

**ICWA, the BIA Guidelines (Old & New),  
and Regulations:  
What's new, what's different, what's coming next?<sup>1</sup>**

**I. Then & Now: Child Welfare Practices & Indian Children**

**A. 1979: A Look Back**

- From 1958-1967, the Child Welfare League of America, funded by the BIA & U.S. Children's Bureau, placed almost 400 Indian children from western states with white families in the East and Midwest.<sup>2</sup>
- As late as 1971, 17% of Indian children were still being sent away to boarding schools.<sup>3</sup>
- In 1976, 25-35% of Indian children were being placed in out-of-home care. 85% of those were placed in non-Indian homes.<sup>4</sup>
- In 1977, Congress commissioned the study that would lead it to enact ICWA, finding that:
  - there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . ;
  - an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
  - the States . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.<sup>5</sup>
- Congress mandated that within 180 days, the Secretary of the Interior promulgate rules and regulations to carry out ICWA's provisions.

- The result? The 1979 *Guidelines for State Courts; Indian Child Custody Proceedings*.<sup>6</sup>

## **B. 2015: The Next Generation**

- A 2005 study of ICWA's effectiveness by the GAO was inconclusive based on states' inability to offer meaningful measures of the number of Indian children served, length of placement, etc.<sup>7</sup>
- In 2000, Indian children represented 1.9% of the foster care population, but only 1.3% of the general population. By 2010, that had increased to 2.1%.<sup>8</sup>
- Beginning in February 2014, the BIA sought input from various child welfare stakeholders by holding listening sessions, soliciting online comments, and receiving correspondence addressing the 1979 Guidelines and overall ICWA compliance.<sup>9</sup>
- The result? The 2015 *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, published February 25, 2015, superseding the 1979 Guidelines.<sup>10</sup>
- And proposed Regulations published for comment in March.<sup>11</sup>

## **II. Comparing the 1979 and 2015 BIA Guidelines: New vs. Old**

### **A. The BIA's 3 Focus Areas**

1. Clarify procedures for determining if a child is an "Indian child," identifying the child's tribe, and notifying the tribe and parents as early as possible.
2. Provide comprehensive guidance on "active efforts."
3. Clarify that the placement preferences carry the presumption that those placements are in the Indian child's best interest.<sup>12</sup>

## B. Major Changes

- The title – the 2015 Guidelines add “Agencies” in addition to “State Courts”
- Streamlining – no more separate guideline & commentary sections
- Removal of “nonbinding” language – a harbinger of the coming Regulations
- Definitions

### Section A: General Provisions

#### 1979 Guidelines

- Policy & Purpose
- Fairly general

#### 2015 Guidelines

- New section: Definitions
- Courts & agencies should follow ICWA even when child is not removed from home
- ICWA applies from case inception if reason to know that child is an Indian child
- Rejects EIF

### Section A: General Provisions

- A.2 defines “active efforts” as more than “reasonable efforts” under ASFA
- Provides 15 examples of active efforts:
  1. Engaging the child, parents, extended family, & custodians
  2. Taking steps necessary to keep siblings together
  3. Identifying appropriate services & helping parents overcome barriers; actively assisting the parents in obtaining services
  4. Identifying, notifying, & inviting tribe to participate
  5. Conducting diligent search for extended family members for assistance & placement

6. Taking tribe's social & cultural conditions & way of life into account; requesting assistance of representative of the tribe who know social & cultural standards
  7. Offering & employing all available & culturally appropriate family pres. strategies
  8. Completing comprehensive assessment of family's circumstances with goal of safe reunification
  9. Notifying & consulting with extended family members to provide structure & support, assure cultural connections, & provide placement
  10. Arranging for family interaction in the most natural setting that assures the child's safety
  11. Identifying community resources & actively assisting the parents or extended family in utilizing & accessing those services
  12. Monitoring progress & participation in services
  13. Providing consideration of alternative ways of addressing the family's needs if services don't exist or are unavailable
  14. Supporting regular visits & trial home visits consistent with the child's safety needs
  15. Providing post-reunification services and monitoring
- A.2 defines "voluntary placement" to include private adoptions (same in A.3(g))
  - Most of the other definitions are identical to those provided in Section 1903.
  - A.3(b) explicitly rejects the Existing Indian Family exception (provides a list of factors that should NOT be considered when determining whether ICWA applies)
  - A.3(c): ICWA's applicability should be determined and notice should be provided even in cases where the child isn't removed (for example: services-only cases, in-home intervention)
  - A.3(d): must treat the case as an ICWA case unless and until it is determined that the child is NOT an Indian child in any case where there is any reason to believe the child IS Indian

## Section B: Pretrial Requirements

### 1979 Guidelines

- Determining child's Indian status, child's tribe, whether placement was covered by ICWA, jurisdiction.
- Notice requirements
- Time limits & extensions
- Emergency removals

### 2015 Guidelines

- Adds that active efforts begins when the investigation does if there's a possibility the child will be removed
- Greatly expands on the emergency removal provisions
- Otherwise similar

## Section B: Pretrial Requirements

- B.1(a): the requirement for active efforts begins "from the moment the possibility arises that an agency case or investigation may result in the need for the Indian child to be placed outside the custody of either parent or Indian custodian in order to prevent removal."
- B.1(b): active efforts must be conducted concurrently with activities to determine if the child/parent is a member/eligible
- B.2(b)(2) requires courts to determine if the agency used active efforts to work with all of the tribes with which the child may be affiliated to determine the child's Indian status
- B.6(a) requires notice be sent for each proceeding (including temporary custody, removal/foster care placement, adoptive placement, TPR)
- B.6(j) requires notice to the tribe in voluntary proceedings
- B.8(f): temporary emergency custody should not exceed 30 days and may be continued past that only if:
  1. Court finds based on QEW testimony that cont'd custody by parent "is likely to result in imminent physical damage or harm to the child" or
  2. Extraordinary circumstances exist
- B.9: adds procedures for determining if there was an improper removal

### Section C: Transfer Procedures

#### 1979 Guidelines

- Dealt w/ procedures for requesting transfer, ruling on transfer petitions, determining good cause to deny transfer, & tribal court declination of transfer

#### 2015 Guidelines

- Biggest change: C.3(c) removes “advanced stage” of the case as a “good cause” factor
- C.4 adds what happens when the tribe accepts transfer, not just what happens if the tribe denies transfer

### Section C: Transfer Procedures

- C.3(c) clarifies that “the court may not consider whether the case is at an advanced stage or whether transfer would result in a change in the placement of the child.” Why?
  1. concurrent but presumptively tribal jurisdiction,
  2. ICWA protects tribe’s rights as well as child’s/family’s,
  3. presumptively in child’s best interest to transfer

### Section D: Adjudications

#### 1979 Guidelines

- Access to reports, active efforts, standards of evidence, & QEW

#### 2015 Guidelines

- The major change is in defining a QEW

### Section D: Adjudications

- D.4: QEW should have specific knowledge of the tribe’s culture & customs
- Changes the requirements for a layperson expert to one who is recognized by the tribe as having substantial experience delivering services to Indians & knowledge of tribe’s cultural & childrearing customs

- Changes requirement for professional witness to require knowledge of tribe's customs

### Section E: Voluntary Proceedings

#### 1979 Guidelines

- Requirements for & contents of voluntary consents
- Withdrawal of consent

#### 2015 Guidelines

- Courts and agencies "should" provide notice to tribes in voluntary proceedings
- Otherwise the same

### Section E: Voluntary Proceedings

- E.1(b): "Agencies and State courts should provide the Indian tribe with notice of the voluntary child custody proceedings, including applicable pleadings or executed consents, and their right to intervene under section B.6 of these guidelines."

### Section F: Dispositions

#### 1979 Guidelines

- Placement preferences
- Good cause to deviate

#### 2015 Guidelines

- Adds standard of proof for active efforts to locate preferred placement
- Specifies that ordinary bonding/attachment is not good cause
- Courts should not conduct an independent BI assessment

### Section F: Dispositions

- Placement preferences remain the same
- "Good cause" to deviate must be based on one or more of:
  - Request of the parents if both parents have reviewed the placement options that comply with the preferences
  - Request of a child able to comprehend the decision

- Child's extraordinary physical/emotional needs (must be supported by QEW testimony;
- does NOT include normal attachment or bonding; does not include an independent consideration of the BI of the Indian child because the preferences reflect the BI of an Indian child)
- Unavailability of a preferred placement after a determination that the agency made active efforts to find preferred placements
- Court may not depart from the preferences based on the socio-economic status of any placement relative to another placement

**Section G: Post-Trial Rights**

1979 Guidelines

- Petition to vacate adoption
- Adult adoptee rights
- Notice of change in child's status (disrupted adoption)
- Maintenance of records

2015 Guidelines

- Adds a section on petitions to invalidate proceedings for violations
- • Otherwise substantially similar

**Section G: Post-Trial Rights**

- G.2(c): any party may petition for invalidation, even if that party's rights weren't the rights violated (for example: tribe can move to invalidate because the parent's rights were violated)

### III. What effect do the 2015 Guidelines have on current & future practice?

#### A. The EIF

##### 2015 Guideline A.3(b)

- Courts should not consider:
  - extent of participation in tribal customs, community affairs, religious/social/cultural/political events;
  - relationship between child & Indian parent(s);
  - extent of parent's ties to tribe;
  - whether Indian parent ever had custody; or
  - level of tribe's participation

##### Case law

- Comports with *Michael J.'s* rejection of EIF.<sup>13</sup>
- Possible conflict with *Adoptive Couple?* (re: parent's "continued" custody)<sup>14</sup>

#### B. ICWA Applicability

##### 2015 Guideline A.3(d)

- "If there is any reason to believe the child is an Indian child, the agency and State court must treat the child as an Indian child, unless and until it is determined that the child is not a member or is not eligible for membership in an Indian tribe."

##### Case law

- Conflict with *Bernini?*<sup>15</sup> (re: if the court has reason to believe that a child may be an Indian child, ICWA's notice provisions apply & agency must determine child's Indian status; burden shifts to the parent to show that child is an Indian child)

### C. Emergency Jurisdiction

#### 2015 Guideline B.8(f)

- emergency removal under § 1922 may not exceed 30 days unless parent's cont'd custody "is likely to result in imminent physical damage or harm to the child"
- supported by QEW

#### Case law / Statute

- No similar requirement in ICWA itself, or applicable case law
- The only requirement for QEW testimony in ICWA/ case law is for finding that cont'd custody would result in serious emotional / physical damage (§ 1912(e), (f)).

### D. Good Cause to Deny Transfer

#### 2015 Guideline C.3(c)

- "the court may not consider whether the case is at an advanced stage or whether transfer would result in a change in the placement of the child"

#### Case law

- Conforms to *Action No JD-6982* ("the issue of the placement of a child is distinct from, and entirely unrelated to, the issue of jurisdiction")<sup>16</sup>
- But contrary to *Action No. JS-8287* (using the 1979 Guidelines to uphold denial of transfer at advanced stage)<sup>17</sup>

## E. QEW Requirements

### 2015 Guideline D.4

- Requires knowledge of tribal customs & childrearing practices for all QEWs

### Case law

- Conflict with *Brenda O.*<sup>18</sup> & *Rachelle S.*<sup>19</sup> (expert testifying about issues not related to cultural mores does not have to have specific knowledge of tribal customs)
- Comports with *Steven H.*?<sup>20</sup> (QEW testimony can be aggregated & need not constitute entire basis for finding)

## F. Placement Preference Deviation

### 2015 Guideline F.4(c)

- Deviation must be based on one or more enumerated conditions
- QEW testimony to support child's extraordinary needs  
Cannot include normal bonding/attachment
- Cannot include independent best interests assessment

### Case law

- Comports with *Navajo Nation?* (court must consider factors in Guidelines but not exclusive; preferred placements are presumptively in Indian child's BI)<sup>21</sup>
- Conflict with *Navajo Nation?* (bonding)

## IV. The Proposed Regulations: Current status, comparison with Guidelines

### A. Current Status

- Published by the BIA on March 20, 2015, to "compliment recently published Guidelines"
- Designed to establish Dep't of Interior's interpretation of ICWA to make it binding and ensure consistency across the states

- Pursuant to ICWA's instruction to pass regulations to implement ICWA
- Solicited comments, particularly re: "must" and "should" language

**B. Comparison: Definitions**

2015 Guideline A.2

- Contains definitions for 26 terms, only some of which are also defined in ICWA

25 CFR § 23.2

- Defines only 20 terms (but § 23.102 defines another 2)
- Many definitions are shorter than the definitions in the Guidelines
- Does not define any terms not in the Guidelines

**C. Comparison: General Provisions**

2015 Guideline A.3(c)

- Specifies that tribal verification & notice provisions should be followed even if child isn't removed to give the tribe an opportunity to participate & provide resources

25 CFR § 23.103(c)

- Does not include this provision

2015 Guideline A.3(f)(2)

- States that it is best practice to follow the procedures in the Guidelines to determine if the child is an Indian child & notify the tribe even for voluntary placements where the parent can have the child returned on demand

25 CFR § 23.103(f)

- Does not include this provision

## D. Comparison: Pretrial Requirements

### 2015 Guideline B.3(c)

- Includes two subsections specifying that (1) there is no requirement that the child maintain a certain level of contact w/ the tribe or (2) that the tribe formally enroll its members in order for the tribe to determine that the child is a member

### 2015 Guideline B.4(d)(iii)

- The agency should take steps necessary to obtain membership for a child who is eligible for membership in a tribe but not yet a member

### 2015 Guideline B.6(d)

- Lists information that should be provided in notice to tribes to assist them in determining whether the child is a member or eligible for membership

### 2015 Guideline B.6(f)

- Because child custody proceedings are usually confidential, info contained in notices should be kept

### 25 CFR § 23.103(f)

- Does not include these provisions (but keeps the main section, indicating that only the tribe can determine if the child is a member or eligible for membership)

### 25 CFR § 23.109

- Does not include this provision

### 25 CFR § 23.111

- Does not include this provision

confidential to the extent possible

25 CFR § 23.111

- Does not include this provision

2015 Guideline B.6(j)

- Notice should also be sent in voluntary proceedings because the tribe might have exclusive jurisdiction and/or the right to intervene and it helps determine if the child is Indian and with placement preferences

2015 Guideline B.6(l)

- Notice requirement includes providing additional info if requested by the tribe

2015 Guideline B.6

- Does not include these provisions

2015 Guideline B.8(a)

- Emergency removal/ placement allowed only to prevent imminent physical damage or harm
- Applies to all Indian children regardless of domicile or residence
- Does not authorize state removal of child from reservation

25 CFR § 23.111

- Does not include this provision

25 CFR § 23.111

- Does not include this provision

25 CFR § 23.111(h)

- No substantive proceedings, rulings, or decisions related to involuntary placement or TPR may occur until notice & the waiting periods have elapsed

25 CFR § 23.113(a)

- Does not include this provision

## **E. Comparison: Transfer to Tribal Court**

### 2015 Guideline C.3(c)

- Includes explanation that court may not consider “advanced stage” or change in placement when making finding of good cause not to transfer because transfer is presumed to be in Indian child’s best interest

### 25 CFR § 23.117(c)

- Does not include this provision

### 2015 Guideline C.4(b)

- The tribal court should inform the state court of its decision to accept/decline transfer within the time required or may request additional time if the reasons for the request are explained

### 25 CFR § 23.118

- Does not include this provision

## **F. Comparison: Voluntary Proceedings**

### 2015 Guideline E.1(b)

- “Agencies and State courts should provide the Indian tribe with notice of the voluntary child custody proceedings, including applicable pleadings or executed consents, and their right to intervene under . . . these guidelines”

### 25 CFR § 23.123(b)

- “Agencies and State courts must provide the Indian tribe with notice of the voluntary child custody proceedings, including applicable pleadings or executed consents, and their right to intervene...”

## G. Comparison: Dispositions

### 2015 Guideline F.4(c)(3)

- Includes the clause: “The good cause determination [to depart from placement preferences] does not include an independent consideration of the best interest of the Indian child because the preferences reflect the best interests of an Indian child...”

### 25 CFR § 23.131(c)(3)

- Does not include this provision

## H. Comparison: Post-Trial Rights

### 2015 Guideline G.6(b)

- States must maintain “the complete record of the placement determination”

### 25 CFR § 23.137(b)

- States must maintain “the complete record of the placement determination (including, but not limited to the findings in the court record and social worker’s statement).”

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### End Notes

<sup>1</sup> Prepared by Dawn Williams, Office of the Arizona Attorney General, for *Connecting Legacies: Collaboration and Innovation with ICWA*, presented by the Administrative Office of the Courts, Dependent Children’s Services Division, Court Improvement Program, on Friday, August 7, 2015 (adapted from PowerPoint presentation).

<sup>2</sup> <http://pages.uoregon.edu/adoption/topics/IAP.html>.

<sup>3</sup> <http://nativeamericanhistory.about.com/od/Law/a/The-Indian-Child-Welfare-Act-What-Is-It.htm>.

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<sup>4</sup> Unger, Steven, ed., *The Destruction of American Indian Families*, New York: Association on American Indian Affairs, 1977, p.1.

<sup>5</sup> 25 U.S.C. § 1901.

<sup>6</sup> 44 Fed. Reg. 67,584 (Nov. 26, 1979).

<sup>7</sup> <http://www.gao.gov/assets/250/245936.pdf>.

<sup>8</sup>

<http://www.nrc4tribes.org/files/Disproportionality%20Rates%20for%20Children%20of%20Color%20in%20Foster%20Care%202013.pdf>.

<sup>9</sup>

<http://www.indianaffairs.gov/WhoWeAre/BIA/OIS/HumanServices/IndianChildWelfareAct/index.htm>.

<sup>10</sup> 80 Fed. Reg. 10,146 (Feb. 25, 2015).

<sup>11</sup> 80 Fed. Reg. 14,880 (Mar. 20, 2015).

<sup>12</sup> <http://www.bia.gov/cs/groups/public/documents/text/idc1-029449.pdf> at 3.

<sup>13</sup> *Michael J. Jr. v. Michael J. Sr.*, 198 Ariz. 154 (App. 2000).

<sup>14</sup> *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013).

<sup>15</sup> *Ariz. Dep't of Econ. Sec. v. Bernini*, 202 Ariz. 562 (App. 2002).

<sup>16</sup> *Maricopa Cnty. Juv. Action No. JD-6982*, 186 Ariz. 354 (App. 1996).

<sup>17</sup> *Maricopa Cnty. Juv. Action No. JS-8287*, 171 Ariz. 104 (App. 1991).

<sup>18</sup> *Brenda O. v. Ariz. Dep't of Econ. Sec.*, 226 Ariz. 137 (App. 2010).

<sup>19</sup> *Rachelle S. v. Ariz. Dep't of Econ. Sec.*, 191 Ariz. 518 (App. 1998).

<sup>20</sup> *Steven H. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 566 (2008).

<sup>21</sup> *Navajo Nation v. Ariz. Dep't of Econ. Sec.*, 230 Ariz. 339 (App. 2012).