



# United States Department of the Interior

OFFICE OF THE SOLICITOR

1849 C STREET N.W.  
WASHINGTON, DC 20240

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M-37037

Memorandum

To: Secretary

From: Solicitor

Subject: Implementation of the Indian Child Welfare Act by Legislative Rule

## **I. Introduction**

This Memorandum identifies the authority for the promulgation of the Department of the Interior's ("Department's") Indian Child Welfare Act ("ICWA" or "the Act")<sup>1</sup> final rule. As discussed below, Congress delegated the Department the authority to issue this legislative rule.

## **II. Background**

Pursuant to its broad constitutional authority over Indian affairs, Congress enacted ICWA in 1978 to address "the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes."<sup>2</sup> ICWA was the result of lengthy congressional hearings, several years of government-to-government consultation with Indian tribes and organizations, and input from Federal and State government agencies and public and private organizations.<sup>3</sup>

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<sup>1</sup> 25 U.S.C. §§ 1901 *et seq.*, Pub. L. No. 95-608, 92 Stat. 3069 (1978).

<sup>2</sup> *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989).

<sup>3</sup> See, e.g., *To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, To Prevent the Breakup of Indian Families, and for Other Purposes: Hearing on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 29 (1978) [hereinafter "1978 House Hearing"]; *To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs*, 95th Cong. (1977) [hereinafter "1977 Senate Hearing"]; *Problems that American Indian Families Face in Raising their Children and How these Problems are Affected by Federal Action or Inaction: Hearing Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93rd Cong. (1974) [hereinafter "1974 Senate Hearing"]; H.R. REP. NO. 95-1386 (1978) [hereinafter "House Report"]; S. REP. NO. 95-597 (1977) [hereinafter "Senate Report"]; 124 CONG. REC. 38,101-12 (1978); 123 CONG. REC. 37,223-26 (1977); 123 CONG. REC. 21,042-44 (1977); TASK FORCE FOUR: FEDERAL, STATE, AND TRIBAL JURISDICTION, FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION, REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION (1976) [hereinafter "AIPRC Report"].

## A. Congressional Authority

The plenary power of Congress to address Indian affairs “is drawn both explicitly and implicitly”<sup>4</sup> from the Constitution’s Indian Commerce Clause<sup>5</sup> and Treaty Clause.<sup>6</sup> The United States Supreme Court has recognized the Indian Commerce Clause as the source of Congress’s “broad power” in the arena of Indian affairs,<sup>7</sup> granting Congress wider authority in Indian affairs than it has pursuant to the Interstate Commerce Clause.<sup>8</sup> In addition, it is “undisputed” that a trust relationship exists between the United States and Indian Tribes,<sup>9</sup> and courts have found the trust relationship to be another source of Congress’s plenary authority over Indian affairs.<sup>10</sup> Congress regularly defines and structures its trust relationship with Indian Tribes through legislation.<sup>11</sup>

Congressional authority includes not only the power to legislate regarding Indian Tribes, but also regarding Indians as individuals. “On numerous occasions [the Supreme] Court specifically has upheld legislation that singles out Indians for particular and special treatment.”<sup>12</sup> In *Morton v. Mancari*, the Supreme Court held that a statute providing a hiring preference and a policy providing a promotion preference at the Bureau of Indian Affairs to Indians did not violate the Due Process Clause of the Fifth Amendment because such a preference was not racial, but rather turned on the special legal and political status of Indians and was both “reasonable and rationally designed to further Indian self-government.”<sup>13</sup> In the wake of *Mancari*, the Supreme Court has

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<sup>4</sup> *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

<sup>5</sup> U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . To regulate Commerce . . . with the Indian tribes[.]”).

<sup>6</sup> U.S. CONST. art. II, § 2, cl. 2 (granting the President the power to make treaties); *United States v. Lara*, 541 U.S. 193, 200 (2004) (noting that the Supreme Court has “traditionally identified” the Indian Commerce Clause and the Treaty Clause as sources of Congress’s Indian affairs power) (citations omitted).

<sup>7</sup> *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 837 (1982); see also *Lara*, 541 U.S. at 200 (“The ‘central function of the Indian Commerce Clause,’ we have said, ‘is to provide Congress with plenary power to legislate in the field of Indian affairs.’”) (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)).

<sup>8</sup> *Cotton Petroleum*, 490 U.S. at 192.

<sup>9</sup> See, e.g., *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011) (“We do not question ‘the undisputed existence of a general trust relationship between the United States and the Indian people.’”) (quoting *United States v. Mitchell*, 463 U.S. 206, 225 (1983)); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (noting that “this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with” Indians, and that “in many acts of Congress and numerous decisions of this Court, [the Government] has charged itself with moral obligations of the highest responsibility and trust” (internal citations and footnotes omitted)); see also U.S. Dep’t of Interior, Office of the Sec’y, Order No. 3355 at 2 (Aug. 20, 2014), available at <https://www.doi.gov/sites/doi.gov/files/migrated/news/pressreleases/upload/Signed-SO-3335.pdf> (“The United States’ trust responsibility is a well-established legal obligation that originates from the unique, historical relationship between the United States and Indian tribes.”).

<sup>10</sup> *United States v. Long*, 324 F.3d 475, 479 (7th Cir. 2003) (“Courts have attributed Congress’s plenary powers over Indian relations to the Indian Commerce Clause . . . and to Congress’s protectorate or trust relationship with the Indian tribes.”) (citing, *inter alia*, *Cotton Petroleum*, 490 U.S. at 192).

<sup>11</sup> See *Jicarilla Apache Nation*, 564 U.S. at 176 (“Congress has expressed this [trust] policy in a series of statutes that have defined and redefined the trust relationship between the United States and the Indian tribes.”); see also *Mitchell*, 463 U.S. at 219-27 (discussing trust relationship in context of statutes charging the Department with managing sales of timber from Indian lands).

<sup>12</sup> *Mancari*, 417 U.S. at 554-55 (collecting cases upholding Indian-specific statutes).

<sup>13</sup> *Id.* at 555.

consistently rejected constitutional challenges to statutes that provide special treatment for Indians.<sup>14</sup> Moreover, in *United States v. Antelope*, the Court established that *Mancari* was not a narrow holding; rather, *Mancari* stands broadly for “the conclusion that federal regulation of Indian affairs is not based on impermissible classifications,” but is instead “rooted in the unique status of Indians as a separate people with their own political institutions.”<sup>15</sup>

Congress enacted ICWA in recognition and furtherance of the “special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people.”<sup>16</sup> In particular, Congress found that “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe.”<sup>17</sup> Congress accordingly did not apply ICWA to all children with Indian ancestry, but instead limited the Act’s scope exclusively to children who are either themselves Tribal members, or are both eligible for membership and the biological child of a Tribal member.<sup>18</sup> Thus, like the preferences at issue in *Mancari*, ICWA does not apply based on a showing of racial ancestry, but rather applies to particular children on the basis of the unique political status of Indian Tribes.<sup>19</sup> And, because ICWA was enacted to provide procedural and substantive safeguards for qualifying children to be placed or remain with Indian families, the Act thus was passed to help fulfill “Congress’s unique obligation toward the Indians.”<sup>20</sup>

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<sup>14</sup> See, e.g., *United States v. Antelope*, 430 U.S. 641, 646-47 (1977) (statute bringing crimes committed by Indians on Indian reservations under Federal jurisdiction did not violate due process or equal protection); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479-80 (1976) (tax immunity for reservation Indians is not racial discrimination).

<sup>15</sup> *Antelope*, 430 U.S. at 646 (internal quotation omitted); accord *Fisher v. Dist. Ct. of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 390-91 (1976) (exclusive Tribal court jurisdiction over adoption proceedings involving Indians is not racial discrimination). Although *Antelope* and *Fisher* concerned on-reservation activities, the Federal government’s authority to legislate with regard to Indians has never been limited to Indians on reservations. *Morton v. Ruiz*, 415 U.S. 199, 236 (1974) (describing “[t]he overriding duty of our Federal Government to deal fairly with Indians wherever located”). See also *Washington v. Wash. St. Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 673 n.20 (1979) (noting “the peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment on their behalf when rationally related to the Government’s ‘unique obligation toward the Indians’”) (quoting *Mancari*, 417 U.S. at 555); *Livingston v. Ewing*, 601 F.2d 1110, 1115-16 (10th Cir. 1979) (rejecting equal protection challenge to state policy and city resolution providing Indian preference in the sale of crafts at a city museum and State government building); *St. Paul Intertribal Housing Bd. v. Reynolds*, 564 F. Supp. 1408, 1412-13 (D. Minn. 1983) (rejecting equal protection challenge to off-reservation Indian housing program).

<sup>16</sup> 25 U.S.C. § 1901.

<sup>17</sup> *Id.* at § 1901(3).

<sup>18</sup> *Id.* at § 1903(4). As the Supreme Court has made clear, membership is voluntary and tribal authority exists only “over Indians who consent to be tribal members.” *Duro v. Reina*, 495 U.S. 676, 693 (1990), superseded by statute on other grounds, Pub. L. No. 101-511, § 8077(d), 104 Stat. 1893 (codified as amended at 25 U.S.C. §§ 1301-1303); accord *id.* at 693 (“Indians like all other citizens share allegiance to the overriding sovereign, the United States. A tribe’s additional authority comes from the consent of its members . . .”). And by the same token, the Supreme Court has made clear that “a tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978).

<sup>19</sup> See *Mancari*, 417 U.S. at 553 n.24 (noting preference “applies only to members of ‘federally recognized’ tribes”); see also *In re L.S.*, 812 N.W.2d 505, 508-09 (S.D. 2012) (ICWA not based on racial classifications).

<sup>20</sup> *Mancari*, 417 U.S. at 555; 25 U.S.C. § 1901 (citing “the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people” in enacting ICWA). See also 124 CONG. REC. at 38,102 (“[C]lose analysis of the Supreme Court decisions in this area . . . firmly supports the

In enacting ICWA, Congress found that the Constitution provides Congress authority over Indian affairs.<sup>21</sup> ICWA states that “Congress . . . has assumed the responsibility for the protection and preservation of Indian tribes and their resources,”<sup>22</sup> and that ICWA both “seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.”<sup>23</sup> Congress further declared “that it is 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.”<sup>24</sup> And although Congress sought to address “the failure of State officials, agencies, and procedures to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future,”<sup>25</sup> Congress carefully considered the traditional role of the States in the arena of child welfare outside Indian reservations. Congress accordingly crafted ICWA to balance the interests of the United States, the individual States, Indian Tribes, and individual Indians:

While the committee does not feel that it is necessary or desirable to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits, it does feel the need to establish minimum Federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe.<sup>26</sup>

## **B. Legislative History of ICWA**

After several years of investigation in the 1970s, Congress found “that an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies.”<sup>27</sup> The congressional investigation, which resulted in hundreds of pages of legislative testimony compiled over the course of four years of hearings, deliberation, and debate, revealed “the wholesale separation of Indian children from their families.”<sup>28</sup> The empirical and anecdotal evidence showed that Indian children were separated from their families at significantly higher rates than non-Indian children.<sup>29</sup> In some

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constitutionality of all the provisions of the bill. In addition, the American law division of the Library of Congress made a similar exhaustive analysis and arrived at the same conclusion.”).

<sup>21</sup> 25 U.S.C. § 1901(1) (citing U.S. CONST. art I, § 8, cl. 3).

<sup>22</sup> *Id.* at § 1901(2).

<sup>23</sup> *Holyfield*, 490 U.S. at 37 (quoting House Report, *supra* note 3, at 23).

<sup>24</sup> 25 U.S.C. § 1902.

<sup>25</sup> House Report, *supra* note 3, at 19.

<sup>26</sup> *Id.*

<sup>27</sup> 25 U.S.C. § 1901(4); *see also Holyfield*, 490 U.S. at 32 (noting statistics indicating “that 25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions”).

<sup>28</sup> House Report, *supra* note 3, at 9 (sic corrected).

<sup>29</sup> Congress described “shocking” disparities:

In Minnesota, Indian children are placed in foster care or in adoptive homes at a per capita rate five times greater than non-Indian children. In Montana, the ratio of Indian foster-care placement is at least 13 times greater. In South Dakota, 40 percent of all adoptions made by the State’s Department of Public Welfare since 1967-68 are of Indian children, yet Indians make up only 7 percent of the juvenile population. The

States, between twenty-five and thirty-five percent of Indian children lived in foster care, adoptive care, or institutions.<sup>30</sup> Indian children removed from their homes were most often placed in non-Indian foster care and adoptive homes.<sup>31</sup> These separations contributed to a number of problems, including the loss of children from Tribal communities, loss of Indian traditions and culture, and long-term emotional effects on Indian children caused by the loss of their Indian identity.<sup>32</sup>

Congress found that removal of children and unnecessary termination of parental rights were utilized to separate Indian children from their Indian communities. The four leading factors contributing to the high rates of Indian child removal were a lack of culturally competent State child welfare standards for assessing the fitness of Indian families; systematic due process violations during child custody procedures that deprived Indian children and their parents of fundamental rights; economic incentives favoring removal of Indian children from their families and communities; and social conditions in Indian country.<sup>33</sup>

Congress also found that many of these problems arose from State actions, *i.e.*, “that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”<sup>34</sup> The standards used by State and private child welfare agencies to assess Indian parental fitness promoted unrealistic non-Indian socioeconomic norms and failed to account for legitimate cultural differences in Indian families. Time and again, social workers “ma[d]e decisions that [we]re wholly inappropriate in the context of Indian family life and so they frequently discover[ed] neglect or abandonment where none exist[ed].”<sup>35</sup> For example, Indian parents might leave their children in the care of extended family members, sometimes for long periods of time. Social workers untutored in the ways of Indian family life assumed leaving children in the care of anyone outside the nuclear family amounted to neglect and grounds for

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number of South Dakota Indian children living in foster homes is per capita, nearly 16 times greater than the non-Indian rate. In the state of Washington, the Indian adoption rate is 19 times greater and the foster care rate 10 times greater. In Wisconsin, the risk run by Indian children of being separated from their parents is nearly 1,600 percent greater than it is for non-Indian children.

*Id.*

<sup>30</sup> *Id.*; see also *Holyfield*, 490 U.S. at 32.

<sup>31</sup> AIPRC Report, *supra* note 3, at 78-88.

<sup>32</sup> See 1974 Senate Hearing, *supra* note 3, at 1-2, 47-51 (statements of Sen. James Abourezk, Chairman, Subcomm. on Indian Affairs, and Dr. Joseph Westermeyer, Dep’t of Psychiatry, Univ. of Minn.).

<sup>33</sup> House Report, *supra* note 3, at 10-12. In addition to these four factors, Congress acknowledged that federal boarding schools also contributed to the loss of Indian children from their communities. *Id.* at 9. However, as described in the AIPRC Report, despite the continued existence of, and problems with, boarding schools, “[c]urrent issues focus more on the problems of the adoption of Indian children by non-Indian families and the temporary and permanent placement of Indian children in non-Indian foster care homes and institutions.” AIPRC Report, *supra* note 3, at 79.

<sup>34</sup> 25 U.S.C. § 1901(5).

<sup>35</sup> House Report, *supra* note 3, at 10.

terminating parental rights.<sup>36</sup> Yet, the House Report noted, this is an accepted practice for certain Tribes.<sup>37</sup>

Further, Congress found that State agencies and judges applied non-Indian socioeconomic values in the child welfare context that failed to account for the differences in family structure and child-rearing practices between Indian and non-Indian communities.<sup>38</sup> The House Report concluded that these cultural differences resulted in unequal and incongruent application of child welfare standards for Indian families.<sup>39</sup> In addition, there was evidence of disparate treatment between Indian and non-Indian families. For example, parental alcohol abuse was one of the most frequently advanced reasons for removing Indian children from their parents.<sup>40</sup> However, in areas where Indians and non-Indians had similar rates of problem drinking, alcohol abuse was rarely used as grounds to remove children from non-Indian parents.<sup>41</sup>

Congress heard testimony that removing Indian children from their families had become a routine practice in many areas. One of the causes for the prevalence of removal was the simple fact that “agencies established to place children have an incentive to find children to place.”<sup>42</sup> Indian leaders alleged that some non-Indians took in Indian children in order to supplement their incomes with federally-subsidized foster care payments,<sup>43</sup> and that some non-Indian families sought to foster Indian children to gain access to the child’s Federal trust account.<sup>44</sup> While economic incentives encouraged the removal of Indian children, the economic conditions in Indian country prevented Tribes from providing their own foster care facilities and certified adoptive parents. Poverty and substandard housing were pervasive on reservations, and obtaining State foster care licenses required a standard of living that was often out of reach in Indian communities. Otherwise loving and supportive Indian families were accordingly prevented from becoming foster parents, resulting in the placement of Indian children in non-Indian homes away from their Tribes.<sup>45</sup>

In addition, State procedures for removing Indian children from their natural homes commonly violated due process. Social workers sometimes obtained “voluntary” parental rights waivers to gain access to Indian children using coercive and deceitful measures.<sup>46</sup> Indian parents with little education, reading comprehension, and understanding of English signed voluntary waivers

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*; see also Brief of Professors of Indian Law as Amici Curiae Supporting Respondents, *Adoptive Couple v. Baby Girl* at 16-17, 133 S. Ct. 2552 (2013) (No. 12-399) (discussing examples of lack of understanding of Indian family customs among State social workers).

<sup>38</sup> House Report, *supra* note 3, at 10.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 11.

<sup>43</sup> *Id.*

<sup>44</sup> 1974 Senate Hearing, *supra* note 3, at 118 (statement of Mel Sampson, Nw. Affiliated Tribes, Wash.).

<sup>45</sup> See House Report, *supra* note 3, at 12.

<sup>46</sup> 1974 Senate Hearing, *supra* note 3, at 95 (excerpt from *Indian Affairs, Newsletter of the Association on American Indian Affairs, Inc.*, June-August 1988, submitted by Bertram Hirsch, Staff Attorney, Ass’n on Am. Indian Affairs) (“Indian foster parents are threatened with jail and loss of welfare payment if they refuse to give up their children.”).

without knowing what rights they were forfeiting.<sup>47</sup> Moreover, State courts sometimes failed to protect the rights of Indian children and Indian parents. In involuntary removal proceedings, the Indian parents and children rarely were represented by counsel and sometimes received little if any notice of the proceeding,<sup>48</sup> and termination of parental rights was seldom supported by expert testimony.<sup>49</sup> Instead, Indian children were removed from their families due to cultural variances or economic conditions in their home or community.<sup>50</sup> Rather than helping Indian parents correct parenting issues, or acknowledging that the alleged problem was the result of legitimate cultural and socioeconomic differences, social workers claimed removal was in the child's best interest.<sup>51</sup>

Congress understood that these issues went beyond reservations and significantly impacted Indian children who lived off reservations as well. Congress noted that there were approximately 35,000 Indian children in foster care, adoptive homes, or institutions whose families did not "live on or near reservations"<sup>52</sup> and yet who were subject to the same problematic State child custody proceedings. In the AIPRC Final Report, which was included as part of the Senate Report on ICWA, the Commission recommended that any final legislation

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<sup>47</sup> House Report, *supra* note 3, at 11 ("In a recent South Dakota entrapment case, an Indian parent in a time of trouble was persuaded to sign a waiver granting temporary custody to the State, only to find that this is now being advanced as evidence of neglect and grounds for the permanent termination of parental rights.")

<sup>48</sup> 1974 Senate Hearing, *supra* note 3, at 67-68 (statement of Bertram Hirsch, Staff Attorney, Ass'n on Am. Indian Affairs):

The first hearing was a hearing on the petition of the social worker stating that there was a need for emergency custody in the department of welfare over Mrs. DeCoteau's children.

The judge issued an order placing that child in the custody of the department of public welfare without informing Mrs. DeCoteau that such a hearing was taking place, and without allowing her an opportunity to come before the court and submit testimony that such an order should not be issued.

So, the child was placed in a foster home and the judge appointed an attorney for Mrs. DeCoteau and set a hearing date on the issue of dependency and neglect. . . .

. . . . They notified Mrs. DeCoteau by publication in the local Sisseton paper, despite the fact that her social worker knew exactly where to find her. This is another problem where the State quite frequently uses the publication notice when, in fact, they know very clearly where the person can be found and how to serve that person directly. They use publication notices instead.

<sup>49</sup> House Report, *supra* note 3, at 11.

<sup>50</sup> *See, e.g.*, House Report, *supra* note 3, at 10 (lack of understanding of tribal social and familial norms); 1974 Senate Hearing, *supra* note 3, at 19 ("Poverty, poor housing, lack of modern plumbing, and overcrowding are often cited by social workers as proof of parental neglect and are used as grounds for beginning custody proceedings.") (Statement of William Byler, Executive Dir., Ass'n on Am. Indian Affairs).

<sup>51</sup> 1974 Senate Hearing, *supra* note 3, at 62 (describing the "best interests of the child" standard as one with "few standards or criteria facilitating its interpretation and therefore allows for wide variations in how individual states' agents or courts put it into practice. This at least allows for, and perhaps encourages the state's agents to use his own value and moral system in evaluating the child-rearing of any particular family who comes before it") (Prepared statement of Dr. Carl Mindell and Dr. Alan Gurwitt, child psychiatrists.).

<sup>52</sup> 124 CONG. REC. at 38,102. *See also* 123 CONG. REC. at 21,043 (noting that the "the lack of preventive and supportive services on reservations and in urban Indian communities contributes to the higher placement rates" with non-Indian families (emphasis added)); Letter from Don Milligan, Indian Desk, Wash. State Dep't of Health and Social Servs., to Al Elgin, Chairman, Task Force #8, Am. Indian Policy Review Comm'n (Feb. 17, 1976) (noting that the "largest percentage" of Indian children receiving child protection services "are in urban and rural off-reservation areas" and that the "proportion of Indian child welfare cases on reservations is a numerical minority in comparison to Indian child welfare cases off-reservation").

address the fact that because “[m]any Indian families move back and forth from a reservation dwelling to border communities or even to distant communities, depending on employment and educational opportunities,” problems could arise when Tribal and State courts offered competing child custody determinations, and that legislation therefore had to address situations where “an Indian child is not domiciled on a reservation and [is] subject to the jurisdiction of non-Indian authorities.”<sup>53</sup> Congress accordingly fashioned ICWA to address the removal of Indian children, as defined in the statute, regardless of where their families were located.<sup>54</sup>

Congress further recognized that the “wholesale removal of [Indian] children by nontribal government and private agencies constitutes a serious threat to [Tribes’] existence as on-going, self-governing communities,”<sup>55</sup> and that the “future and integrity of Indian tribes and Indian families are in danger because of this crisis.”<sup>56</sup> As one Tribal representative testified before Congress, “[t]he ultimate preservation and continuation of [Tribal] cultures depends on our children and their proper growth and development.”<sup>57</sup> The Tribal Chief of the Mississippi Band of Choctaw Indians, a member of the National Tribal Chairmen’s Association, told Congress that removal of Indian children from their homes and communities threatened the very survival of Tribal cultures, stating that the “chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their people.”<sup>58</sup> Thus, in addition to protecting individual Indian children and families, Congress also was concerned about preserving the integrity of Tribes as self-governing, sovereign entities and ensuring Tribes’ cultural and political survival.<sup>59</sup>

### C. Overview of ICWA’s Provisions

ICWA applies to “child custody proceedings,” defined as foster care placements, terminations of parental rights, and preadoptive and adoptive placements,<sup>60</sup> involving an “Indian child,” defined as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”<sup>61</sup> In such proceedings, Congress accords Tribes “numerous prerogatives . . . through the ICWA’s substantive provisions . . . as a means of protecting not only the interests of

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<sup>53</sup> Senate Report at 51-52 .

<sup>54</sup> In response to questions concerning the scope of congressional authority to apply ICWA to off-reservation children, Congress analyzed relevant law and concluded that its power to legislate was not “limited to Indian lands or to the reservation in the exercise of its plenary power over Indian affairs,” House Report, *supra* note 3, at 15, and that Congress had the “power to control the incidents of child custody litigation involving nonreservation Indian children and parents pursuant to the Indian commerce clause.” *Id.* at 18.

<sup>55</sup> 124 CONG. REC. at 38,103. *See also Wakefield v. Little Light*, 347 A.2d 228, 237-38 (Md. 1975) (finding that “there can be no greater threat to ‘essential tribal relations,’ and no greater infringement on the right of the . . . tribe to govern themselves than to interfere with tribal control over the custody of their children”).

<sup>56</sup> 124 CONG. REC. at 38,103.

<sup>57</sup> 1977 Senate Hearing, *supra* note 3, at 169 (statement of Bobby George, Navajo Tribe).

<sup>58</sup> *Id.* at 157 (Statement of Calvin Isaac, Nat’l Tribal Chairmen’s Ass’n).

<sup>59</sup> *See* 124 CONG. REC. at 38,102 (“[B]ecause of the trust responsibility owed to the Indian tribes by the United States to protect their resources and future, [Congress has] an obligation to act to remedy this serious problem.”).

<sup>60</sup> 25 U.S.C. § 1903(1). ICWA also defines each of these four types of child custody proceeding. *Id.*

<sup>61</sup> *Id.* at § 1903(4).



individual Indian children and families, but also of the tribes themselves.”<sup>62</sup> In addition, ICWA provides important procedural and substantive standards to be followed in State-administered proceedings concerning possible removal of an Indian child from his or her family.<sup>63</sup>

The “most important substantive requirement imposed on state courts” by ICWA is the placement preference for any adoptive placement of an Indian child.<sup>64</sup> “In any adoptive placement of an Indian child under State law,” ICWA requires that “a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.”<sup>65</sup> ICWA requires similar placement preferences for pre-adoptive placement and foster care placement.<sup>66</sup> These preferences reflect “Federal policy that, where possible, an Indian child should remain in the Indian community. . . .”<sup>67</sup>

Congress also sought to maximize Tribal participation in, and jurisdiction over, Indian child custody proceedings. In involuntary child custody proceedings, State courts must notify the child’s Tribe when the court knows or has reason to know that an Indian child is involved.<sup>68</sup> Tribal jurisdiction is generally exclusive over Indian child custody proceedings for on-reservation children,<sup>69</sup> and State courts must generally transfer proceedings involving an Indian child living off-reservation to Tribal court upon a petition by the child’s parent, Indian custodian, or Tribe.<sup>70</sup> And an Indian child’s Tribe may petition any court of competent jurisdiction to invalidate any action for foster placement or termination of parental rights under State law that violates certain provisions of ICWA.<sup>71</sup> These provisions recognize the importance of ensuring that Tribes are proactively made aware of Indian child custody proceedings and given the opportunity to adjudicate such proceedings internally should the Tribe so choose.

#### **D. Current Necessity for Regulations**

ICWA’s requirements remain vitally important today. Although ICWA has helped to prevent the wholesale separation of Indian children from their families in many regions of the United States, Indian children remain disproportionately more likely to be removed from their homes and

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<sup>62</sup> *Holyfield*, 490 U.S. at 49.

<sup>63</sup> *See, e.g.*, 25 U.S.C. § 1912(d) (requiring party seeking foster-care placement to prove that “active efforts” designed to prevent the breakup of the Indian family were provided); *id.* at § 1912(e) (requiring expert testimony regarding potential damage to child resulting from continued custody by parent before foster care placement may be ordered).

<sup>64</sup> *Holyfield*, 490 U.S. at 36-37.

<sup>65</sup> 25 U.S.C. § 1915(a).

<sup>66</sup> *Id.* at § 1915(a)-(b).

<sup>67</sup> House Report, *supra* note 3, at 23; *see also Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960, 963 (Ariz. Ct. App. 2000) (“The Act is also based on the notion that protecting tribal interests best serves the interests of Indian children.”); *In re Appeal in Pima Cty. Juvenile Action No. S-903*, 635 P.2d 187, 189 (Ariz. Ct. App. 1981) (“The Act is based on the fundamental assumption that it is in the Indian child’s best interest that its relationship to the tribe be protected.”).

<sup>68</sup> 25 U.S.C. § 1912. This notice requirement also applies to the child’s parent or Indian guardian.

<sup>69</sup> *Id.* at § 1911(a).

<sup>70</sup> *Id.* at § 1911(b). The exceptions to this rule are when there is good cause for State court jurisdiction, the Tribal court declines jurisdiction, or either of the child’s parents objects to the transfer. *Id.*

<sup>71</sup> *Id.* at § 1914. The child’s parent or Indian guardian may also file such a petition.

communities.<sup>72</sup> In addition, based on 2013 data, Indian children are present in State foster care at a rate 2.5 times their proportion in the general population.<sup>73</sup> This disparity has *increased* since 2000.<sup>74</sup> In some States, including numerous States with significant Indian populations, Indian children are present in State foster care systems at rates as high as 14.8 times their proportion in the general population of that State.<sup>75</sup> While this overrepresentation of Indian children in the foster care system likely has multiple causes, it nonetheless supports the need for this rule to ensure such placements comport with ICWA.

In addition, the absence of uniform Federal standards has resulted in competing standards being applied to ICWA adjudications across the United States, contrary to Congress's intent.<sup>76</sup> Perhaps the most noted example is the "existing Indian family" exception, under which some State courts first determine the "Indian-ness" of the child and family before applying the Act.<sup>77</sup> As a result, children who meet the statutory definition of "Indian child," and their parents, are denied the procedures and protections that Congress established by Federal law based on a subjective State court determination that the child or his or her family does not seem "Indian enough" for ICWA to apply.<sup>78</sup> State courts also differ as to what constitutes "good cause" for departing from ICWA's child placement preferences,<sup>79</sup> and are inconsistent as to how to demonstrate sufficient "active efforts" to keep a family intact.<sup>80</sup> In other instances, State courts simply have ignored ICWA requirements outright.<sup>81</sup>

These trends demonstrate that many of the problems Congress intended to address by enacting ICWA persist today. Indian children still face disproportionate (and often unwarranted) representation in State child care systems, often for the exact reasons that led to similar overrepresentation in the 1970s. At the same time, in the absence of binding regulations

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<sup>72</sup> See, e.g., ATTORNEY GENERAL'S ADVISORY COMMITTEE ON AMERICAN INDIAN AND ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE, ENDING VIOLENCE SO CHILDREN CAN THRIVE 87 (Nov. 2014).

<sup>73</sup> See National Council of Juvenile and Family Court Judges, *Disproportionality Rates for Children of Color in Foster Care in Fiscal Year 2013* tbl. 1 (June 2015).

<sup>74</sup> *Id.* (showing disproportionality rate of 1.5 in 2000).

<sup>75</sup> *Id.*

<sup>76</sup> See *Holyfield*, 490 U.S. at 43-46; see also 25 U.S.C. § 1902; House Report, *supra* note 3, at 19; see generally Casey Family Programs, *Indian Child Welfare Act: Measuring Compliance* (2015), available at [www.casey.org/media/measuring-compliance-icwa.pdf](http://www.casey.org/media/measuring-compliance-icwa.pdf).

<sup>77</sup> See, e.g., *S.A. v. E.J.P.*, 571 So. 2d 1187, 1189 (Ala. Civ. App. 1990) (describing Existing Indian Family Doctrine as a rule that "ICWA [is] inapplicable in a case where [a] child who had never been a member of an Indian family or culture is the subject of a child custody proceeding," regardless of whether that child satisfies the threshold statutory definition of "Indian child").

<sup>78</sup> See, e.g., *Thompson v. Fairfax Cty. Dep't of Family Servs.*, 747 S.E.2d 838, 847-48 (Va. Ct. App. 2013) (collecting cases); *In re Alexandria P.*, 176 Cal. Rptr. 3d 468, 484-85 (Cal. Ct. App. 2014) (noting split across California jurisdictions); see also *Holyfield*, 490 U.S. at 46 (concluding that absent a uniform Federal meaning for the term "domicile," parties or agencies could avoid ICWA's application "merely by transporting [the child] across state lines").

<sup>79</sup> See, e.g., *In re A.J.S.*, 204 P.3d 543, 551 (Kan. 2009); *In re Adoption of F.H.*, 851 P.2d 1361, 1363-64 (Alaska 1993); *In re Adoption of M.*, 832 P.2d 518, 522 (Wash. 1992).

<sup>80</sup> See *State ex rel. C.D. v. State*, 200 P.3d 194, 205 (Utah Ct. App. 2008) (noting State-by-State disagreement over what qualifies as "active efforts").

<sup>81</sup> *Oglala Sioux Tribe & Rosebud Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 754 (D.S.D. 2015) (finding that the State had "developed and implemented policies and procedures for the removal of Indian children from their parents' custody in violation of the mandates of the Indian Child Welfare Act").

interpreting the statutory language, State courts apply ICWA inconsistently and often in contravention of congressional intent.

## **E. Department Implementation of ICWA**

### **1. 1979 and 1994 Regulations**

The Department issued ICWA regulations in July 1979 to establish procedures through which a Tribe may reassume jurisdiction over Indian child custody proceedings,<sup>82</sup> as well as procedures for notice of involuntary Indian child custody proceedings, payment for appointed counsel in state courts, and procedures for the Department to provide grants to Tribes and Indian organizations for Indian child and family programs.<sup>83</sup> In January 1994, the Department revised its ICWA regulations in order to convert the competitive grant award process for Tribes to a noncompetitive funding mechanism, while continuing the competitive award system for Indian organizations.<sup>84</sup> As discussed in further depth below, the Department limited the rules to these specific subjects because, at the time, the agency misinterpreted the scope of its rulemaking authority.

### **2. 1979 and 2015 Guidelines**

In April 1979, the Department published proposed recommended guidelines for State courts to consider during Indian child custody proceedings.<sup>85</sup> The Department noted that the guidelines, which set out the Department's "best practice" recommendations for implementing ICWA's substantive requirements, were intended to "complement those related procedures"<sup>86</sup> published in the July 1979 regulations discussed above.<sup>87</sup> However, the Department also stated its belief that ICWA "does not delegate the Interior Department the authority to *mandate* procedures for state or tribal courts" concerning the majority of ICWA's provisions.<sup>88</sup>

In June 1979, the Department invited public comment on the guidelines.<sup>89</sup> Several commenters remarked that the Department did have the authority to issue regulations and should do so.<sup>90</sup> The

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<sup>82</sup> Tribal Reassumption of Jurisdiction Over Child Custody Proceedings, 44 Fed. Reg. 45,092, 45,095 (July 31, 1979) (codified at 25 C.F.R. pt. 13).

<sup>83</sup> Indian Child Welfare Act; Implementation, 44 Fed. Reg. 45,096, 45,102 (July 31, 1979) (codified at 25 C.F.R. pt. 23).

<sup>84</sup> Indian Child Welfare Act, 59 Fed. Reg. 2,248 (Jan. 13, 1994) (codified at 25 C.F.R. pt. 23).

<sup>85</sup> Recommended Guidelines for State Courts – Indian Child Custody Proceedings, 44 Fed. Reg. 24,000 (Apr. 23, 1979).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* (emphasis in original)

<sup>89</sup> Recommended Guidelines for State Courts – Indian Child Custody Proceedings, 44 Fed. Reg. 32,294 (June 5, 1979).

<sup>90</sup> *See, e.g.*, Letter from Bob Aitken, Dir., Social Servs., The Minnesota Chippewa Tribe, to David Etheridge, U.S. Dep't of Interior, Office of the Solicitor, Div. of Indian Affairs (May 23, 1979) (on file with the Department of the Interior) ("I feel strongly the Bureau of Indian Affairs should not be putting any of the act in 'guideline' form. The 'recommended guidelines for state courts' should be in rule or regulation form for state courts to follow. It appears the state courts will have a choice on whether or not to follow the Act. In my opinion, the Act does delegate to the Interior Department the authority to mandate such procedures.") (emphasis in original); Letter from Henry

Department nevertheless declined to issue regulations, and instead, revised its recommended guidelines and published them in final form in November 1979.<sup>91</sup>

In 2014, the Department invited public comments to determine whether to update its guidelines to address inconsistencies in State-level ICWA implementation that had arisen since 1979 and, if so, to determine what changes should be made. The Department held several listening sessions, including sessions with representatives of Federally-recognized Indian Tribes, State-court representatives (e.g., the National Council of Juvenile and Family Court Judges and the National Center for State Courts' Conference of Chief Justices Tribal Relations Committee), the National Indian Child Welfare Association, and the National Congress of American Indians. The Department received comments at the listening sessions and also received additional written comments, including comments from individuals and organizations. The Department considered these comments and subsequently published updated Guidelines (2015 Guidelines) in February 2015.<sup>92</sup>

The 2015 Guidelines encompass a broader range of issues than the 1979 guidelines given the Department's benefit of experience and continued challenges to achieving Congress's intent in ICWA. For example, the 2015 Guidelines provide additional guidance on ICWA's applicability, such as whether State courts determine whether ICWA applies in virtually any child custody proceeding, whether ICWA applies even if an Indian child is not removed from a home, and when a child is treated as an Indian child.<sup>93</sup> The Guidelines also encourage agencies and courts

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Sockheson, Chairman, Steering Comm. of the Nat'l Ass'n of Indian Legal Servs., to David Etheridge, U.S. Dep't of Interior, Office of the Solicitor, Div. of Indian Affairs (May 17, 1979) (on file with the Department of the Interior) ("Fearful of a constitutional challenge by states, a possibility soundly discredited and rejected by the lawmakers, the Secretary has adopted a position which flies in the face of clear Congressional intent to the contrary, i.e., that he, even as a steward of Congressional purpose, cannot mandate procedures for state or tribal courts, the very meat & potatoes of the whole of Title I of the Act. In the place of these badly needed regulations, therefore, was substituted a Notice of 'Recommended Guidelines for State Courts-Indian Child Custody Proceedings', which will have the practical effect of regulations without the protections afforded to the public under the Administrative Procedures Act. . . . It is apparent that the delicate relationships sought to be preserved by the Act justified and required regulatory action with regard to state court procedures by the Bureau and cannot be subjected to the whim of what surely Congress believed were recalcitrant state courts now functioning under questionable 'guidelines.'"); Letter from Alexander Lewis, Sr., Governor, Gila River Indian Comty., to David Etheridge, U.S. Dep't of Interior, Office of the Solicitor, Div. of Indian Affairs (May 21, 1979) (on file with the Department of the Interior) ("[A]bsent regulations without force and effect, the guidelines are useless and the aims of the Act will be made more difficult to achieve. . . . By virtue of the Supremacy Clause of the United States Constitution, and this Act of Congress – the Indian Child Welfare Act, the Secretary of the Interior does have authority to promulgate regulations regarding the transfer of jurisdiction of Indian child proceedings from State to Tribal Court. I urge that you reconsider this action and promulgate regulations instead of guidelines, so that the provisions of the Act will not be emasculated."); Letter from Frank Stede, Vice-Chief, Miss. Band of Choctaw Indians, to David Etheridge U.S. Dep't of Interior, Office of the Solicitor, Div. of Indian Affairs (May 22, 1979) (on file with the Department of the Interior) ("[T]he notices should have been issued [as] regulations contrary to what the Interior Department presents as an [argument] for not issuing the guide lines as notices, the Congress clearly gave the Secretary authority to mandate procedures for State or Tribal court by passing legislation which deals with State and Tribal [i]ssue[s] in such an extensive fashion, clearly Congress would not have [g]one to such details if it had intended that compliance to [be] voluntary.").

<sup>91</sup> Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979).

<sup>92</sup> Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146 (Feb. 25, 2015).

<sup>93</sup> *Id.* at 10,147.

to consider whether ICWA applies as early in the proceedings as possible, addressing the use of evidence of investigations into whether the child is an Indian child, and discuss when “active efforts” begin.<sup>94</sup> The 2015 Guidelines discuss the process and scope of the ICWA notice requirements, as well as procedures concerning transfers to Tribal court.<sup>95</sup> More generally, the Guidelines touch on the types of substantive ICWA provisions about which State courts have issued inconsistent opinions.

### 3. Proposed Rule

Many commenters on the 2015 Guidelines requested that the Department not only update its ICWA guidelines, but also issue binding regulations addressing the requirements and standards that ICWA provides for State-court child custody proceedings. Commenters offered many reasons why regulations are needed, but particularly emphasized the valuable role regulations could play in promoting uniform application of ICWA across the country. Recognizing that need, the Department began a notice-and-comment process to promulgate formal ICWA regulations. The Department issued a proposed rule on March 20, 2015 that would “incorporate many of the changes made to the recently revised guidelines into regulations, establishing the Department’s interpretation of ICWA as a binding interpretation to ensure consistency in implementation of ICWA across all States.”<sup>96</sup> As part of its process collecting input on the proposed regulations, the Department held five public hearings and five Tribal consultation sessions across the country, as well as one public hearing and one Tribal consultation by teleconference.

### 4. Final Rule

The final rule updates definitions and notice provisions in the existing ICWA regulations and adds a new subpart I to 25 C.F.R. part 23 to address ICWA implementation by State courts.<sup>97</sup> It promotes nationwide uniformity and provides clarity to the minimum Federal standards established by the Act. In many instances, the standards in the final rule reflect State interpretations and best practices, as reflected in State court decisions, State laws implementing ICWA, or State guidance documents. The rule also reflects comments from organizations and individuals that serve children and families, including, in particular, Indian children, and have substantial expertise in child welfare practices.

In particular, the final rule addresses the following issues:

- *Applicability.* The final rule clarifies when ICWA applies, and clarifies that ICWA does not contain an “existing Indian family” exception.

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<sup>94</sup> *Id.* at 10,148.

<sup>95</sup> *Id.* at 10,148-49.

<sup>96</sup> Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 14,880, 14,881 (Mar. 20, 2015).

<sup>97</sup> While the final rule’s publication in the Federal Register is pending as of the date of this M-Opinion, a copy of the rule can be found at <http://www.indianaffairs.gov/WhoWeAre/BIA/OIS/HumanServices/IndianChildWelfareAct/index.htm>.

- *Initial Inquiry.* The final rule clarifies the steps involved in conducting a thorough inquiry, at the beginning of child custody proceedings, into whether the child is an “Indian child” subject to the Act.
- *Emergency proceedings.* The final rule clarifies the distinction between the requirements for emergency proceedings and other child custody proceedings involving Indian children. It also includes provisions helping to ensure that emergency removal and placements are as short as possible, and that, when necessary, proceedings are promptly initiated and fully comply with ICWA.
- *Notice.* The final rule describes uniform requirements for prompt notice to parents and Tribes in involuntary proceedings to facilitate compliance with statutory requirements.
- *Transfer.* The final rule clarifies the requirement that a State court determine whether the State or Tribe has jurisdiction and, where jurisdiction is concurrent, establishes standards to guide the determination whether good cause exists to deny transfer (including factors that cannot properly be considered) and addresses transfer of proceedings to Tribal court.
- *Qualified expert witnesses.* The final rule clarifies the term “qualified expert witness.”
- *Placement preferences.* The final rule clarifies when and what placement preferences apply in foster care, preadoptive, and adoptive placements, provides presumptive standards for what may constitute good cause to depart from the placement preferences, and prohibits courts from considering certain factors as the basis for departure from placement preferences.
- *Voluntary proceedings.* The final rule clarifies certain aspects of ICWA’s applicability to voluntary proceedings, including addressing the need to determine whether a child is an “Indian child” in voluntary proceedings and specifying the requirements for obtaining consent.
- *Information, recordkeeping, and other rights.* The final rule addresses the rights of adult adoptees to information and sets out what records States and the Secretary shall maintain.
- *Effective date.* The final rule specifies that it will take effect 180 days after its publication in the Federal Register.

### III. Analysis

#### A. Authority to Promulgate Regulations

When an agency seeks to issue a legislative rule, which carries with it the force of law necessary to bind third parties,<sup>98</sup> the threshold inquiry is whether the agency has sufficient statutory authority to do so.<sup>99</sup> I conclude that ICWA grants the Department the authority to promulgate the final rule,<sup>100</sup> and that the Department’s contrary determination in 1979 was legally incorrect.

<sup>98</sup> See *Nat’l Latino Media Coal. v. FCC*, 816 F.2d 785, 788 (D.C. Cir. 1987) (“A valid legislative rule is binding upon all persons, and on the courts, to the same extent as a congressional statute.”).

<sup>99</sup> See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”); see also *Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1141 (9th Cir. 2007) (citation omitted).

<sup>100</sup> As noted in the proposed rule and by several commenters on the proposed rule, in addition to the express authority in ICWA, the Secretary is charged with “the management of all Indian affairs and of all matters arising out of Indian relations,” 25 U.S.C. § 2, and may “proscribe such regulations as [s]he may think fit for carrying into effect the various provisions of any act relating to Indian affairs. . . .” 25 U.S.C. § 9. See also 43 U.S.C. § 1457

The Department's primary authority for this rule is 25 U.S.C. § 1952, which states: "Within one hundred and eighty days after November 8, 1979, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." This expansive language evinces clear Congressional intent that the Department issue rules to implement ICWA. And, as discussed above, the Department has previously issued several rules implementing portions of ICWA. The rulemaking grant in Section 1952 is therefore sufficiently broad to encompass authority for the Department to issue rules that set standards for Indian child custody proceedings in State courts.<sup>101</sup>

Not only does ICWA authorize the Department to promulgate implementing regulations generally, but any such rules also may be binding legislative rules. When determining whether a statute gives an agency legislative rulemaking ability, "the grant of authority relied upon by a federal agency in promulgating regulations need not be specific; it is only necessary that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued."<sup>102</sup> Courts therefore have found that a statutory directive for an agency to "promulgate such rules and regulations as may be necessary" (or similar formulations) provides the authority to issue legislative rules unless doing so would counter congressional intent or otherwise violate the statute.<sup>103</sup> Because the final rule would have no such effect,<sup>104</sup> the Department retains the authority to promulgate a legislative rule.

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("The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies: . . . Indians.').

<sup>101</sup> Similar grants of rulemaking authority have been held to presumptively authorize agencies to issue regulations addressing matters covered by the statute unless there is clear Congressional intent to withhold authority in a particular area. See, e.g., *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-78 (1999); *Am. Hosp. Ass'n v. Nat'l Labor Relations Bd.*, 499 U.S. 606, 609-10 (1991) (general grant of rulemaking authority "was unquestionably sufficient to authorize the rule at issue in this case unless limited by some other provision in the Act"); see also *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013) (finding not "a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field").

<sup>102</sup> *Qwest Commc'ns Int'l Inc. v. FCC*, 229 F.3d 1172, 1179 (D.C. Cir. 2000) (citations omitted); accord *S.J. Groves & Sons Co. v. Fulton Cty.*, 920 F.2d 752, 764 (11th Cir. 1991). In *Chrysler Corporation v. Brown*, 441 U.S. 281 (1979), the Court also held that the legislative rule must affect binding rights and responsibilities and comply with applicable procedural requirements, *id.* at 302-03, both of which are satisfied here.

<sup>103</sup> See, e.g., *United States v. Mitchell*, 39 F.3d 465, 471 (4th Cir. 1994) (finding agency authority to promulgate detailed regulations pursuant to statutes stating that agencies can "prescribe rules and regulations for the declaration and entry of . . . articles carried on the person or contained in the baggage of a person arriving in the United States," "promulgate such regulations as may be appropriate to enforce [chapter 35 of Title 16 of the U.S. Code]," and "make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of [communicable diseases]"); *Pharm. Research & Mfrs. of Am. v. FTC*, 44 F. Supp. 3d 95, 123 (D.D.C. 2014) (FTC regulations pursuant to agency authorization to "prescribe such other rules as may be necessary and appropriate to carry out the purposes" of various antitrust statutes); *Am. Med. Ass'n v. Heckler*, 606 F. Supp. 1422, 1440 (S.D. Ind. 1985) (statute authorizing the Department of Health and Human Services (HHS) to "prescribe such regulations as may be necessary to carry out the administration" of Medicare).

<sup>104</sup> Congress passed ICWA to counter the "alarmingly high percentage of Indian families . . . broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and [the] alarmingly high percentage of such children . . . placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C. § 1901(4); accord 124 CONG. REC. at 38,102. As discussed above, that goal has proven difficult to achieve in the absence of regulatory standards consistently applied among State jurisdictions. The final rule is a

To whatever extent a court determines that the scope of the Department's rulemaking authority under ICWA is ambiguous, ICWA's legislative history further suggests that such authority is broad and inclusive.<sup>105</sup> The original versions of the House and Senate bills that led to the enactment of ICWA, as well as the version passed by the Senate, qualified the current grant of rulemaking authority with additional procedural requirements.<sup>106</sup> In particular, the bills required that within six months, the Secretary consult with Tribes and Indian organizations "in the consideration and formulation of rules and regulations to implement the provisions of this Act"; within seven months, the Secretary present the proposed rules to congressional committees; within eight months, the Secretary publish proposed rules for notice and comment; and within ten months, the Secretary promulgate final rules and regulations to implement the provisions of the Act.<sup>107</sup> The bills authorized the Secretary to revise the rules and regulations, but required that they be presented to the Congressional committees first.<sup>108</sup> These requirements were considered during hearings held in 1978 before the House of Representatives Committee on Interior and Insular Affairs.<sup>109</sup>

The fact Congress introduced and considered bills throughout the 95th Congress that imposed burdensome procedural requirements on the Department strongly suggests that Congress intended that Section 1952 provide the Department with a broad grant of rulemaking authority. During House floor debate, the bill's sponsor, Representative Udall, offered an amendment to remove the procedural steps set out above and change the rulemaking grant to its current text. However, Representative Udall did not indicate any intent to change the scope of ICWA's broad grant of rulemaking authority, but instead explained that this amendment was designed to remove the burdens of submitting regulations to congressional committees.<sup>110</sup> By ultimately deleting these provisions, Congress demonstrated that it did not intend to unduly restrict the Department's rulemaking capability, and instead sought to vest the Department with exclusive authority over ICWA regulations.

As discussed in the preamble to the final rule, the Department has determined that this regulation is "necessary to carry out the provisions" of ICWA.<sup>111</sup> Although the Department initially hoped

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necessary exercise of the Department's statutorily-delegated authority to ensure that ICWA is administered efficiently and effectively.

<sup>105</sup> In addition, courts have described ICWA as "a remedial statute in that it was enacted to stem the 'alarmingly high percentage of Indian families being separated by removal of children through custody proceedings. § 1901(4). We interpret remedial statutes 'liberally to facilitate and accomplish [their] purposes and intent.'" *State ex rel. Children, Youth & Families Dep't v. Marlene C. (In re Esther V.)*, 248 P.3d 863, 869 (N.M. 2011) (citation omitted); *accord Gomez v. Toledo*, 446 U.S. 635, 639 (1980) ("[R]emedial legislation . . . is to be construed generously to further its primary purpose."). ICWA's grant of regulatory authority could be read as broadly authorizing the Department to take necessary action to effectuate congressional intent.

<sup>106</sup> See S. 1214, 95th Cong. § 205; see also Senate Report at 8-9

<sup>107</sup> See S. 1214 § 205(b).

<sup>108</sup> *Id.* at § 205(c).

<sup>109</sup> See 1978 House Hearing, *supra* note 3, at 47.

<sup>110</sup> See 124 CONG. REC. 38,107.

<sup>111</sup> 25 U.S.C. § 1952. Where the empowering provision of a statute states simply that the agency promulgate "such rules and regulations as may be necessary" to carry out the Act, courts will uphold the regulation as "necessary" so long "as it is reasonably related to the purposes of the enabling legislation," *Mourning v. Family Publ'ns Serv.*, 411



that binding regulations would not be necessary, a third of a century of experience has established the need for more uniformity in the interpretation and application of this important Federal law. For example, various State courts and agencies have interpreted the Act in different, and sometimes conflicting, ways. This has resulted in different standards being applied to ICWA adjudications across the United States, contrary to Congress's intent.<sup>112</sup> The Department further has determined that the current nonbinding guidelines are insufficient to fully vindicate Congress's goal of nationwide protections for Indian children, families, and Tribes.<sup>113</sup> While State courts sometimes defer to the guidelines in ICWA cases, the guidelines lack the force of law and State courts may depart from the guidelines as they see fit.<sup>114</sup> These State-specific determinations about the meaning of key terms in the Federal law will continue absent a legislative rule, with potentially devastating consequences for the Indian children, families, and Tribes that ICWA was designed to protect.

Nor does the fact that the current final rule will be issued after ICWA's 180 day deadline impede this action. Courts generally uphold regulations enacted after the passage of a statutory deadline so long as the statute, as is the case with ICWA, does not spell out explicit consequences for late action. That is, "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction."<sup>115</sup> As there is no such "consequence" language in ICWA, the Department retains the authority to carry out its statutorily-delegated rulemaking authority, even to the present day.

## **B. Statements Made in the 1979 Guidelines**

At the outset, the fact that the Department now has decided to publish comprehensive regulations, even though the agency chose not to in 1979, is legally permissible.<sup>116</sup> Agencies

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U.S. 356, 369 (1973) (citations omitted), and does not "render nugatory [whatever] restrictions that Congress has imposed." *AFL-CIO v. Chao*, 409 F.3d 377, 384 (D.C. Cir. 2005).

<sup>112</sup> See *Holyfield*, 490 U.S. at 43-46; see also 25 U.S.C. § 1902; House Report at 19.

<sup>113</sup> See 80 Fed. Reg. at 14,881.

<sup>114</sup> See, e.g., *Gila River Indian Cmty. v. Dep't of Child Safety*, 363 P.3d 148, 153 (Ariz. Ct. App. 2015).

<sup>115</sup> *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003) (quoting *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993)). See also *Bhd. of Ry. Carmen Div., Transp. Comm'ns. Int'l Union v. Pena*, 64 F.3d 702, 704 (D.C. Cir. 1995) (applying *Barnhart's* underlying rule, as set out in *Brock v. Pierce County*, 476 U.S. 253 (1986), and by association, *Barnhart*, to discretionary agency actions). In *Pena*, the court held that even if a statutory deadline used the word "shall" in the context of requiring agency action, the requirement was still discretionary and the agency could not be enjoined from taking that action past the deadline. *Id.* In particular, the court reasoned that the availability of alternative remedies such as an APA challenge to the rule would be preferable to invalidating the agency action outright on technical grounds. *Id.* at 704-05. See also *Friends of the Aquifer, Inc. v. Mineta*, 150 F. Supp. 2d 1297, 1301 (N.D. Fla. 2001) (citing *Pena* for proposition that missing discretionary statutory deadline is not fatal absent evidence "1) that compliance with the deadlines was or is essential to the effective operation of the statute, (2) that Congress intended the deadlines to be anything other than directory, or (3) that Congress has been concerned with the Secretary's failure to act within the specified deadlines").

<sup>116</sup> See *Natural Res. Def. Council, Inc. v. EPA*, 22 F.3d 1125, 1145 (D.C. Cir. 1994) (upholding EPA's reaction to ongoing State failure to satisfy EPA's non-mandatory guidance on ambient air quality standards by using statutory authority to "issue regulations as are necessary to carry out [its] duties under the [Clean Air] Act" and replace the guidance with a binding legislative rule, and applying test set out in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984)); accord *Citizens Coal Council v. EPA*, 447 F.3d 879, 892-93 (6th Cir. 2006) (regulations published under "agency shall promulgate" statutory clause permissible under *Chevron*

may reevaluate a previous decision and determine that what may have worked decades earlier is no longer viable, or that an agency's previous interpretation of law was simply incorrect.<sup>117</sup> As the Supreme Court has observed, "[regulatory] agencies do not establish rules of conduct to last forever,' . . . and . . . an agency must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'"<sup>118</sup> So, while an agency must show that there are good reasons for the new policy, it need not demonstrate that the reasons for the new policy *are better* than the reasons for the old one; rather, it suffices that the new policy is permissible under the statute and that the agency *believes it to be better* than the previous policy.<sup>119</sup> In such cases, the agency need only explain why it is disregarding the facts and circumstances that underlay or were engendered by the prior policy.<sup>120</sup>

Furthermore, not only has the Department described its reasons for departing from the statements it made in 1979 both in this M-Opinion and in the preamble to the final rule,<sup>121</sup> I believe that the Department's prior position that it lacked the authority to issue binding regulations was incorrect in 1979 and remains incorrect at present. In 1979, the Department cited a number of reasons for issuing nonbinding guidelines, a course of action that was opposed by numerous commenters.<sup>122</sup> As described below, these reasons are not persuasive.

First, the Department's statement in 1979 that binding regulations were "not necessary to carry out the Act" has now been firmly contradicted by thirty-seven years of real-world ICWA application. The intervening years have shown that contradictory State court application of the statute has impeded Congress's goal of providing minimum Federal standards that would protect Indian children, families, and Tribes. This, in turn, has allowed problems identified in the 1970s to remain in the present day. The lack of clarity and uniformity regarding the meaning of key ICWA provisions also creates confusion, delays, and appeals in individual cases involving Indian children.

Second, the Department's 1979 statements were made prior to the Supreme Court's carefully reasoned decision in *Holyfield* in 1989. There, the Supreme Court addressed whether a State court had jurisdiction over a child custody proceeding involving two Indian children. As the sole disputed issue in the case was whether the children were "domiciled" on a reservation for ICWA purposes, the Court confronted the initial question of whether Congress intended the definition of "domicile" to be a matter of State law. The Court noted that "the meaning of a federal statute is necessarily a federal question in the sense that its construction remains subject to this Court's supervision."<sup>123</sup> The Court further noted the rule of statutory construction that "Congress when

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in light of agency's demonstration that real-world considerations established necessity of regulations to effectuate congressional intent).

<sup>117</sup> 5 U.S.C. § 551(5) ("rule making' means agency process for formulating, *amending*, or repealing a rule") (emphasis added).

<sup>118</sup> *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (quoting *Am. Trucking Ass'ns, Inc. v. Atchison, Topeka & Santa Fe R.R. Co.*, 387 U.S. 397, 416 (1967) and *Permian Basin Area Rate Cases*, 390 U.S., 747, 784 (1968)) (alteration in original).

<sup>119</sup> *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515-16 (2009).

<sup>120</sup> *Id.*

<sup>121</sup> See generally Section II.C-D and Section III of the preamble to the final rule.

<sup>122</sup> See *supra* notes 85-91 and accompanying text.

<sup>123</sup> 490 U.S. at 43.

it enacts a statute is not making the application of the federal act dependent on state law.”<sup>124</sup> The Court gave two justifications for this rule of statutory construction. One, “federal statutes are generally intended to have uniform nationwide application.”<sup>125</sup> Two, allowing the application of State law to control would create “the danger that the federal program would be impaired. . . .”<sup>126</sup>

The Court then discussed its prior holding in *NLRB v. Hearst Publications Inc.*,<sup>127</sup> where the Supreme Court rejected an argument that the term “employee” in the Wagner Act should be defined by State law by reasoning that “[t]he Wagner Act is . . . intended to solve a national problem on a national scale.”<sup>128</sup> The Court concluded that what it said of the Wagner Act “applies equally well to the ICWA.”<sup>129</sup> In explaining the reasons for this conclusion, the Court noted, *inter alia*, that “Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities” and “that Congress perceived the States and their courts as partly responsible for the problem it intended to correct.”<sup>130</sup> The *Holyfield* Court also recognized that Congress intended the implementation of ICWA to have nationwide consistency, so “Congress could hardly have intended the lack of nationwide uniformity that would result from state-law definitions of domicile.”<sup>131</sup>

In 1979, the Department had neither the benefit of the Court’s decision nor the opportunity to observe how a lack of uniformity in the interpretation of ICWA by State courts could undermine the Act’s underlying purposes. But in current practice, what was intended to be a uniform Federal minimum standard now varies in its application based on the State, or even the judicial district.<sup>132</sup> The Department thus has reasonably sought to model its action on the *Holyfield* Court’s observation that “a statute under which different rules apply from time to time to the same child, simply as a result of his or her transport from one State to another, cannot be what Congress had in mind.”<sup>133</sup>

Third, I disagree with the Department’s 1979 statement that “primary responsibility” for interpreting portions of ICWA that do not expressly delegate responsibility to the Department “rests with the courts that decide Indian child custody cases.” The Department based this assumption by citing a portion of ICWA’s legislative history indicating that the statutory term “good cause” was “designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child.”<sup>134</sup> However, this conclusion takes the cited legislative history out of context: the “good cause” language at issue merely was designed

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 44 (citations omitted).

<sup>127</sup> 322 U.S. 111 (1944).

<sup>128</sup> 490 U.S. at 44 (citing *Hearst*, 322 U.S. at 123).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 45.

<sup>131</sup> *Id.*

<sup>132</sup> See, e.g., *Dinwiddie Dep’t of Soc. Servs. v. Nunnally*, 764 S.E.2d 526, 527 (Va. 2014) (Millette, J., concurring in part and dissenting in part) (arguing that the majority opinion’s “best interests of the child” ICWA analysis “disregards precedent from the Supreme Court of the United States, substitutes its judgment for that of Congress, and embraces an entirely novel analysis”).

<sup>133</sup> *Holyfield*, 490 U.S. at 46.

<sup>134</sup> 44 Fed. Reg. at 67,584.

to provide State courts with flexibility when making certain jurisdictional determinations based on the facts presented in each particular case.<sup>135</sup> That phrase was not addressing the reach of the Department's rulemaking authority.<sup>136</sup>

Moreover, the Department was incorrect to whatever extent it then believed that providing *any* regulatory guidance on the meaning of terms such as “good cause” improperly intrudes on a State court’s flexibility to address particular factual scenarios. Other statements in the legislative history, which the Department did not reference in 1979, suggest Congress desired Federal agencies to be more involved in State removals of Indian children.<sup>137</sup> And again, the Department did not have the benefit of the Supreme Court’s decision in *Holyfield*, which recognized that Congress “perceived the States and their courts as partly responsible for the problem it intended to correct.”<sup>138</sup> The Court concluded that “[u]nder these circumstances it is most improbable that Congress would have intended to leave the scope of the statute’s key jurisdictional provision subject to definition by state courts as a matter of state law.”<sup>139</sup> The Department similarly concludes here that “[u]nder these circumstances,” it is improbable that Congress intended the broad grant of rulemaking authority in Section 1952 to authorize the Department to issue binding rules that interpret only certain portions of ICWA.

Fourth, I am not persuaded by the Department’s 1979 statements that due to federalism concerns, it would have been extraordinary for Congress to have authorized the Department to exercise supervisory authority over State or Tribal courts or to legislate for them with respect to Indian child custody matters in the absence of an express Congressional declaration to that effect.<sup>140</sup> As discussed above, ICWA expressly *directs* the Department to adopt “such rules and regulations as may be necessary to carry out the provisions of” ICWA.<sup>141</sup> And as Congress noted, ICWA does not “oust the State from the exercise of its legitimate police powers in regulating domestic relations,”<sup>142</sup> but instead establishes “minimum Federal standards and procedural safeguards *in State Indian child custody proceedings* designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe.”<sup>143</sup> In light of these statutory goals, it would be illogical to read ICWA as prohibiting the Department from issuing rules applicable to State courts – the very entities that Congress passed ICWA to regulate.<sup>144</sup>

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<sup>135</sup> S. REP. NO. 95-597 at 17.

<sup>136</sup> *Id.*

<sup>137</sup> See, e.g., 1974 Senate Hearing, *supra* note 3, at 463-65 (statement of Raymond Butler, Acting Dir., Office of Indian Servs., Chief of Div. of Social Servs., D.C.) (suggesting that the Federal government oversee State child welfare proceedings involving Indian children through additional staff, withholding Federal funding, and other means).

<sup>138</sup> 490 U.S. at 45.

<sup>139</sup> *Id.*

<sup>140</sup> See 44 Fed. Reg. 67,584.

<sup>141</sup> 25 U.S.C. § 1952.

<sup>142</sup> House Report, *supra* note 3, at 17.

<sup>143</sup> *Id.* at 19 (emphasis added); accord 25 U.S.C. § 1902 (purpose of ICWA is the “establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture”).

<sup>144</sup> See, e.g., *New York v. FCC*, 486 U.S. 57, 66-67 (1988) (finding congressional authority for agency to issue rules applicable to States pursuant to statute tasking agency with making “such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter”); see also *Garrelts v. Smithkline Beecham Corp.*, 943 F. Supp. 1023, 1062 (N.D. Iowa 1996) (statutory

The Supreme Court has repeatedly reaffirmed the power of Congress to pass laws enforceable in State courts.<sup>145</sup> The Court also has explained that States are “not immune under the Tenth Amendment from laws passed by the Federal government which are, as is the law here, necessary and proper to the exercise of a [constitutionally] delegated power,” even when such laws touch on areas usually left to the States.<sup>146</sup> Here, Congress enacted ICWA in part under the authority of the Indian Commerce Clause, which provides Congress with “plenary power over Indian affairs.”<sup>147</sup> In clarifying ICWA’s requirements, the Department is merely exercising the authority that Congress delegated to it.<sup>148</sup>

This sound exercise of congressional delegation is emphasized by the fact that ICWA serves as partial fulfillment of the Federal “trust responsibility owed to the Indian tribes by the United States to protect their resources and future,”<sup>149</sup> and was enacted pursuant to Congress’s “plenary power over Indian affairs.”<sup>150</sup> Critically, Congress did not apply ICWA wholesale to any and all State child custody proceedings; rather, it limited the statutory reach to proceedings involving an Indian child. States, whose sovereignty ICWA leaves entirely intact where there are no Federal or Tribal interests at stake (i.e., an “Indian child” is not involved), must necessarily defer in such cases unless the State chooses to “provide[] a higher standard of protection” than that required by ICWA.<sup>151</sup>

In this regard, the Department’s final rule is not an “extraordinary” exercise of authority involving an assertion of “supervisory control” over State courts.<sup>152</sup> While the final rule may override what some States believed to be the best interpretation of ICWA, the Supreme Court has reasoned that such a scenario is not equivalent to making State “judicial decisions subject to reversal by executive officers.”<sup>153</sup> Rather, the final rule simply clarifies a limited set of substantive standards and related procedural safeguards that courts will apply to the particular

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authorization that agency “make and promulgate from time to time such rules and regulations as may be necessary” is a congressional authorization for the agency to preempt state law” to the extent that “it was Congress’s intent that the agency act in a particular field”) (citations and quotations omitted).

<sup>145</sup> See, e.g., *F.E.R.C. v. Mississippi*, 456 U.S. 742, 760-61 (1982); *Testa v. Katt*, 330 U.S. 386, 394 (1947).

<sup>146</sup> *United States v. Oregon*, 366 U.S. 643, 649 (1961).

<sup>147</sup> 25 U.S.C. § 1901(1).

<sup>148</sup> ICWA is not the only statute that authorizes Federal agencies to set minimum standards binding on States. See, e.g., 42 U.S.C. § 652(a)(1) (requiring the HHS Secretary to “establish such standards for State programs for locating noncustodial parents, establishing paternity, and obtaining child support and support for the spouse (or former spouse) with whom the noncustodial parent’s child is living as he determines to be necessary to assure that such programs will be effective”).

<sup>149</sup> 124 CONG. REC. at 38,102; accord 25 U.S.C. § 1901(2) (noting “that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources”).

<sup>150</sup> 25 U.S.C. § 1901(1).

<sup>151</sup> 25 U.S.C. § 1921. See also *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996) (States “have been divested of virtually all authority over Indian commerce and Indian tribes”); accord *Worcester v. Georgia*, 31 Pet. 515, 560-61 (1832).

<sup>152</sup> 44 Fed. Reg. 67,584.

<sup>153</sup> *Nat’l Cable & Telecom. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005).

cases before them involving an area over which congressional authority is plenary.<sup>154</sup> These standards and safeguards, in turn, will provide clear guidance for State courts to follow that will help ensure consistent and accurate interpretation of the minimal Federal standards established in ICWA. For these reasons, and because Congress provided the Department the authority to issue this rule, I find that the issuance of this rule is consistent with federalism principles.

### Conclusion

The Department possesses the requisite authority to issue regulations that implement the substantive provisions in ICWA by prescribing uniform minimum federal standards and procedures for States to follow.<sup>155</sup>



Hilary C. Tompkins

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<sup>154</sup> The Supreme Court has explained that “[v]alid regulations establish legal norms. Courts can give them proper effect even while applying the law to new-found facts, just as any court conducting a trial in the first instance must conform its rulings to controlling statutes, rules, and judicial precedents.” *United States v. Haggard Apparel Co.*, 526 U.S. 380, 391 (1999). Of course, the construction of ICWA by State courts will “remain[] subject to [the Supreme] Court’s supervision. . . .” *Holyfield*, 490 U.S. at 43.

<sup>155</sup> This Opinion would not have been possible without the committed legal research and drafting of Attorney-Advisors Sam Ennis and Dan Lewerenz, and Assistant Solicitor – Branch of Tribal Government Services, Division of Indian Affairs, Rebekah Krispinsky.