resides on or is domiciled on a reservation.

There are - there is no time limit to which a tribe has to subscribe to be involved in the proceedings. They - and no substantive proceedings, rules or decisions on a child's placement may occur until notice as well as waiting periods that are in the rule have elapsed.

And those waiting periods are ten days after each parent or Indian custodian has been notified and the tribe receives notice or 30 days after that time if requested by any of those parties.

Now, in an emergency removal situation, those must be as short as possible. And emergency removal situations, the agency or state court has to document whether the removal or placement is proper and whether it also continues to be necessary to prevent imminent physical damage or harm to the child.

That's something that we've received a lot of comments on so far so we're interested to know what you think about that provision. The court also has to possibly hold a hearing to evaluate whether continued removal or replacement is necessary in the emergency removal process.

And also, if they determined that it is no longer necessary, they have to immediately terminate the placement and return the child, if the emergency has ended or begin a regular placement proceeding at that point.

And like in a regular Indian child welfare proceeding, and emergency removal proceeding, the agencies also have to treat the child as an Indian child until a contrary determination has been made. And they also have to conduct active

efforts to prevent the breakup of the Indian family as early as possible considering the circumstances of the emergency removal.

To have to immediately take steps and document the steps to confirm whether the child is an Indian child and to verify tribal membership. And they have to notify the child's parents or Indian custodian as well as the tribe of the removal.

And they also have to maintain - which is very important, they have to maintain the records of those - of the notice. Continuing with emergency removals, at any court hearing on emergency removals, the court has to decide whether the removal or placement is no longer necessary, as I mentioned, and temporary emergency custody should be no more than 30 days unless there is a hearing that includes the testimony of a qualified expert witness which we'll talk about the qualifications of an expert witness a little bit later - or extraordinary circumstances exist.

And emergency removals must and as soon as the imminent physical damage or harm no longer exists. Again, we're really interested in receiving comments on that, and - or whether the tribe exercises jurisdiction over the case.

I know that's a lot of information but we're going to keep on rolling, and I'm going to turn it over to (Debra Burton) from - who is a social worker in the Bureau of Indian Affairs.

(Debra Burton): Good afternoon. I'm going to be discussing - the first topic I'm going to discuss is the proposed rule, transfer to tribal court. The proposed rule clarifies that there is a right to request transfer to tribal courts with each proceeding and at any stage of the proceeding because we've had some state courts in the



past refuse the request - refuse to transfer cases to tribal court because they stated that it came too late in the proceeding.

And the new rule clarifies -- proposed rule -- clarifies that that right exists at any stage of the proceedings. The state court must transfer, unless either parent objects, the tribal court declines or the state court determines there is good cause to deny the transfer.

The proposed rule clarifies that the good cause basis must be stated on the record and that there are factors that the court will not consider when making the determination about transferring the case to tribal court.

The first one is whether the case is at an advanced stage, the child contact with tribe or reservation, the tribal court's (respective) placement for the child. These are three factors that the state court may not consider and these factors are listed in the proposed rule.

Now the petition for placement - and the petition for placement or termination of parental rights must demonstrate to the court that active efforts to avoid the need for removal were made prior to and until the start of the proceedings and that the active efforts were unsuccessful.

The proposed rule clarifies that and puts in the requirements that these active efforts must be documented in detail in the court record and that there must be a showing that the resources of the extended family tribe, Indian social service groups, were - that there was an attempt to use these resources and that must be documented in the court records.

Now the court may order foster care placement only if there is clear and convincing evidence supported by the testimony of one or more qualified

expert witnesses that continued custody with a parent or Indian custodian is likely to result in serious physical damage or harm to the child.

And the court may order termination of parental rights only if there's evidence beyond a reasonable doubt, again, supported by the testimony of the qualified expert witnesses with serious physical damage or harm to the child (being the) standard.

How this is not new because this isn't a statute but what is new is the rule clarifies what is and what is not clear and convincing evidence. Now the proposed rule sets out four categories of qualified expert witness and the proposed rule is clear that these categories are in descending order of preference.

So the first preference for a qualified expert witness is a member of the child's tribe who is recognized by the tribal community as knowledgeable and tribal customs, a family organization and child rearing.

Now that is the first preference. The second preference is a member of another tribe who is recognized by the child's tribe as an expert based on knowledge of delivery of child and family services to Indians and the tribe.

The third preference is a layperson who's recognized as having substantial experience in delivering services in child and family services to Indians and having a knowledge of social and cultural standards in the child's tribe.

And the fourth, and least preferred, category is a professional who has education and experience and who can demonstrate knowledge of prevailing social and cultural standards within the tribe. I'm going to turn it over to (Gina Jackson) who will discuss voluntary proceedings now.

(Gina Jackson): Hello everyone. So I'm going to talk about voluntary proceedings, dispositions and post-trial rights. So - and I'm going to highlight a few areas from each of the areas.

Involuntary proceedings, the proposed rule will require the agency and state courts to ask if the child is an Indian child and provide the tribe but notice of the voluntary proceedings including the right to intervene.

Consent of the parent or of the Indian custodian must be in writing, recorded before the court, must explain the consequences in terms of the consent in detail certifying that the consequences and terms were explained and fully understood by the parent or Indian custodian.

The consent document must set out any conditions in the consent. In this position, the agency must follow (equal) placement preferences or tribal placement preferences even if there's a request for anonymity, also providing clear and convincing evidence that a diligent search was conducted to meet the placement preferences and explain if they couldn't be met.

Notifying parents, Indian custodians, family members, the tribe, maintain the documentation of placement, and if there is departure from the placement preferences, it can only be done if the court finds good cause to depart from placement preferences.

The good cause basis must be in the record and the party asserting good cause (finds) the burden to prove good cause by the standard of clear and convincing evidence.

Good cause from - to depart from placement preferences must be based on the parent requests (if both attest) they reviewed the placement options, the child's request is able to understand the decision, the child's extraordinary physical or emotional needs as established by a qualified expert witness.

What this does not include is binding or attachment from the placement or the unavailability of a placement and determination that active efforts were made to find a placement.

Good cause may not (be made) based upon the socioeconomic status of any placement relative to another placement. In post-trial rights, the new - the updated proposed rule establishes procedures to vacate an adoption if consent was obtained by fraud or duress or if the proceeding violated ICWA.

The proposed rule establishes who can that invalidate an action based on a violation of ICWA and that would be the Indian child, the parent, Indian custodian, tribes regardless of whether that particular party's rights were violated.

It also establishes adult adoptee rights to learn their tribal affiliation and encourages states to designate someone to assist with adult adoptees. It requires notice of any change in the child status such as change in placement.

States must provide BIA with a copy of the decree or order in any final adoption including information on the child and also establish a single location for all records of voluntary or involuntary foster care, pre-adoptive placement and adoptive placement that will be available within seven days of request by the child's tribe or the Department of the Interior.

The records must contain, at a minimum, the petition or complaint, all substantive orders in a proceeding, the record of placement determination including the findings and the court record and the social worker's statement.

We are here today seeking your comment on any provision of the proposed rule. We also will have another tribal consultation later this week in Tulsa. You can give comments verbally and in writing or both.

And we are really seeking any kind of details, specific language, and any recommendations you have to help us come up with the best proposed rule as possible. Comments are due - the important date is - to remember is May 19th and email is the preferred method to submit comments. And you can send those to [Comments@BIA.gov](mailto:Comments@BIA.gov). Thank you.

Larry Roberts: Thank you, (Gina). So we're going to move on now to hear comments from all of you. And when I would ask is that try to limit your initial comments to five minutes so that everybody has a chance to make comments that wants to do so. We'll then - once that has happened, we will open up for folks to ask additional comments.

We have a number of folks on the line with us today, so I want to remind everyone that we have another teleconference tomorrow in which you're more than free and welcome to participate in and then as (Gina) said, we have a consultation in Tulsa later this week and we would really welcome any written comments you would have by May 19th. And so with that, operator, we'll open it up for our first question.

Coordinator: All right, if you'd like to ask a question, please press star 1 on your touchtone phone at this time. Again, that's star 1 if you'd like to ask a question. One moment please. And currently there are no questions or comments in the

queue. All right, one moment please. All right, our first question is from (Lisa Bluelake). Your line is open.

(Lisa Bluelake): Yes, I just - since there weren't any questions, I did have a question about the qualified expert witnesses. Luckily right now, the tribe that I work for does have a Native American that serves as our ICWA coordinator and he does do the expert witness testimony.

However, that's not always been the case. In other tribes I worked for, we also had a non-Indian in the position but someone who is recognized by the tribe as having enough experience with the tried to provide a testimony.

And so - and they were an employee of the tribe. So I'm not sure how - where that would fit in the list because they're not a member of the child's tribe or a member of another tribe but they're not really a layperson either.

Larry Roberts: Okay, thank you, (Lisa), or your comment and question here. That person - you're right, well, we would need to look in terms of what category that person would fall into.

I think it's important at this stage in terms of comments from tribes sort of laying out those professionals that tribes retain to work on these issues to make sure that they are covered in some appropriate way in the rule, if that's sort of your comment.

So, you know, I think that that person - perhaps the tribe could suggest some greater clarity and how we define those qualified expert witnesses so that we are covering folks employed by the tribe that you have knowledge of.

(Lisa Bluelake): Right. The thing I can think of is someone who is, you know, hired or retained by the tribe for the specific purpose of, you know, providing this - the expertise but - thank you.

Larry Roberts: Okay, thank you.

Coordinator: Thank you. Our next question is from (Maureen Geary). Your line is open.

(Maureen Geary): Good afternoon. Thank you. I'm calling from California on behalf of several tribes. And a couple of the very preliminary issues that we have in California pertain to our tribal ICWA representatives appearing in court without legal counsel.

And we do have some bench officers, court clerks and actually some attorneys who refuse to allow the tribal ICWA representatives to sit at counsel table, file documents, cross-examine witnesses. And we have been arguing here that if the tribe is unrepresented, they are, in fact, appearing pro per.

There aren't funds available to have court-appointed attorneys for the tribes but I'm wondering if the rules could address that issue, that tribal ICWA representatives should be treated as a full party in the case when the tribe has intervened.

The other issue that we have here is - and I'd like to - my clients would like to see a much stronger statement in the rules that ICWA should be applied at the very beginning, immediately, when a child is even being investigated.

Many courts in California refuse to apply the Indian Child Welfare Act if a child remains in the home with her parents even though a petition has been filed in the dependency court. We call that family maintenance in California.

And they refuse to apply the Act in those places, so a stronger statement that ICWA applies even in those situations would be hugely helpful.

One question that we have here is the proposed regulations definition of domicile. So I'm going to ask those of you in Washington if you could go through that definition.

And we're a little concerned that it's limited to the mother. And with that, my clients have asked me to submit written comments which I will do, but wanted to at least touch on those basic issues first. Thank you.

Larry Roberts: Okay, thank you for those comments. And so, not only in response to your specific comments, Ms. (Geary), but just in general for everyone, we really appreciate comments with specificity.

And so we really appreciate you highlighting areas that you see as questions for us to look at, but also what is very helpful is proposed solutions in terms of language that the tribes would like to see.

So I'm really happy to hear that you will be submitting comments as well. It's helpful for us to be able to look at and evaluate language that we received from the public in terms of how the regulation could be improved.

In terms of - so I think we've gotten your comment and hear you loud and clear on ICWA reps appearing in state courts. Understand that you would like a stronger statement for ICWA to be applied immediately.

In terms of the definition of domicile, there's someone here that can answer what's that as it's proposed, only applies to the mother. So I think that that's something we would - you know, if it's unclear to you I think it falls in that



category were it's something that would like your comments on how to have it specifically changed to include the universe of folks that you would like.

(Maureen Geary): Thank you.

Coordinator: And as a reminder, if you'd like to ask a question, please press star 1 on your phone at this time. Currently there are no questions in the queue.

Larry Roberts: We really appreciate everyone calling in today to participate in the tribal consultation and, you know, we really appreciate any comments you have today. We also understand that folks may be calling in in preparation of the written comments as well.

So we'll leave the line open for a few more minutes for additional questions. Okay, so I guess will give folks one final opportunity here. We scheduled this from 1:00 to 4:00, but we want to be mindful of that once time as well.

And so if you have any comments that you would like to share now on this proposed rule, if you could just signal again they you would like to provide comment. Operator, how do they do that?

Coordinator: They would need to press star 1 on their touchtone phone to do that.

Larry Roberts: Okay. Okay, well, I want to thank everyone for participating in the call today. I really encourage everyone to submit written comments by May 19th and you can submit them to - via email at [Comments@BIA.gov](mailto:Comments@BIA.gov) or you can send them in by mail and you can (send them) to Elizabeth Appel at the Office of Regulatory Affairs.

And her addresses on the BIA Web site under the Office of Regulatory Affairs and Collaborative Actions. So we thank you for participating this afternoon and we look forward to receiving your comments.

Coordinator: Thank you. This concludes today's conference. Participants, you may disconnect at this time.

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