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ROADWAY TO REFORM: ASSESSING THE 2015 GUIDELINES AND NEW FEDERAL RULE TO THE INDIAN CHILD WELFARE ACT’S APPLICATION TO STATE COURTS

I. INTRODUCTION

In 1987, Congress enacted the Indian Child Welfare Act (“ICWA”), in order to protect Native American children during custody and placement proceedings. The 38-year-old statute was last updated on its application with guidelines in 1979. Over the years, courts have determined that the guidelines were not binding on state courts; rather the guidelines served as a model for courts on the proper application of ICWA. Thus, issues resulted in the application of ICWA, and it often varied depending on jurisdiction. In February of 2015, the Bureau of Indian Affairs (“BIA”), enacted new guidelines for the application and adjudication of ICWA cases. The purpose of these new guidelines is to clarify the use of ICWA in child custody proceedings for state courts and agencies. Following the enactment of the

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1 See Indian Child Welfare Act, 25 U.S.C. § 1902 (1978) (“[The purpose of this Act is] to protect the best interest of Indian Children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . .”).
2 See Guidelines for State Courts in Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,584 (Nov. 26, 1979) [hereinafter 1979 Guidelines] (determining how ICWA was to be applied in cases involving child placement).
4 See id. at § 1 (stating different jurisdictions apply ICWA differently).
2015 guidelines, the BIA enacted a federal rule implementing regulations on
the application of ICWA in state and tribal courts. This new rule is binding,
and effective as of January 2017.

Historically, ICWA has been challenged since its enactment in
1978. In the years since its enactment, ICWA has been the subject of
hundreds of court cases and academic writings. It is a topic that is highly
contested due to the purpose it seeks to achieve, which is keeping a Native
American child in a home that will keep with unique cultural values. The
BIA sought to reform the interpretation of the statute in order to resolve some
of the long-standing problems and questions arising in state and tribal
courts.

The BIA held “listening sessions” with members of the field in order
to determine what the major problems with ICWA were. The problems
acknowledged by the BIA, specifically the lack of uniform application in
courts, formed the basis of the new ICWA guidelines. These guidelines
discuss a variety of issues, such as pretrial requirements, procedures to
transfer to tribal courts, adoptions, voluntary/involuntary proceedings, and
termination of parental rights. The new rule (“Final Rule”), further
elaborates on the issues discussed in the 2015 guidelines, and implements
many of the guidelines as binding law.

Part I of this note will provide a comprehensive overview of the
history behind the ICWA statute, and the developments that have been made

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8 See id. (stating purpose is uniform application of ICWA).
9 See infra Part II (discussing history and intent of ICWA). The ICWA was enacted in 1978 as
a response to the ongoing efforts of the United States government to rectify previous injustices
against the Native American community. See Vento, supra note 3, at § 2 (detailing history and
cases involving creation of ICWA).
10 See Vento, supra note 3, at § 2 (pointing to hundreds of ICWA cases since its enactment in
1978).
11 See infra Part II (asserting policy reasons for enactment of ICWA); see also 25 U.S.C. §
1902 (1978) (stating purpose is to keep Native American children in homes with Native American
culture).
12 See 2015 Guidelines, supra note 5, at 10,147 (discussing lack of clarity and uniformity in
application).
13 See id. (stating in 2014, BIA department invited comments to assess whether to update
guidelines and make changes).
14 See id. at 10,148 (noting cases that led to development of new guidelines). There were
various cases and instances that led the BIA to believe that clarity of ICWA was necessary. Id.
15 See id. at 10,150-59 (replacing 1979 guidelines). Tribal and state courts have faced
extensive issues in applying ICWA, specifically when to apply the statute. Id.
in recent years. It will also discuss the major Supreme Court decisions that serve as the rationale behind the enactment of the 2015 guidelines and the Final Rule. Further it will examine the 2015 guidelines imposed by the BIA for state courts in relation to ICWA. Recent decisions regarding the guidelines, and the implementation of the Final Rule are also being examined. Part II will discuss the terms of the 2015 guidelines and the impact it will have on cases in state courts. It will also mention recent court cases that have been filed challenging the constitutionality of ICWA and the 2015 guidelines. Part III will analyze the 2015 guidelines and the Final Rule in relation to the purpose of ICWA; specifically, looking at fundamentals of family law, such as the best interest of the child. This section will analyze the recent cases being brought against the 2015 guidelines in relation to past challenges of ICWA.

This note will propose the impacts that the 2015 guidelines and Final Rule will have on attorneys and judges in state courts. Further, the 2015 guidelines have ignited new court cases that challenge the validity of the rules and authority of the BIA to enact them. Therefore, this note will discuss how this is still an emerging issue that is likely to be dealt with by many courts in order to understand the full long-term implications of the Final Rule. Although it is a new and binding rule, the Final Rule will be
applicable in all ICWA cases as of January 2017.30 Ultimately, the role these regulations will have on attorneys handling ICWA cases in state courts will be emphasized throughout this piece.31

Part IV will conclude with a discussion of the Final Rule in some detail, to emphasize the areas that will be important in assuring consistent application of ICWA.32 Part IV will also recommend a course of action pertaining to the changes in binding authority that have occurred as a result of new guidelines and rules for those practicing in the field.33

I. HISTORY

A. Origins of Self-Determination Legislation

Prior to the enactment of ICWA, there was not any existing legislation pertaining to the adjudication of child placement cases involving Native American children.34 Native American tribes have sovereignty over their lands and their affairs;35 however, this was not always the case.36 Prior to the 1970’s, there were policies in the United States that ranged from...
implementing reservations for tribes to even terminating tribes.\textsuperscript{37} This changed during the 1970’s, when the Nixon Administration implemented policies to further the self-determination of Native American tribes.\textsuperscript{38} Self-determination was a mixture of legislation and ideologies, which focused on providing Native Americans with the right to self-govern and to make important decisions regarding their tribe’s affairs on their own.\textsuperscript{39}

During this time, many different pieces of legislation were enacted to further the interests of Native American self-determination, and one of these was ICWA.\textsuperscript{40} New legislation also served to establish the civil rights of Native Americans, and the sovereignty that tribes had on their reservation lands.\textsuperscript{41} Today, many of these pieces of legislation, such as the Indian Civil Rights Act of 1968, are still in effect and good law.\textsuperscript{42}

Today, under federal law, Native American tribes are sovereign entities living within the borders of the United States.\textsuperscript{43} Native American tribes have their own tribal courts;\textsuperscript{44} however, there are some instances in which the tribes do not have jurisdiction.\textsuperscript{45} Tribal courts have jurisdiction over adoption and custody cases involving Native American children;\textsuperscript{46}

\begin{itemize}
  \item \textsuperscript{37} See Parnell, supra note 34, at 381-82 (explaining Native American policy leading up to 1970’s). These policies proved to be detrimental to tribes, and specifically to children. Id. at 382-84.
  \item \textsuperscript{38} See id. (discussing policy approaches of allotment, termination, and self-determination); see also Hassan Saffouri, Comment, The Good Cause Exception to the Indian Child Welfare Act's Placement Preferences: The Minnesota Supreme Court Sets a Difficult (Impossible?) Standard, 21 WM. MITCHELL L. REV. 1191, 1193-96 (1996) (explaining how and why ICWA was enacted).
  \item \textsuperscript{39} See Atwood, supra note 35, at 654 (detailing self-determination for Native American tribes); Division of Self-Determination Services, Division of Self-Determination Mission, BUREAU INDIAN AFF., U.S. DEP’T OF INTERIOR, http://www.bia.gov/WhoWeAre/BIA/OIS/Self-Determination (last visited Dec. 24, 2016) (explaining concept of self-determination and BIA’s role).
  \item \textsuperscript{40} See Saffouri, supra note 38, at 1193-96 (stating initiatives enforced by Nixon Administration). “President Nixon continued the shift in the direction of self-determination by stating a policy of strengthening tribal sovereignty and of ending the termination of tribes.” Id.; see also Parnell, supra note 34, at 382-84 (furthering discussion on ICWA).
  \item \textsuperscript{41} See Saffouri, supra note 38, at 1193-96 (passing of one act required state courts to get consent from tribes before exercising jurisdiction).
  \item \textsuperscript{42} See id. at 1193-96 (discussing policy shifting to aid tribal sovereignty).
  \item \textsuperscript{43} See WILLIAM C. CANBY JR., AMERICAN INDIAN LAW IN A NUTSHELL 244-45 (West, 6th ed., 2015) (discussing rights extended to tribal courts and tribal sovereignty). See generally, State Jurisdiction Over Offenses Committed By Or Against Indians In The Indian Country, 18 U.S.C. § 1162 (2010) (giving states criminal and civil jurisdiction over tribal lands within state borders).
  \item \textsuperscript{44} See CANBY, supra note 43, at 244-45 (explaining tribal courts and tribal jurisdiction).
  \item \textsuperscript{45} Compare 25 U.S.C. § 1911(a) (1978) (providing exclusive jurisdiction to tribal court over proceedings involving Indian children, regardless of domicile), with CANBY, supra note 43, at 244-45 (explaining instances in which tribal courts do not have jurisdiction).
  \item \textsuperscript{46} See 25 U.S.C. § 1911(a) (“Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child”). See generally CANBY, supra note 43, at 244-45 (explaining specifics of tribal court jurisdiction).
\end{itemize}
however, many of these cases end up in state courts for a multitude of reasons. If a child is domiciled outside of the tribe’s reservation, the child can still be subject to the jurisdiction of the tribal court. Under ICWA, state courts should transfer adoption and custody cases to the tribal court upon petition by the parent, guardian, or the tribe. A state retains the right to exercise “good cause” in order to retain the case in state court. For these reasons, cases involving ICWA have historically been intertwined with state and tribal courts. It has led to issues with the proper adjudication of cases, and improper placement of Native American children in foster or adoptive homes. It has also led to challenges for non-Native American individuals and families to adopt a Native American child, as placement preferences are with Native American families absent good cause. While the concept of good cause is not defined in ICWA, courts have generally held this to mean that there must be a showing of good reason by the state to deviate from ICWA’s requirements.

47 See CANBY, supra note 43, at 244-45 (“[T]he state court must transfer the case to tribal court upon petition of either parent, the child’s Indian custodian, or the tribe unless the state court finds ‘good cause’ for retaining the case or unless either parent objects to the transfer.”). See also Saffouri, supra note 38, at 1193-207 (explaining “good cause” exception and factors for determination). 48 See CANBY, supra note 43, at 224-45 (explaining procedure for transferring cases into state court). 49 See 25 U.S.C. § 1902 (declaring congressional policy in protecting interest of Indian children). See also 2015 Guidelines, supra note 5 (outlining procedures for transferring ICWA cases). The right to transfer a case can occur at any time in the proceeding, yet the tribal court may retain discretion. Id. The “good cause” exception still applies. Id. 50 See CANBY, supra note 43, at 244-45 (“[T]he state court must transfer the case to tribal court upon petition of either parent, the child’s Indian custodian, or the tribe unless the state court finds “good cause” for retaining the case or unless either parent objects to the transfer.”). See also Saffouri, supra note 38, at 1192 n.4 (discussing general process of transfers into state courts); Parnell, supra note 34, at 385-88 (detailing tribal court jurisdiction). 51 See Parnell, supra note 34, at 388 (discussing tribal intervention during state court proceedings); Saffouri, supra note 38, at 1193-96 (explaining jurisdiction within context of ICWA’s history). 52 See 2015 Guidelines, supra note 5 (explaining rationale behind the new ICWA guidelines). 53 See id. (noting cases involving adoption disputes and ICWA); Saffouri, supra note 38, at 1206 (explaining placement preference is with Native American families); see also Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2556-57 (2013) (stating obstacles for non-Indian family to adopt an Indian child under ICWA); Shreya A. Fadia, Note, Adoptive Couple v. Baby Girl’s Refashioning of ICWA’s Framework, 114 COLUM. L. REV. 2007, 2009 (2014) (“This is in part because the child-custody proceeding at the center of Adoptive Couple was one involving placement of a Native American child and thus implicated [ICWA], the complex set of federal provisions governing child-custody proceedings concerning placement of Indian children.”). 54 See 1979 Guidelines, supra note 2, at 67,584 (discussing implementation of ICWA and standards to be followed in determining placement).
B. Purpose of the Indian Child Welfare Act

As previously mentioned, ICWA was enacted in 1978 during the era of self-determination. ICWA was enacted in order to establish a “strong federal policy that, where that, where possible, an Indian child should remain in the Indian community.” ICWA establishes “guidance to States regarding the handling of child abuse and neglect and adoption cases involving Native children and sets minimum standards for the handling of these cases.” Native American children were being removed from their homes and placed into non-Native American homes at a concerning rate, which fueled concern of forced assimilation.

The purpose of enacting ICWA was to reverse the separation of Native American children from their families, and to establish tribal authority over child welfare cases. Beginning in the early 1970’s, congressional hearings were held on the survival of Native American tribes. During this time, it became obvious that there was an issue in the Native American community. Children were being taken from their homes at high rates, and these children were placed in non-Native American homes. This became alarming due to the echoes of assimilation and the “white-run” boarding schools in the early 1900’s. During this time, Native American children were taken from their homes in an effort to assimilate...
them into American society.\textsuperscript{64} This resulted in a loss of cultural identity and practices, and during the 1970's those fears were ultimately renewed.\textsuperscript{65}

The congressional hearings, discussing the flaws with Native American policies, in the early 1970's made it clear that changes were necessary.\textsuperscript{66} The solution Congress adopted is what is now known as ICWA.\textsuperscript{67} The Act "governs adoption and child custody proceedings involving Indian children . . . custody proceedings subject to the Act include foster care, placement, termination of parental rights, and pre-adoptive and adoptive placement, but not parental custody pursuant to divorce."\textsuperscript{68}

\textbf{C. Controversial Cases}

Congress enacted ICWA in order, "to protect the best interests of Indian children," and since enactment it has been heavily litigated and contested, resulting in many court cases.\textsuperscript{69} The BIA cited several controversial ICWA cases in the years since the enactment of ICWA as the basis for the implementation of the new guidelines.\textsuperscript{70} In 1989, \textit{Mississippi Band of Choctaw Indians v. Holyfield}, established that "a federal policy that, where possible, an Indian child should remain in the Indian community."\textsuperscript{71}

\textsuperscript{64} See id. at 602-03 (explaining removal of children from homes and its impact).
\textsuperscript{65} See id. at 603 (discussing loss of cultural identity attributed to removal practice).
\textsuperscript{66} See id. at 604 (discussing congressional hearings prior to ICWA); see also, Fadia, supra note 53, at 2012 ("[C]ited statistics show[ed] that approximately a quarter of all Indian children had been removed from their families and placed in foster or adoptive care, or had been sent to boarding schools.").
\textsuperscript{67} See Atwood, supra note 35, at 603-07 (addressing removal of children from homes and its impact).
\textsuperscript{68} See CANBY, supra note 43, at 244-45 (explaining purpose of ICWA).
\textsuperscript{70} See 2015 Guidelines, supra note 5, at 10,146 (citing state court cases dealing with ICWA).
\textsuperscript{71} See Miss. Band of Choctaw Indians, 490 U.S. at 37 (holding Native American children should stay in Native American community); see also 2015 Guidelines, supra note 5, at 10,146 (citing Miss. Band of Choctaw Indians as one basis for ICWA and preserving cultural community).
This holding by the United States Supreme Court affirmed the policy behind ICWA, which is to protect the cultural values of Native American children.\textsuperscript{72}

Subsequently, \textit{Oglala Sioux Tribe & Rosebud Sioux Tribe v. Van Hunnik} exposed several issues with the application of ICWA.\textsuperscript{73} The Court held that there were violations of Due Process with respect to determining placement and custody of Native American children.\textsuperscript{74} The Court also noted that orders were issued to remove Indian children from their homes without basing those orders on evidence adduced at the hearing “by not allowing them to present evidence to contradict the State’s removal documents.”\textsuperscript{75}

Perhaps the most recent and controversial case involving ICWA was decided only a few years ago in 2013.\textsuperscript{76} \textit{Adoptive Couple v. Baby Girl} was a case in which a Native American father argued he did not consent to the termination of his parental rights, and sought to block the adoption of his child by a non-Native American family.\textsuperscript{77} The South Carolina State Supreme Court applied ICWA, and held that the termination of the father’s rights was barred under the statute.\textsuperscript{78}

The United States Supreme Court reversed the decision.\textsuperscript{79} The Court held that ICWA did not bar the termination of the father’s rights, and ICWA did not apply because the father was not seeking adoption of the child.\textsuperscript{80} Ultimately, the father ended his legal parental rights before the birth of the child, and no parental relationship was ever established.\textsuperscript{81} The purpose of ICWA is to prevent the “breakup” of Native American families.\textsuperscript{82} In this

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\item \textsuperscript{72} See 2015 Guidelines, \textit{supra} note 5, at 10,146 (emphasizing importance of keeping children in cultural community); \textit{Miss. Band of Choctaw Indians}, 490 U.S. at 30 (establishing federal policy behind ICWA).
\item \textsuperscript{73} See \textit{Oglala Sioux Tribe & Rosebud Sioux Tribe v. Van Hunnik}, 100 F. Supp. 3d 749, 752 (D. S.D. 2015) (explaining application of Due Process Clause in regards to tribal cases).
\item \textsuperscript{74} See id. at 769-72 (addressing several due process violations).
\item \textsuperscript{75} Id. at 769-72 (explaining evidentiary issues leading to breakup of families).
\item \textsuperscript{76} See \textit{Adoptive Couple v. Baby Girl}, 133 S. Ct. 2552, 2555 (2013) (arguing ICWA did not apply due to lack of relationship with Indian father); \textit{see also} \textit{Brewer, supra} note 5 (stating \textit{Adoptive Couple} was contributing factor to reform of ICWA).
\item \textsuperscript{77} See \textit{Adoptive Couple}, 133 S. Ct. at 2553 (discussing factual basis for bringing case and references to ICWA).
\item \textsuperscript{78} See id. (arguing father did not have rights under ICWA).
\item \textsuperscript{79} See id. at 2554-56 (holding father unable to use ICWA defense).
\item \textsuperscript{80} See id. at 2564 (“Biological Father is not covered by § 1915(a) because he did not seek to adopt Baby Girl; instead, he argued that his parental rights should not be terminated in the first place.”).
\item \textsuperscript{81} See id. at 2558-60 (discussing \textit{Adoptive Couple’s} custody battle with Biological Father). “Biological Father signed papers stating that . . . he was ‘not contesting the adoption.’” Id. at 2558.
\item \textsuperscript{82} See id. at 2552 (noting purpose behind ICWA was to uphold Indian family structure).
\end{itemize}
instance, there was no family relationship that met the definition under ICWA; therefore, the statute did not apply.\textsuperscript{83}

This major decision had a substantial impact on the application of ICWA.\textsuperscript{84} While the Supreme Court’s decision in Adoptive Couple did not overturn ICWA, it did create restrictions on voluntary adoptions.\textsuperscript{85} Ultimately, this decision, along with other issues involving ICWA, led the BIA to enact new guidelines, and a new Final Rule, to help clarify the purpose and application of ICWA in state courts.\textsuperscript{86}

\section*{D. Enactment of Guidelines for ICWA}

The BIA enacted guidelines in order to ensure the proper application and adjudication of ICWA.\textsuperscript{87} Due to the fact that there was no prior legislation on the issue, the BIA felt that it would be appropriate to issue guidelines to model how the statute was to be properly applied as intended by Congress.\textsuperscript{88} The first set of guidelines was issued the year after the statute was enacted with the aim of preserving congressional intent.\textsuperscript{89}

\subsection*{1. 1979 Guidelines}

After the enactment of ICWA in 1978, the BIA determined that guidelines to the application of ICWA should be issued to ensure proper adjudication of ICWA cases and clarify to any questions concerning the statute.\textsuperscript{90} The ICWA statute states that there must be “reasonable efforts”

\begin{thebibliography}{99}
\item See Adoptive Couple, 133 S. Ct. at 2554-56 (explaining lack of relationship meant ICWA did not apply). See also 2015 Guidelines, supra note 5, at 10,146 (explaining rationale behind new guidelines and relation to Adoptive Couple).
\item See Brewer, supra note 5 (stating Adoptive Couple was turning point in realization that ICWA needs reform).
\item See 2015 Guidelines, supra note 5, at 10,146 (outlining purpose behind enactment of new guidelines).
\item See 1979 Guidelines, supra note 2, at 67,586 (“Proceedings in state courts involving the custody of Indian children shall follow strict procedures and meet stringent requirements to justify any result in any individual case contrary to these preferences.”).
\item See id. (“These guidelines represent the interpretation of the Interior Department of certain provisions of the Act. Other guidelines provide procedures which, if followed, will help assure that rights guaranteed by the Act are protected when state courts decide Indian child custody matters.”).
\item See id. (noting BIA felt clarification and instruction on ICWA necessary).
\item See id. (providing detailed insight on how to apply ICWA in state courts).
\end{thebibliography}
made to prevent the breakup of a Native American family, and to place children in Native American homes.91 However, there was little to no guidance from Congress or the Supreme Court as to the application or enforcement of this vague standard.92 For this reason, the BIA drafted guidelines to assist state courts and agencies to apply ICWA in a uniform and consistent manner.93

2. 2015 Guidelines

The 2015 ICWA Guidelines were enacted to help state courts and agencies apply ICWA.94 The new guidelines came as a result of years of misapplication and controversial cases such as Adoptive Couple.95 The BIA held listening sessions in order to establish what the issue areas were with the statute were.96 These listening sessions invited members of tribes, and those active in the adoption industry, to discuss their views on the handling of ICWA cases, and what aspects of ICWA needed to be clarified to ensure

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91 See 25 U.S.C. § 1912 (d) (2016) (“[E]fforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family . . . .”). See also 1979 Guidelines, supra note 2, at 67,584 (“Any party petitioning a state court . . . must demonstrate to the court that prior to the commencement of the proceeding active efforts have been made to alleviate the need to remove the Indian child from his or her parents or Indian custodians.”); Megan Scanlon, Comment, From Theory to Practice: Incorporating the “Active Efforts” Requirement in Indian Child Welfare Act Proceedings, 43 ARIZ. ST. L.J. 629, 647 (2011) (explaining “active efforts” should be incorporated as national standard).

92 See Scanlon, supra note 91, at 646 (“However, due to a lack of guidance from Congress and the Supreme Court, the active efforts requirement and corresponding burden of proof fluctuates in state courts.”).

93 See id. at 646-47 (discussing state court inconsistencies applying “active efforts” requirement of section 1912(d)).

94 See 2015 Guidelines, supra note 5, at 10,146 (“Much has changed in the 35 years since the original guidelines were published, but many of the problems that led to the enactment of ICWA persist.”); see also Suzette Brewer, War of Words: ICWA Faces Multiple Assaults From Adoption Industry, INDIAN COUNTRY TODAY MEDIA NETWORK (July 8, 2015), http://indiancountrytodaymedianetwork.com/2015/07/08/war-words-icwa-faces-multiple-assaults-adoption-industry-160993 (explaining rationale for new guidelines, mainly emphasizing reform).

95 See 2015 Guidelines, supra note 5, at 10,146 (mentioning recent cases demonstrating ICWA is still wrongly applied). See also, Brewer, supra note 5 (“Washburn referred to Adoptive Couple v. Baby Girl and ongoing ICWA violations in South Dakota as crucial turning points that prompted the tribes and government agencies to find a better way to reinforce the federal statutes . . . .”).

96 See 2015 Guidelines, supra note 5, at 10,147 (explaining decision to hold public listening sessions on ICWA and its application).
that it was adjudicated properly. There were many that testified to the ongoing problems they saw with the application of ICWA.

Thus, the BIA enacted a revised edition of the guidelines to help state courts and agencies apply ICWA in a better way. Prior to 2015, the guidelines had not been updated since 1979, and since that time many instances of wrongful interpretation have occurred. In order to adapt to modern times, and place an emphasis on the importance to ICWA’s application, the new BIA guidelines were enacted.

3. The Final Rule

In June of 2016, the BIA announced that the agency would be enacting a federal rule pertaining to ICWA. This new federal rule would solidify aspects of the 2015 guidelines, and implement changes brought up as a result of the listening sessions with the public. The new rule, called the “Final Rule,” is binding on all state and tribal courts as of January 2017. The BIA has stated that Native American children are more likely to be removed from their homes than any other children. Also, the BIA blames the inconsistent application of ICWA as a reason for this staggering

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97 See id. ("The Department held several listening sessions, including sessions with representatives of federally recognized Indian tribes, State court representatives . . . the National Indian Child Welfare Association, and the National Congress of American Indians.").

98 See id. ("An overwhelming proportion of the commenters requested that the Department update its ICWA guidelines and many had suggestions for revisions that have been included.").

99 See id. at 10,146 ("These updated guidelines provide guidance to State courts and child welfare agencies implementing the Indian Child Welfare Act’s . . . provisions in light of written and oral comments received during a review of the Bureau of Indian Affairs . . . Guidelines for State Courts in Indian Child Custody Proceedings published in 1979.").

100 See id. at 10,147 (noting guidelines have not been updated since 1979).

101 See 2015 Guidelines, supra note 5, at 10,147 ("Although there have been significant developments in ICWA jurisprudence, the guidelines have not been updated since they were originally published in 1979.").


103 See id. at 38,784 ("The Department received comments from those at the listening sessions and also received written comments, including comments from individuals and additional organizations. The Department considered these comments and subsequently published updated Guidelines (2015 Guidelines) in February 2015.").

104 See id. at 38,782 ("The Department’s current nonbinding guidelines are insufficient to fully implement Congress’s goal of nationwide protections for Indian children, parents, and Tribes.").

105 See id. at 38,779 ("Native American children . . . are still disproportionately more likely to be removed from their homes and communities than other children.").
The BIA stated that they had hoped binding regulations would not be necessary; however, there was no uniform application of ICWA and the statute has been applied “contrary to Congress’s intent” resulting in harm to Native American families.107

II. TERMS OF 2015 GUIDELINES

The listening sessions with “hundreds of individual Indian people and organizations representing Indian child welfare advocacy” enabled the BIA to determine what problems were present with the application of ICWA.108 The listening sessions helped to establish areas of concern with ICWA, and procedures that have been inaccurately applied in previous years.109

The new ICWA guidelines were enacted in February 2015 in the Federal Register.110 The BIA noted that these guidelines “clarify the minimum Federal standards and best practices, governing implementation of ICWA.”111 The purpose behind the enactment of the 2015 guidelines is to ensure that the implementation is consistent among all states.112 The BIA proposed that the new guidelines would be “enacted for the benefit of Indians,” and to “be liberally construed” to benefit Native Americans.113

Following the implementation of the 2015 guidelines comes the enactment of a new federal rule.114 The Final Rule is a 360-page document

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106 See id. at 38,782 (“For decades, 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.”).
108 See Brewer, supra note 5 (explaining listening sessions for public on ICWA). See also 2015 Guidelines, supra note 5, at 10,147 (explaining need for listening sessions on ICWA to gauge public perception).
109 See Brewer, supra note 5 (“[T]heir comments were suggested changes and revisions to the guidelines, which have been all but ignored by state social service agencies and courts across the country for years.”).
111 See id. (explain purpose of implementation).
112 See id. at 10,146 (“In order to fully implement ICWA, these guidelines should be applied in all proceedings and stages of a proceeding in which the Act is or becomes applicable.”).
113 See id. (explaining proposed benefits of new guidelines).
114 See Final Rule, supra note 7, at 38,779 (explaining ICWA’s impact ICWA in state and tribal courts). See also Suzette Brewer, Breaking: BIA Publishes Final ICWA Rule, INDIAN COUNTRY MEDIA NETWORK, June 8, 2016.
that deals with everything from adoptions to termination of parental rights under ICWA. The Final Rule implements various new standards and requirements that are aimed at establishing consistency and regularity in ICWA application.

A. Analyzing the 2015 Guidelines

When the BIA enacted the 2015 guidelines, the aim was to correct areas that have historically been points of contention. The first section of the guidelines provides general provisions using the initial inquiry rule. Under the general provisions, state courts and agencies must ask whether ICWA applies in every case. If there is any reason to believe that a child may be of Native American ethnicity, then courts must apply ICWA, even in cases when a child is not removed from the home. The guidelines also establish pre-trial requirements for ICWA cases. Under pre-trial requirements, proper notice must be given to all parties involved. Additionally, the BIA no longer needs to verify if the child is Native American. The tribe retains the power to determine tribal membership, and the minimum degree of contact with the tribe is


See Final Rule, supra note 7, at 38,779 (describing implementation of ICWA in state and tribal courts). See also Brewer, supra note 5 (discussing aspects of new federal rule).

See Final Rule, supra note 7, at 38,779 (detailing new ICWA requirements in state and tribal courts). See also Brewer, supra note 5 (“[T]he 360-page rule will provide a more consistent interpretation of the 38-year-old statute ‘regardless of the child welfare worker, judge or state involved.’”).

See 2015 Guidelines, supra note 5, at 10,147 (stating background for new guidelines). There is a strong emphasis on improving application and preventing future harm. Id.

See id. at 10,146 (introducing general provisions for the new guidelines).

See id. at 10,147 (“Provides that, where agencies and State courts have reason to know that a child is an Indian child, they must treat that child as an Indian child unless and until it is determined that the child is not an Indian child.”).

See id. at 10,148 (stating courts should determine in every case whether ICWA applies).

See id. at 10,147-48 (discussing pre-trial requirements, such as initial inquiry).

See id. at 10,148 (“Whether ICWA applies, the updated guidelines will ensure that proper notice is given to parents/Indian custodians and tribes, that tribes have the opportunity to intervene or take jurisdiction over proceedings, as appropriate, and that ICWA’s placement preferences are respected.”).

See 2015 Guidelines, supra note 5, at 10,152 (“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.”).
eliminated. Under the guidelines, the tribe has reserved the right to intervene at any time.

Under ICWA, state courts can prevent the transfer of a case to a tribal court for “good cause.” Under these guidelines, section C clarifies procedures for transfers to tribal courts. Under this section, the right to transfer is available at any time during the proceeding, even in cases of emergency removal. While states still reserve the right to prevent the transfer for “good cause,” the guidelines are now more general and the level of contact the child has with the tribe is no longer relevant.

The guidelines now discuss the adjudication of involuntary placements, adoptions, and termination of parental rights. Under section D, there is now a right to examine records and reports in a timely manner. Also, this section ensures that parents, custodians, and tribes have the opportunity to ensure they are able to protect their rights under ICWA. Further, this section of the guidelines now places an emphasis on the “active efforts” requirement of the statute.

Also discussed under the guidelines are voluntary proceedings. In cases of voluntary proceedings, consent documentation requirements must be met. It is also necessary to determine if ICWA applies, and to abide by the provisions if it is determined to apply. In regards to dispositions, the

124 See id. at 10,147 (“[N]o requirement for the child to have a certain degree of contact with the tribe or for a certain blood degree.”).
125 See id. (discussing rights given to tribes pertaining to intervening in custody cases).
126 See id. at 10,149 (“[G]ood cause may be found if either parent objects, the tribal court declines, or the State court otherwise determines that good cause exists.”).
127 See id. at 10,149 (pertaining to § C of new guidelines).
128 See id. (discussing transfer process).
129 See 2015 Guidelines, supra note 5, at 10,149 (“[G]ood cause may be found if either parent objects, the tribal court declines, or the State court otherwise determines that good cause exists.”).
130 See id. at 10,149 (establishing guidelines for areas that historically have been troubled in ICWA application).
131 See id. (“[T]his ensures that parents/Indian custodians and tribes have the opportunity to examine information necessary to protect their rights under ICWA. This updated section also expands significantly on how to comply with the Act’s ‘active efforts’ requirement.”).
132 See id. (explaining previous concerns of misapplication of ICWA).
133 See id. at 10,149 (“[P]articularly [this section] establishes ‘active efforts’ require a level of effort beyond ‘reasonable efforts.’”). See also Scanlon, supra note 91, at 647 (discussing the “active efforts” standard).
134 See id. at 10,149 (establishing new regulations on voluntary proceedings).
135 See 2015 Guidelines, supra note 5, at 10,149 (“ICWA applies to voluntary proceedings that operate to prohibit an Indian child’s parent or Indian custodian from regaining custody of the child upon demand.”).
136 See id. (“[E]ven in voluntary proceedings, it is necessary to determine whether ICWA applies, and to comply with ICWA’s provisions.”).
guidelines require that all potential placements be investigated to ensure that they conform to ICWA.\textsuperscript{137} When placing the child in a foster home, the burden of proof is on the state agency to prove that the placement conforms to ICWA.\textsuperscript{138} Lastly, the guidelines set post-trial rights under ICWA.\textsuperscript{139} The post-trial rights include the ability of a Native American child, parent, guardian, or tribe to petition to invalidate an action when ICWA or the guidelines has been violated.\textsuperscript{140}

\textbf{B. Impact on State Courts and Agencies}

The provisions of the 2015 guidelines are meant to assist state courts and agencies on how to better apply ICWA.\textsuperscript{141} Under the new BIA guidelines, the 1979 guidelines will be replaced with updated reforms applicable in state and tribal courts.\textsuperscript{142} The hope is that the new guidelines will allow for better adjudication of ICWA cases, and establish better use of the statute to achieve consistency and uniformity in applying the law in the way Congress intended.\textsuperscript{143}

In the months since the release of the guidelines, there has been both praise and criticism for these new regulations pertaining to ICWA.\textsuperscript{144} The BIA Assistant Secretary of Indian Affairs, Kevin Washburn, states that the revised guidelines will be important in helping to promote Congress' intent

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\textsuperscript{137} See id. ("[The] agency bears the burden of proof if it departs from any of the placement preferences and must demonstrate that it conducted a diligent search to identify placement options that satisfy the placement preferences, including notification to the child’s parents or Indian custodians, extended family, tribe, and others[.]")

\textsuperscript{138} See id. (noting state court determines whether there is “good cause” to deviate from placement requirements).

\textsuperscript{139} See id. at 10,149 (discussing post-trial rights under the new guidelines).

\textsuperscript{140} See id. (providing recourse to challenge any potential violations of ICWA).

\textsuperscript{141} See 2015 Guidelines, supra note 5, at 10,146. (summarizing guidelines); Press Release, Off. of Assistant Sec’y, U.S. Dep’t of Interior, Assistant Secretary Washburn Answers Call to Strengthen Implementation of Indian Child Welfare Act (Mar. 18, 2015) (on file with author) [hereinafter Washburn Press Release] (discussing future legislation in furtherance of goal to strengthen implementation of ICWA).

\textsuperscript{142} See 2015 Guidelines, supra note 5, at 10,147 (explaining guidelines will replace previous guidelines from 1979).

\textsuperscript{143} See Washburn Press Release, supra note 141 (discussing ICWA clarification of state court and agency responsibilities in Indian child custody proceedings).

behind the statute. The BIA and proponents of the revised guidelines believe that the new guidelines will be beneficial in helping to allow Native American children to keep their families and cultural identities. There are also those who criticize the revised guidelines and the statute as a whole, such as the American Academy of Adoption Attorneys (“AAAA”). Those in opposition claim that the statute on its face is flawed and the revised guidelines do not make any significant changes. The argument is that the statute needs to be revised entirely, and it does not seek to promote the “best interest of the child.” Rather the opposition argues that the statute simply places children in an environment based on cultural and ethnic reasoning without considering if the placement will benefit the child. The differing opinions on the 2015 guidelines have given rise to several new lawsuits being filed in various courts around the country.

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145 See Brewer, supra note 5 (“Our updated guidelines for state courts will give families and tribal leaders comfort that the Obama Administration is working hard to provide better clarity so that the courts can carry out Congress’ intent to protect tribal families, preserve tribal communities, and promote tribal continuity now and into the future.”) (citations omitted).

146 See Washburn Press Release, supra note 141 (stating position of BIA and potential benefits), see also Brewer, supra note 5 (“Immediately after the announcement, tribes and Indian child welfare advocates across the country applauded the new direction by the government in enforcing the original intent and purpose of ICWA.”).

147 See Suzette Brewer, Indian Country Braces for Battle with Adoption Industry Over ICWA Guidelines, INDIAN COUNTRY TODAY MEDIA NETWORK, Mar. 30, 2015, [hereinafter Indian Country Braces for Battle] http://indiancountrytodaymedianetwork.com/2015/03/30/indian-country-braces-battle-adoption-industry-over-icwa-guidelines-159800 (discussing opposition); Brewer, supra note 5 (“Immediately after the announcement, tribes and Indian child welfare advocates across the country applauded the new direction by the government in enforcing the original intent and purpose of ICWA.”).

148 See Indian Country Braces for Battle, supra note 147 (detailing the opposition to ICWA rule and guidelines), see also Brewer, supra note 5 (discussing opposing views on new guidelines).

149 See Indian Country Braces for Battle, supra note 147 (discussing “best interest” argument). See also Brewer, supra note 5 (“[P]rovide clear instruction on the application of ‘active efforts’ to prevent the breakup of the Indian family and provisions which carry the presumption that ICWA’s placement preferences are in the best interests of Indian children.”).

150 See Indian Country Braces for Battle, supra note 147 (discussing ICWA).

C. Current Litigation

Several cases have been filed in response to the enactment of the new guidelines. While cases challenging ICWA occur regularly, these cases all question the constitutionality of the guidelines, and the BIA’s authority to enact it. Some of these cases are rooted in deeper issues with the ICWA statute, but are using the new guidelines as leverage to bring the issue to the courts’ attention.

A.D. et al. v. Washburn is a case filed by the Goldwater Institute, a group working for Native American affairs, challenging ICWA. It is one of several cases being filed to challenge the constitutionality of the 2015 guidelines. A.D. et al. is seeking declaratory and injunctive relief against provisions in ICWA and the new guidelines they deem to be discriminatory. The Goldwater Institute brought this class action lawsuit arguing that child placement should be race neutral. Currently, this case is still awaiting oral arguments; however, the state and federal governments have submitted motions to dismiss.

Recently, In the Interest of J.M.B was decided in the Court of Appeals of Kansas. This is one of the first cases decided that cited the BIA guidelines in the decision. The court used the new guidelines to determine how to apply ICWA when there is a reason to believe that a child is Native American. The court held that the guidelines state that ICWA

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152 See Indian Country Braces for Battle, supra note 147 (discussing lawsuits presently challenging legality of new guidelines); see also Goldwater Institute, supra note 151 (explaining status and claims of case against ICWA).
153 See Indian Country Braces for Battle, supra note 147 (explaining issues with ICWA are larger than the new guidelines).
154 See Goldwater Institute, supra note 151 (challenging constitutionality of ICWA).
155 See id. ("The Goldwater Institute is challenging certain provisions of the Act in order to vindicate the constitutional rights of off-reservation children of Indian ancestry . . .").
156 See id. (opposing provisions of ICWA).
157 See id. ("The civil rights class action is based on the fundamental principles of equal treatment under law, respect for individual rights, and federalism embedded in the federal Constitution.").
158 See id. ("The Goldwater Institute has been a national leader in the movement to improve educational opportunities for children, to protect individual rights and freedom of all individuals, including their right to engage in legitimate business occupations.").
159 See id. (awaiting court’s decision on motions to dismiss).
161 See id. (reversing the District Court’s lack of ICWA application).
162 See id. at *24 (holding new guidelines important in applying ICWA).
163 See id. at *26 ("Under the BIA Guidelines instruct that ’[I]f there is . . . membership in an Indian tribe.’").
must be applied when there is reason to believe that the child is Native American.\textsuperscript{164} The case was remanded to include the ICWA analysis, and presently, there have not been any rulings as to the constitutionality of the new guidelines.\textsuperscript{165}

Despite the lack of a ruling on the constitutionality of the 2015 guidelines, one case was decided that is considered a big blow to its implementation.\textsuperscript{166} National Council for Adoption v. Jewell\textsuperscript{167} was filed in Virginia on behalf of two Native American children.\textsuperscript{168} The complaint was filed in opposition to the guidelines new placement preferences.\textsuperscript{169} The case was dismissed in October 2015 on lack of standing to challenge the guidelines.\textsuperscript{170} Aside from the Jewell case and the A.D. \textit{et al.} case, there are cases in other states as well that challenge ICWA and the 2015 guidelines.\textsuperscript{171} These cases are in the initial stages and have not gone past complaints being

\textsuperscript{164} See id. at *1 (remanding to District Court for failing to apply ICWA).


\textsuperscript{166} See Synopsis of Recent Attacks on ICWA, supra note 164 (discussing cases pending on ICWA).

\textsuperscript{167} 156 F. Supp. 3d 727, 727 (E.D. Va. 2015).

\textsuperscript{168} See id. (holding plaintiff lacked standing); Synopsis of Recent Attacks on ICWA, supra note 164 (“one was a member of Navajo Nation, and the other a member of the Pascua Yaqui Tribe.”). Although both plaintiffs were Native American, the court held that there was no standing.

\textsuperscript{169} See Synopsis of Recent Attacks on ICWA, supra note 164 ("The Complaint . . . objects to the Guidelines’ placement preferences provision, which prescribes an ‘independent best interest of the child test.’ The complaint also objects to the Guidelines’ requirement that adoption agencies follow ICWA’s placement preferences and conduct a diligent search to identify placement options that satisfy these requirements.").

\textsuperscript{170} See Kate Fort, DOJ Wins Motion to Dismiss in NCFA v. Jewell, TURTLE TALK, Dec. 10, 2015, https://turtletalk.wordpress.com/2015/12/10/doi-wins-motion-to-dismiss-in-ncfa-v-jewell-2015-guidelines-litigation/ (“[P]laintiff’s lack of standing to challenge the Guidelines, that the Guidelines are not justiciable as a ‘final agency action’, and that the Guidelines are non-binding interpretive rules . . . and the 2015 Guidelines do not commandeer state entities.”). See also Suzette Brewer, Federal Judge Dismisses Anti-ICWA Suit, INDIAN COUNTRY TODAY MEDIA NETWORK, Dec. 11, 2015, http://indiancountrytodaymedianetwork.com/2015/12/11/federal-judge-dismisses-anti-icwa-suit-162743 [hereinafter Federal Judge Dismisses Anti-ICWA] (“[In an anti-ICWA suit,] United States District Judge Gerald Bruce Lee dismissed the suit, ruling . . . that the plaintiffs lack standing; the guidelines are not subject to trial because they do not create legal rights and obligations; the guidelines are non-binding; and that the guidelines ‘do not commandeer’ state entities.”).

\textsuperscript{171} See Synopsis of Recent Attacks on ICWA, supra note 164 (discussing other cases challenging ICWA and new guidelines).
filed; however, it is an emerging issue that should be watched by lawyers practicing in this field.\(^{172}\)

Since the enactment of the 2015 guidelines, the BIA had discussed the possibility of proposing a new federal rule in relation to ICWA.\(^{173}\) The new rule would essentially change the way that ICWA is implemented.\(^{174}\) Assistant Secretary for the BIA, Kevin Washburn, advocated in a press release that the new rule would “clarify and strengthen the implementation” of ICWA in an attempt to promote the policy behind the statute.\(^{175}\)

\[D. \text{The Final Rule}\]

Just as the BIA had discussed with the enactment of the 2015 guidelines, a new federal rule was enacted in June of 2016.\(^{176}\) The purpose of this rule is to establish consistency in the application of ICWA in all family law cases.\(^{177}\) Under the new federal rule, there are a wide variety of changes and regulations that are being implemented in the handling of ICWA cases.\(^{178}\) While the majority of the changes are similar to the changes enforced in the 2015 guidelines, there are some aspects, which are worth noting due to importance.\(^{179}\)

Firstly, the initial inquiry refers to any time there is a court case involving foster care, or the termination of parental rights, the question must

\[^{172}\] See id. (explaining status of major current litigation challenging ICWA and its guidelines).

\[^{173}\] See Washburn Press Release, supra note 141 (discussing future legislation in furtherance of goal); Brewer, supra note 5 (discussing potential for new federal rule on ICWA).

\[^{174}\] See Washburn Press Release, supra note 141 (discussing future legislation in furtherance of this goal); Brewer, supra note 5 (discussing the changes the new guidelines will implement in regards to ICWA).

\[^{175}\] See Washburn Press Release, supra note 141 (“The Bureau of Indian Affairs’ proposed rule clarifies and strengthens implementation of the Act’s requirements in Indian child custody proceedings to ensure that Indian families and tribal communities do not face the unwarranted removal of their youngest and most vulnerable members.”).


\[^{177}\] See Washburn Press Release, supra note 141 (legislation in furtherance of this goal); Brewer, supra note 5 (discussing implementation of Final Rule on ICWA).

\[^{178}\] See 2015 Guidelines, supra note 5, at 10,146 (detailing how changes to implementation of ICWA carried over to new rule); Indian Child Welfare Act Proceedings Final Rule, 81 Fed. Reg. at 38,779 (incorporating new guidelines into rule); Washburn Press Release, supra note 141 (discussing future legislation in furtherance of goal); Brewer, supra note 5 (explaining aspects of Final Rule on ICWA).

\[^{179}\] See Indian Child Welfare Act, 25 C.F.R § 23 (2017) (stating changes made are determined to be most important aspects of ICWA).
be asked whether the child is Native American. If the child is deemed to be Native American, then ICWA will apply. The aim with this new regulation is that all cases that fall under ICWA will now be properly screened and handled. Prior to the new regulation, cases that should have been handled as ICWA cases fell through the cracks due to lack of the initial inquiry rule application.

Another major change in the new Final Rule pertains to the reunification standard. Traditionally, the reunification standard was that "reasonable efforts" must be made to reunify the child with his/her family. However, under the Final Rule, the standard is changed to "active efforts" with the intent to ensure that there is a distinct pathway to reunification for the child and the family.

Further, the Final Rule clarifies when ICWA applies, and that there are to be no exceptions of applicability. Other important aspects of the Final Rule include the handling of emergency proceedings to ensure child

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181 See id. (noting important "threshold issue").
182 See id. at 38,779 (discussing historical and societal causes for reform).
183 See id. (explaining instances where cases were not handled appropriately).

[Commenters provided numerous anecdotal accounts where Indian children were unnecessarily removed from their families and placed in non-Indian settings; where the rights of Indian children, their parents, or their Tribes were not protected; or where significant delays occurred in Indian child-custody proceedings due to disputes or uncertainty about the interpretation of the Federal law.

Id. at 38,778; see also Brewer, supra note 5 (mentioning history of misapplication of ICWA as basis of rule).
184 See id. at 38,791 (explaining change in standard); Breaking: ICWA Final Rule, supra note 114 (explaining change in reunification standard).
185 See 25 C.F.R § 23 (noting change in standard from "active" to "reasonable" efforts). This is a lower standard, which may make it easier to meet. See Indian Child Welfare Act Proceedings Final Rule, 81 Fed. Reg. at 38,791.
186 See 25 C.F.R § 23 (noting even with standard there is still case by case discretion).
The purpose of ICWA is to prevent abuses by courts in the removal of Native American children from their communities. The BIA enacted the 2015 guidelines with the intention of resolving issues with ICWA and enforcing uniform implementation of the federal law. As the BIA states in the 2015 guidelines, the intention is to help resolve issues that have arisen since the implementation of the statute. Landmark cases, such as Adoptive Couple, are just examples of the issues that presently exist involving ICWA.

There is a lack of uniform application and understanding of when the rules apply; however, the guidelines set forth more in-depth explanations of the application of the rules. As previously mentioned, the new guidelines were the first part of a two-part plan. The Final Rule will

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188 See id. at 38, 779. (describing emergency proceedings).

189 See id. at 38, 779-96 (requiring consent for proceeding to be deemed “voluntary”).

190 See id. (requiring notice to be “prompt”).

191 See Atwood, supra note 35, at 601-05 (“The ICWA was designed to remedy a unique and longstanding record of child welfare abuses by federal and state officials, state court judges, and private adoption agencies that led to widespread removal of Indian children from their homes and communities.”).

192 See 2015 Guidelines, supra note 5, at 10,146 (stating the purpose for enacting new guidelines).

193 See id. (citing historical wrongs and Congressional intent).

194 See Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2254 (2013) (noting that the purpose behind ICWA was to uphold the Indian family structure). See also 2015 Guidelines, supra note 5, at 10,146 (explaining current issues with ICWA).

195 See 2015 Guidelines, supra note 5, at 10,146-48 (explaining how misapplication of ICWA results in harm to Native American children and families); Washburn Press Release, supra note 141 (announcing need for binding rule of ICWA application).

196 See Washburn Press Release, supra note 141 (stating guidelines will provide understanding of statute).

197 See Brewer, supra note 5 (discussing the plan for the guidelines and proposed rule).
essentially solidify and expand upon the 2015 guidelines. The guidelines, while controversial, serve an important purpose in preserving congressional statutes and intent. It is clear that reform of ICWA is necessary due to problems that can be seen throughout the history of the statute, mainly the lack of uniform application. By states choosing when to apply ICWA, there are situations that cause unnecessary harm to families and undue delay in cases.

A. Current Litigation

As previously discussed above, there is current litigation involving ICWA and the new guidelines; however, the cases are in the early stages. For example, in Jewell, where the guidelines were challenged, the court dismissed the case because of a lack of subject matter jurisdiction. Yet, the In the Interest of J.M.B court, applied the new guidelines to determine if ICWA was at play. The tension arising out of the two holdings further demonstrates historically differing opinions on ICWA, how to apply it, and how far it extends.

Due to the fact that this is an emerging issue, it will be important to follow similar cases that are currently before courts in various states to

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199 See id. (stating many concepts from guidelines carried over to Final Rule).
200 See supra Part II (explaining factual basis for reform).
201 See supra Part II (describing past difficulties arising from improper application of ICWA).
202 See Synopsis of Recent Attacks on ICWA, supra note 164 (listing current litigation on ICWA and guidelines that are still in preliminary stages).
determine how to follow ICWA. For example, A.D. et al., in Arizona, is also challenging the guidelines, and a motion to dismiss was also recently filed. If the case is dismissed, it will support the proposition made in Jewell, that the guidelines cannot be challenged. However, if the reverse happens it may set precedent for the courts limiting the scope of ICWA and guidelines. Presently, there are other cases in various states all with similar objectives, which are to challenge ICWA through the newly enacted guidelines. It is too soon to tell exactly how the lower courts will decide; however, these cases are to be watched by attorneys and judges in state courts to ensure that ICWA is properly and uniformly applied. New cases questioning the validity of ICWA and the new guidelines continue to emerge. At this point, it is likely that the cases will make their way to higher federal courts; thus, they will continue to be relevant and applicable going forward.

206 See Synopsis of Recent Attacks on ICWA, supra note 164 (naming all current litigation on the matter).
207 See Goldwater Institute, supra note 151 ("The failure of ICWA as applied by the BIA guidelines to adequately consider the child’s best interests deprives children with Indian ancestry of liberty without due process of law."). Goldwater is seeking to prove that aspects of ICWA and the guidelines are unconstitutional and there should be race-neutrality in these types of cases.
208 See Goldwater Institute, supra note 151 (discussing dismissal). See also Synopsis of Recent Attacks on ICWA, supra note 164 (setting further precedent that guidelines may not be challenged). See generally Nat’l Council for Adoption v. Jewell, 156 F. Supp. 3d 727, 727 (E.D. Va. 2015) (explaining that court would not decide matter on guidelines because not binding).
209 See Goldwater Institute, supra note 151 (seeking relief that would require parts of guidelines to be ruled unconstitutional). If Goldwater is successful in bringing this suit, it would strike parts of ICWA as unconstitutional.
210 See Synopsis of Recent Attacks on ICWA, supra note 164 (discussing cases in other states also challenging guidelines).
211 See id. (explaining cases and challenges to guidelines are new).
212 See Naomi Schaefer Riley, An Obsession with Racial Identity is Put Above the Needs of a Child, N.Y. POST, Mar. 27, 2016, 6:00AM, http://nypost.com/2016/03/27/an-obsession-with-racial-identity-is-put-above-the-needs-of-a-child (discussing recent ICWA cases arising from guidelines allowing petitioning of placements). A foster child in California was removed from her foster home after the Choctaw tribe and the biological father petitioned for her placement. The fact that she was one-sixty-fourth Native American allowed the Choctaw tribe and the biological father to cite to ICWA as grounds to remove her to an ICWA placement.
213 See Synopsis of Recent Attacks on ICWA, supra note 164 (explaining cases will likely be appealed and there is long way to go).
B. The Final Rule

In enacting the Final Rule, the BIA hopes that the new regulations will enforce ICWA in a more uniform and consistent manner. Changes such as the initial inquiry rule and the reunification standard are highly important, and if applied correctly could help numerous children and families. Historically, ICWA has not been implemented in a way that would be seen as uniform or consistent. This has led to major Supreme Court cases and public outrage. The Final Rule is an attempt to fix this. The rule is lengthy and detailed, which will be helpful in explaining the proper processes and requirements that the statute entails. The new reunification standard is important because it places an emphasis on the entire purpose of ICWA as a whole. Further, the initial inquiry rule helps to clarify when ICWA applies and to whom it applies. These changes are important because they are the crux of the long standing problems of ICWA. Just as the BIA hopes, consistency and uniformity are the necessary factors in ensuring the future success of ICWA.


215 See Synopsis of Recent Attacks on ICWA, supra note 164 (explaining in detail changes to ICWA application).

216 See id. (stating past misapplication serves as rationale for enacting a federal rule).


218 See Synopsis of Recent Attacks on ICWA, supra note 164 (stating purpose is to correct past wrongs and preserve Congressional intent).


221 See id. at 38,779 (stating there must be initial inquiry into whether child is Native American). The initial inquiry rule will help to determine if ICWA will be applied based on Native American ethnicity, and the presumption is that if there is any question as to the child being Native American, ICWA will still be applied. Id.

222 See Indian Child Welfare Act Proceedings Final Rule, 81 Fed. Reg. at 38,779 (hoping to establish reform); see also Brewer, supra note 5 (discussing aim to correct mistakes and prevent future harm due to inconsistency in state courts).

C. What This Means for The Future

ICWA has recently been thrown back into the national spotlight as an emerging issue due to the implementation of the 2015 guidelines and Final Rule.\textsuperscript{224} It stems from the decision in Adoptive Couple, and also Congress’ plenary power.\textsuperscript{225} The new BIA rule is binding on the states, whereas the guidelines are not.\textsuperscript{226} For this reason, it is an issue that is likely to work its way up to the Supreme Court in order to decide how far the regulation of ICWA can go.\textsuperscript{227}

The opposition towards the 2015 guidelines stems from those believing that ICWA is more problematic than it is probative.\textsuperscript{228} The AAAA is a group that has been very outspoken about what they believe to be concerns with the guidelines and the Final Rule.\textsuperscript{229} Currently, the AAAA serves as one of the biggest organized opponents to the actions being taken by the BIA.\textsuperscript{230} The AAAA’s main concern is the constitutionality of the Final Rule and the 2015 guidelines.\textsuperscript{231} The BIA contends that it is within their constitutional authority to enact these guidelines and the Final Rule, as there is a special and unique relationship that exists between the Federal Government and Native American tribe.\textsuperscript{232}

\textsuperscript{224} See Brewer, supra note 5 (discussing how ICWA returned to national attention).

\textsuperscript{225} See Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2554 (2013) (noting that the purpose behind ICWA was to uphold the Indian family structure); see also, e.g., Worcester v. Georgia, 31 U.S. 515, 515 (1832) (stating that Congress has plenary power over Native American tribes); Cherokee Nation v. Georgia, 30 U.S. 1, 1 (1831) (same); Morton v. Mancari, 417 U.S. 535, 555 (1974) (establishing Congress has a unique relationship with tribes).


\textsuperscript{227} See Synopsis of Recent Attacks on ICWA, supra note 164 (discussing cases challenging new guidelines); see also Am. Acad. of Adoption Attorneys, supra note 203 (explaining opposition to new guidelines). See also Nat’l Indian Child Welfare Ass’n, supra note 203 (discussing necessity of ICWA and new guidelines).

\textsuperscript{228} See Am. Acad. of Adoption Attorneys, supra note 203 (explaining AAAA and its motives).

\textsuperscript{229} See id. (citing constitutional and statutory violations as basis for opposition).

\textsuperscript{230} See id. (“The nation’s largest constituent group of adoption attorneys, law professors and judges submitted a 45-page response to the [BIA] concerning [the ICWA].”).

\textsuperscript{231} See id. (stating constitutionality of ICWA is still debatable).

In response to the challenges to the guidelines other groups, such as the National Indian Child Welfare Association, have spoken out in support of the BIA's actions.\textsuperscript{233} The group contends that the actions are within the constitutional authority of the BIA.\textsuperscript{234} According to the group, congressional plenary power allows for a unique relationship between the tribes and the Federal Government.\textsuperscript{235} Also, Congress allows for the BIA to issue rules that are in furtherance of the intended purpose of the bureau.\textsuperscript{236} Further, the group contends that ICWA has not been previously complied with and the new guidelines are necessary for uniform application of the statute across the country.\textsuperscript{237} They believe that ICWA has not been followed in the past, and until there is consistent application of the law, Native American child welfare will be at risk.\textsuperscript{238}

The future of ICWA is currently at a crossroads.\textsuperscript{239} While there are many who support the purpose and concept of ICWA, there are also those who greatly oppose it.\textsuperscript{240} The BIA feels that ICWA is a solid piece of legislation; however, it does need work.\textsuperscript{241} The BIA has come out and said that the Final Rule will help to enforce ICWA and allow it to achieve its

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\item \textsuperscript{233} See Nat'l Indian Child Welfare Ass'n, supra note 203 (advocating for ICWA).
\item \textsuperscript{234} See id. (arguing that Congress has authority over Native American affairs). See generally Morton v. Mancari, 417 U.S. 535, 555 (1974) (stating that Congress has a unique relationship with tribes).
\item \textsuperscript{235} See Nat'l Indian Child Welfare Ass'n, supra note 203 (“[M]atters regarding tribes and tribal members are within the purview of the federal—not state—government.”).
\item \textsuperscript{236} See id. (“[T]he proposed regulations will be promulgated based on the authority granted by Congress which states: ‘the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter.’
\item \textsuperscript{237} See id. (“The proposed regulations provide the clarity that was previously missing to support consistent ICWA application nationwide that can protect all of the parties who are involved in these proceedings.”).
\item \textsuperscript{238} See id. (“[C]hildren and families will continue to face discrimination in the child welfare system, will continue to be removed at alarming rates, and will continue to be placed in risky adoptions.”).
\item \textsuperscript{239} See Am. Acad. of Adoption Attorneys, supra note 203 (discussing opposition for new guidelines); Nat'l Indian Child Welfare Ass'n, supra note 203 (discussing support for new guidelines).
\item \textsuperscript{240} Compare Nat'l Indian Child Welfare Ass'n, supra note 203 (discussing support for new guidelines), with Am. Acad. of Adoption Attorneys, supra note 203 (discussing opposition for new guidelines); see also Brewer, supra note 5 (discussing support and opposition).
\item \textsuperscript{241} See Tanya H. Lee, Kevin Washburn Leaving BIA in January, INDIAN COUNTRY MEDIA NETWORK, Dec. 10, 2015, http://indiancountrytodaymedianetwork.com/2015/12/10/kevin-washburn-leaving-bia-january-162729 (“The ICWA has not lived up to its promise, so we’ve been looking at ways to improve that. ‘We updated guidelines that needed to be updated and we’re looking at the rules for implementing the law . . . .'”)
\end{itemize}
\end{footnotesize}
intended purpose. Ultimately, this is an emerging issue that those practicing law, especially family law, should be mindful of as it may lead to changes in how state courts apply ICWA. It is an area that is often overlooked; however, it is necessary to promote the welfare of Native American children. The Final Rule is a new solution to old problems. While on paper the benefits of the federal rule are clear and enticing, the real benefits will only come if the law is applied properly in state courts. The aim of the BIA in the Final Rule is to correct these areas of concern; however, state courts, attorneys, and judges will need to implement these changes across the board if the Final Rule is to be successful.

The BIA likely has the authority to enact the Final Rule and 2015 guidelines, as it has not been determined otherwise throughout the history of ICWA. Thus, the Final Rule is binding. It is important that it is followed in order to appropriately apply ICWA. Historically, Native American tribes have had a special relationship with the Federal Government. ICWA, the Final Rule, and the 2015 guidelines are an attempt by Congress to correct the wrongs of the past. For these reasons, the Final Rule serves a special purpose for both the Federal Government, and

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242 See Proposed Rule, supra note 227, at 14,880 (stating BIA’s position on ICWA); see also Lee, supra note 243 (explaining BIA’s authority to enact rules and guidelines).


244 See Proposed Rule, supra note 227 at 14,880 (explaining necessity of protecting cultural values of Native American children and promoting judicial uniformity).

245 See id. (discussing establishing reform of ICWA).


247 See id. at 38,779-85 (declaring state courts need to apply ICWA uniformly to ensure Congress’s intent).

248 See id. (explaining why BIA has authority to issue guidelines and rules).

249 See id. (stating Final Rule is binding on state courts effective January 2017).

250 See id. (noting following rule will preserve congressional intent).

251 See id. at 38,779-81 (explaining how ICWA was not properly followed in past cases); Washburn Press Release, supra note 141 (discussing need for binding rules).

most importantly, the Native American tribes. It should be uniformly applied and adhered too unless a higher court states otherwise.

IV. CONCLUSION

There is no doubt that ICWA is a controversial law. It has been so since it was first implemented in 1978. The 2015 guidelines put in place by the BIA reignited ICWA issues that some had seemed to forget about. The BIA Final Rule is an attempt to resolve long standing issues. It is likely that a case will find its way to the United States Supreme Court in the near future. However, until that day, the current litigation serves as a guide as to where the law is going and how practitioners should be applying the law.

While attorneys may be aware that ICWA exists, they should be mindful that changes have occurred and more changes are likely to come in the coming months and years. If the current litigation serves as a guide, ICWA will continue to be a constitutional federal law. As the BIA has mentioned in establishing the Final Rule, most state courts have not historically followed ICWA in the appropriate, uniform manner. It is too soon to tell if the Final Rule will change this; however, it has been almost 40 years since the statute was enacted and it is still not being applied properly.

Attorneys practicing in state court, and especially attorneys practicing family law, should be mindful that the new ICWA rule does exist and it is binding. For those working in state courts, and those simply interested in Native American affairs, this is an issue area that is emerging. Within the coming years, it is likely that more clarity on ICWA and changes to the statute will occur. But for now, attorneys should be aware of the new rules and the new cases challenging ICWA, as it may be foreshadowing what is to come.

The 2015 guidelines and Final Rule are a great departure from the ways of the past. It is an attempt to right old wrongs and ensure justice. But just as history has demonstrated, the laws are only successful if applied properly. While the new guidelines and rules are created with Native

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253 See Indian Child Welfare Act Proceedings Final Rule, 81 Fed. Reg. at 38,779-81 (explaining unique purpose of ICWA and Final Rule); Breaking: ICWA Final Rule, supra note 114 (discussing basis for new rule); Washburn Press Release, supra note 141 (detailing rationale and need for ICWA reform to achieve important governmental purpose).

American children and families in mind, the processes within the rules must be followed to achieve tangible benefits and results.

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