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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.¹ The 38-year-old statute was last updated on its application with guidelines in 1979.² 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.³ Thus, issues resulted in the application of ICWA, and it often varied depending on jurisdiction.⁴ In February of 2015, the Bureau of Indian Affairs (“BIA”), enacted new guidelines for the application and adjudication of ICWA cases.⁵ The purpose of these new guidelines is to clarify the use of ICWA in child custody proceedings for state courts and agencies.⁶ Following the enactment of the

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).

³ See Carol Schultz Vento, Annotation, *Construction and Application of Indian Child Welfare Act of 1978 (ICWA)* (25 U.S.C.A. § 1901 et seq.) Upon Child Custody Determinations, 89 A.L.R. 5th 195, § 2.5 (noting applicability of Bureau of Indian Affairs guidelines to state court custody proceedings).

⁴ See *id.* at § 1 (stating different jurisdictions apply ICWA differently).

⁵ See Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146, 10,147 (Feb. 25, 2015) [hereinafter *2015 Guidelines*] (pertaining to application in state courts); see also Suzette Brewer, *BIA Releases New ICWA Guidelines to Protect Native Families and Children*, INDIAN COUNTRY TODAY MEDIA NETWORK (Feb. 26, 2015), <http://indiancountrytodaymedianetwork.com/2015/02/26/bia-releases-new-icwa-guidelines-protect-native-families-and-children-159392> (announcing enactment of new ICWA guidelines).

⁶ See 2015 Guidelines, *supra* note 5, at 10,146 (“[G]uidance to State courts and child welfare agencies implementing [ICWA] provisions in light of written and oral comments received during a review of the [BIA] *Guidelines for State Courts in Indian Child Custody Proceedings* published in 1979”).

2015 guidelines, the BIA enacted a federal rule implementing regulations on the application of ICWA in state and tribal courts.⁷ This new rule is binding, and effective as of January 2017.⁸

Historically, ICWA has been challenged since its enactment in 1978.⁹ In the years since its enactment, ICWA has been the subject of hundreds of court cases and academic writings.¹⁰ 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.¹¹ 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.¹²

The BIA held “listening sessions” with members of the field in order to determine what the major problems with ICWA were.¹³ The problems acknowledged by the BIA, specifically the lack of uniform application in courts, formed the basis of the new ICWA guidelines.¹⁴ 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.¹⁵ The new rule (“Final Rule”), further elaborates on the issues discussed in the 2015 guidelines, and implements many of the guidelines as binding law.¹⁶

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

⁷ See Indian Child Welfare Act Proceedings Final Rule, 81 Fed. Reg. 38,778, 38,779 (Jun. 14, 2016) (codified at 25 C.F.R. § 23) (discussing implementation of ICWA in state and tribal courts).

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.*

¹⁶ See Indian Child Welfare Act Proceedings Final Rule, 81 Fed. Reg. 38,778, 38,782 (Jun. 14, 2016) (codified at 25 C.F.R. § 23) (discussing implementation of ICWA in state and tribal courts).

in recent years.¹⁷ 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.¹⁸ Further it will examine the 2015 guidelines imposed by the BIA for state courts in relation to ICWA.¹⁹ Recent decisions regarding the guidelines,²⁰ and the implementation of the Final Rule are also being examined.²¹ Part II will discuss the terms of the 2015 guidelines and the impact it will have on cases in state courts.²² It will also mention recent court cases that have been filed challenging the constitutionality of ICWA and the 2015 guidelines.²³ Part III will analyze the 2015 guidelines and the Final Rule in relation to the purpose of ICWA,²⁴ specifically, looking at fundamentals of family law, such as the best interest of the child.²⁵ This section will analyze the recent cases being brought against the 2015 guidelines in relation to past challenges of ICWA.²⁶

This note will propose the impacts that the 2015 guidelines and Final Rule will have on attorneys and judges in state courts.²⁷ Further, the 2015 guidelines have ignited new court cases that challenge the validity of the rules and authority of the BIA to enact them.²⁸ 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.²⁹ Although it is a new and binding rule, the Final Rule will be

¹⁷ See *infra* Part I (discussing historical background of ICWA and guidelines).

¹⁸ See *infra* Part I, Section C (summarizing issues and decisions creating need for clarification and new guidelines).

¹⁹ See *infra* Part II, Section A (examining guidelines of BIA in detail). See also 2015 Guidelines, *supra* note 5, at 10,150-59 (clarifying minimum federal standards and best practices).

²⁰ See *infra* Part II, Section C (discussing current and recent litigation involving new guidelines).

²¹ See *infra* Part II (implementing new standards and requirements to establish consistency in ICWA application).

²² See *infra* Part II, Section A (discussing requirements of new ICWA guidelines).

²³ See *infra* Part II, Section C (mentioning recent cases filed questioning constitutionality of new guidelines).

²⁴ See *infra* Part III (stating guidelines and rules serve as reform of ICWA). See Indian Child Welfare Act Proceedings Final Rule, 81 Fed. Reg. 38,778, 38,779 (Jun. 14, 2016) (codified at 25 C.F.R. § 23) (implementing changes to administration of ICWA).

²⁵ See *infra* Part III (explaining federal rule solidifies and expands 2015 guidelines to better serve purpose).

²⁶ See *infra* Part III (discussing tension arising out of differing opinions).

²⁷ See *infra* Part III (noting this emerging issue is one for higher court to determine).

²⁸ See *infra* Part II (describing constitutionality challenges of new guidelines).

²⁹ See *infra* Part II, Section C (noting that, presently, no decision on constitutionality of guidelines, has been made).

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

³⁰ See *infra* Part III (discussing new Final Rule on ICWA). See also 2015 Guidelines, *supra* note 5, at 10,150-59 (“Effective immediately, these guidelines supersede and replace the guidelines published in 1979.”).

³¹ See *infra* Parts III & IV (noting changes new guidelines put in place for attorneys and state courts).

³² See *infra* Part IV (advising attorneys to be mindful of current and future changes).

³³ See *infra* Part IV (describing how Final Rule attempts to resolve issues with ICWA's application).

³⁴ See Wendy Therese Parnell, Comment, *The Existing Indian Family Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act*, 34 SAN DIEGO L. REV. 381, 382-84 (1997) (discussing history of ICWA statute). During this time, numerous children were removed from their homes and placed in non-Native American homes without explanation. *Id.*

³⁵ See Barbara Ann Atwood, Article, *Flashpoints Under The Indian Child Welfare Act: Toward A New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 654 (2002) (explaining the power of self-determination). “The federal government’s belated desire to save tribes from extinction resulted in the prioritizing by Congress of tribal survival . . . of the ICWA. The power of self-definition the right to define one’s constituents and survive as a collective entity lies at the core of tribal sovereignty and self-determination.” *Id.*

³⁶ See *id.* (identifying destruction of Indian tribes and culpability of government). See also Parnell, *supra* note 34, at 382 (regarding historical changes in federal Native American policies in past decades).

implementing reservations for tribes to even terminating tribes.³⁷ This changed during the 1970's, when the Nixon Administration implemented policies to further the self-determination of Native American tribes.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.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.⁴⁰ New legislation also served to establish the civil rights of Native Americans, and the sovereignty that tribes had on their reservation lands.⁴¹ Today, many of these pieces of legislation, such as the Indian Civil Rights Act of 1968, are still in effect and good law.⁴²

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

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.

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).

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).

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).

⁴¹ See Saffouri, *supra* note 38, at 1193-96 (passing of one act required state courts to get consent from tribes before exercising jurisdiction).

⁴² See *id.* at 1193-96 (discussing policy shifting to aid tribal sovereignty).

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).

⁴⁴ See CANBY, *supra* note 43, at 244-45 (explaining tribal courts and tribal jurisdiction).

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).

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).

however, many of these cases end up in state courts for a multitude of reasons.⁴⁷ If a child is domiciled outside of the tribe's reservation, the child can still be subject to the jurisdiction of the tribal court.⁴⁸ Under ICWA, state courts should transfer adoption and custody cases to the tribal court upon petition by the parent, guardian, or the tribe.⁴⁹ A state retains the right to exercise "good cause" in order to retain the case in state court.⁵⁰ For these reasons, cases involving ICWA have historically been intertwined with state and tribal courts.⁵¹ It has led to issues with the proper adjudication of cases, and improper placement of Native American children in foster or adoptive homes.⁵² 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.⁵³ 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.⁵⁴

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.⁵⁵ 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.”⁵⁶ 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.”⁵⁷ 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.⁵⁸

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.⁵⁹ Beginning in the early 1970’s, congressional hearings were held on the survival of Native American tribes.⁶⁰ During this time, it became obvious that there was an issue in the Native American community.⁶¹ Children were being taken from their homes at high rates, and these children were placed in non-Native American homes.⁶² This became alarming due to the echoes of assimilation and the “white-run” boarding schools in the early 1900’s.⁶³ During this time, Native American children were taken from their homes in an effort to assimilate

⁵⁵ See Saffouri, *supra* note 38, at 1193-96 (noting policy shift towards tribal sovereignty).

⁵⁶ See 2015 Guidelines, *supra* note 5, at 10,146 (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989)) (emphasizing rationale and need for ICWA).

⁵⁷ *Indian Child Welfare Act, (ICWA)*, Bureau INDIAN AFFS, U.S. DEP’T OF INTERIOR, <http://www.indianaffairs.gov/WhoWeAre/BIA/OIS/HumanServices/IndianChildWelfareAct/index.htm> (last updated Jan. 31, 2017) (explaining purposes of BIA and ICWA).

⁵⁸ See Saffouri, *supra* note 38, at 1196 (explaining instances of removal of children from homes). “For example during the early 1970’s in Minnesota, one in eight Indian children was in an adoptive home, and approximately ninety percent of Indian children were in non-Indian homes. *Id.*

⁵⁹ See Atwood, *supra* note 35, at 587 (explaining past wrongs as rationale for ICWA); see also, Fadia, *supra* note 53, at 2011 (“Congress’ primary impetus for enacting ICWA was mounting concern that removing Indian children from tribes could possibly endanger long-term tribal survival and the well-being of Indian children.”).

⁶⁰ See Atwood, *supra* note 35, at 601 (noting hearings concluded various issues for Native American tribes). “Testimony before congressional committees . . . documented the existence of a crisis in the Indian family . . . [that] threaten[s] survival.” *Id.*

⁶¹ See *id.* at 601-02 (describing separation of Indian families as tragic and destructive of Native American life).

⁶² See *id.* at 602 (explaining how removal of children from homes played role in enactment).

⁶³ See Atwood, *supra* note 35, at 602 (examining 1800’s when Indian children “were targets of blatant cultural genocide”). Children were placed in boarding schools to separate them from their Native American culture. *Id.*

them into American society.⁶⁴ This resulted in a loss of cultural identity and practices, and during the 1970's those fears were ultimately renewed.⁶⁵

The congressional hearings, discussing the flaws with Native American policies, in the early 1970's made it clear that changes were necessary.⁶⁶ The solution Congress adopted is what is now known as ICWA.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."⁶⁸

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.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.⁷⁰ In 1989, *Mississippi Band of Choctaw Indians v. Holyfield*, established that "'a federal policy that, where possible, an Indian child should remain in the Indian community.'"⁷¹

⁶⁴ See *id.* at 602-03 (explaining removal of children from homes and its impact).

⁶⁵ See *id.* at 603 (discussing loss of cultural identity attributed to removal practice).

⁶⁶ See *id.* at 604 (discussing congressional hearings prior to ICWA); see also, Fadia, *supra* note 53, at 1212 ("[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.").

⁶⁷ See Atwood, *supra* note 35, at 603-07 (addressing removal of children from homes and its impact).

⁶⁸ See CANBY, *supra* note 43, at 244-45 (explaining purpose of ICWA).

⁶⁹ See 25 U.S.C. § 1902 (declaring congressional policy in favor of Indian children, families, and tribes); *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2557 (2013) (discussing parental rights in regard to ICWA); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 33-36 (1989) (emphasizing importance of cultural community); *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 769-72 (D.S.D. 2015), *on reconsideration in part sub nom. Oglala Sioux Tribe v. Hunnik*, No. CV 13-5020-JLV, 2016 WL 697117 (D.S.D. Feb. 19, 2016) (discussing Constitutional parameters, specifically Due Process).

⁷⁰ See 2015 Guidelines, *supra* note 5, at 10,146 (citing state court cases dealing with ICWA). See also *Adoptive Couple*, 133 S. Ct. at 2252 (determining ICWA did not apply in this case); *Miss. Band of Choctaw Indians*, 490 U.S. at 30 (emphasizing cultural community); *Oglala Sioux Tribe*, 100 F. Supp. 3d at 749 (2015) (discussing Due Process in relation to tribal courts).

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.⁷²

Subsequently, *Oglala Sioux Tribe & Rosebud Sioux Tribe v. Van Hunnik* exposed several issues with the application of ICWA.⁷³ The Court held that there were violations of Due Process with respect to determining placement and custody of Native American children.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.”⁷⁵

Perhaps the most recent and controversial case involving ICWA was decided only a few years ago in 2013.⁷⁶ *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.⁷⁷ The South Carolina State Supreme Court applied ICWA, and held that the termination of the father’s rights was barred under the statute.⁷⁸

The United States Supreme Court reversed the decision.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.⁸⁰ Ultimately, the father ended his legal parental rights before the birth of the child, and no parental relationship was ever established.⁸¹ The purpose of ICWA is to prevent the “breakup” of Native American families.⁸² In this

⁷² See 2015 Guidelines, *supra* note 5, at 10,146 (emphasizing importance of keeping children in cultural community); *Miss. Band of Choctaw Indians*, 490 U.S. at 30 (establishing federal policy behind ICWA).

⁷³ See *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).

⁷⁴ See *id.* at 769-72 (addressing several due process violations).

⁷⁵ *Id.* at 769-72 (explaining evidentiary issues leading to breakup of families).

⁷⁶ See *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2552 (2013) (arguing ICWA did not apply due to lack of relationship with Indian father); see also Brewer, *supra* note 5 (stating *Adoptive Couple* was contributing factor to reform of ICWA).

⁷⁷ See *Adoptive Couple*, 133 S. Ct. at 2553 (discussing factual basis for bringing case and references to ICWA).

⁷⁸ See *id.* (arguing father did not have rights under ICWA).

⁷⁹ See *id.* at 2554-56 (holding father unable to use ICWA defense).

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.”).

⁸¹ See *id.* at 2558-60 (discussing *Adoptive Couple*’s custody battle with Biological Father). “Biological Father signed papers stating that . . . he was ‘not contesting the adoption.’” *Id.* at 2558.

⁸² See *id.* at 2552 (noting purpose behind ICWA was to uphold Indian family structure).

instance, there was no family relationship that met the definition under ICWA; therefore, the statute did not apply.⁸³

This major decision had a substantial impact on the application of ICWA.⁸⁴ While the Supreme Court's decision in *Adoptive Couple* did not overturn ICWA, it did create restrictions on voluntary adoptions.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.⁸⁶

D. Enactment of Guidelines for ICWA

The BIA enacted guidelines in order to ensure the proper application and adjudication of ICWA.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.⁸⁸ The first set of guidelines was issued the year after the statute was enacted with the aim of preserving congressional intent.⁸⁹

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.⁹⁰ The ICWA statute states that there must be "reasonable efforts"

⁸³ 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*).

⁸⁴ See *Brewer*, *supra* note 5 (stating *Adoptive Couple* was turning point in realization that ICWA needs reform).

⁸⁵ See *Top 10 ICWA Myths Fact Sheet Dispelling the Top 10 ICWA Myths*, NATIONAL INDIAN CHILD WELFARE ASSOCIATION http://www.nicwa.org/Indian_Child_Welfare_Act/documents/Top%2010%20ICWA%20Myths.ppd (last visited Jan. 31, 2017) (explaining voluntary restrictions on ICWA and correcting falsities on the matter).

⁸⁶ See 2015 Guidelines, *supra* note 5, at 10,146 (outlining purpose behind enactment of new guidelines).

⁸⁷ 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.").

⁸⁸ See *id.* ("[T]hese 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.").

⁸⁹ See *id.* (noting BIA felt clarification and instruction on ICWA necessary).

⁹⁰ See *id.* (providing detailed insight on how to apply ICWA in state courts).

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

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.⁹⁷ There were many that testified to the ongoing problems they saw with the application of ICWA.⁹⁸

Thus, the BIA enacted a revised edition of the guidelines to help state courts and agencies apply ICWA in a better way.⁹⁹ Prior to 2015, the guidelines had not been updated since 1979, and since that time many instances of wrongful interpretation have occurred.¹⁰⁰ In order to adapt to modern times, and place an emphasis on the importance to ICWA's application, the new BIA guidelines were enacted.¹⁰¹

3. The Final Rule

In June of 2016, the BIA announced that the agency would be enacting a federal rule pertaining to ICWA.¹⁰² 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.¹⁰³ The new rule, called the "Final Rule," is binding on all state and tribal courts as of January 2017.¹⁰⁴ The BIA has stated that Native American children are more likely to be removed from their homes than any other children.¹⁰⁵ Also, the BIA blames the inconsistent application of ICWA as a reason for this staggering

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.").

¹⁰² See Indian Child Welfare Act Proceedings Final Rule, 81 Fed. Reg. 38,778, 38,779-85 (Jun. 14, 2016) (codified at 25 C.F.R. § 23) (discussing implementation of ICWA in state and tribal courts).

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.").

statistic.¹⁰⁶ 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

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.”).

¹⁰⁷ See Indian Child Welfare Act Proceedings Final Rule, 81 Fed. Reg. at 38,782 (stating necessity of binding regulations on ICWA).

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.”).

¹¹⁰ See 2015 Guidelines, *supra* note 5, at 10,146-47 (stating purpose behind enactment of new guidelines).

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.¹¹⁵ The Final Rule implements various new standards and requirements that are aimed at establishing consistency and regularity in ICWA application.¹¹⁶

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.¹¹⁷ The first section of the guidelines provides general provisions using the initial inquiry rule.¹¹⁸ Under the general provisions, state courts and agencies must ask whether ICWA applies in every case.¹¹⁹ 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.¹²⁰

The guidelines also establish pre-trial requirements for ICWA cases.¹²¹ Under pre-trial requirements, proper notice must be given to all parties involved.¹²² Additionally, the BIA no longer needs to verify if the child is Native American.¹²³ The tribe retains the power to determine tribal membership, and the minimum degree of contact with the tribe is

<http://indiancountrytodaymedianetwork.com/2016/06/08/breaking-bia-publishes-final-icwa-rule-164738> [hereinafter *Breaking: ICWA Final Rule*] (announcing enactment of Final Rule).

¹¹⁵ 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).

¹¹⁶ See Final Rule, *supra* note 7, at 38,779 (detailing new ICWA requirements in state and tribal courts). See also Brewer, *supra* note 5 (“[The] 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.’”).

¹¹⁷ 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.*

¹¹⁸ See *id.* at 10,146 (introducing general provisions for the new guidelines).

¹¹⁹ 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.”).

¹²⁰ See *id.* at 10,148 (stating courts should determine in every case whether ICWA applies).

¹²¹ See *id.* at 10,147-48 (discussing pre-trial requirements, such as initial inquiry).

¹²² See *id.* at 10,148 (“[W]hether 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.”).

¹²³ 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.¹²⁴ Under the guidelines, the tribe has reserved the right to intervene at any time.¹²⁵

Under ICWA, state courts can prevent the transfer of a case to a tribal court for “good cause.”¹²⁶ Under these guidelines, section C clarifies procedures for transfers to tribal courts.¹²⁷ Under this section, the right to transfer is available at any time during the proceeding, even in cases of emergency removal.¹²⁸ 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.¹²⁹

The guidelines now discuss the adjudication of involuntary placements, adoptions, and termination of parental rights.¹³⁰ Under section D, there is now a right to examine records and reports in a timely manner.¹³¹ Also, this section ensures that parents, custodians, and tribes have the opportunity to ensure they are able to protect their rights under ICWA.¹³² Further, this section of the guidelines now places an emphasis on the “active efforts” requirement of the statute.¹³³

Also discussed under the guidelines are voluntary proceedings.¹³⁴ In cases of voluntary proceedings, consent documentation requirements must be met.¹³⁵ It is also necessary to determine if ICWA applies, and to abide by the provisions if it is determined to apply.¹³⁶ 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] establish[es] ‘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.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.¹³⁸ Lastly, the guidelines set post-trial rights under ICWA.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.¹⁴⁰

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.¹⁴¹ Under the new BIA guidelines, the 1979 guidelines will be replaced with updated reforms applicable in state and tribal courts.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.¹⁴³

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

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[.]”)

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

¹³⁹ See *id.* at 10,149 (discussing post-trial rights under the new guidelines).

¹⁴⁰ See *id.* (providing recourse to challenge any potential violations of ICWA).

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).

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

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

¹⁴⁴ See Casey Tolan, *A Series of New Lawsuits Is Challenging How Native American Kids Are Adopted*, FUSION.NET, July 17, 2015, 2:27PM <http://fusion.net/story/168764/a-series-of-new-lawsuits-is-challenging-how-native-american-kids-are-adopted/> (discussing criticism for new guidelines and new lawsuits).

behind the statute.¹⁴⁵ 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.¹⁴⁶ There are also those who criticize the revised guidelines and the statute as a whole, such as the American Academy of Adoption Attorneys (“AAAA”).¹⁴⁷ Those in opposition claim that the statute on its face is flawed and the revised guidelines do not make any significant changes.¹⁴⁸ The argument is that the statute needs to be revised entirely, and it does not seek to promote the “best interest of the child.”¹⁴⁹ 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.¹⁵⁰ The differing opinions on the 2015 guidelines have given rise to several new lawsuits being filed in various courts around the country.¹⁵¹

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).

¹⁵¹ See *A.D. v. Washburn*, No. CV-15-01259-PHX-NVM, 2016 U.S. Dist. LEXIS 135710, at *4-5 (D. Ariz. Sept. 29, 2016) (arguing ICWA and 2015 Guidelines violate U.S. Constitution). See also *A.D. v. Washburn: Equal Protection For Indian Children*, GOLDWATER INSTITUTE (Jul. 7, 2015), <http://goldwaterinstitute.org/en/work/topics/constitutional-rights/equal-protection/case/equal-protection-for-indian-children/> [hereinafter *Goldwater Institute*] (depicting lawsuit filed in response to new guidelines).

C. Current Litigation

Several cases have been filed in response to the enactment of the new guidelines.¹⁵² While cases challenging ICWA occur regularly, these cases all question the constitutionality of the guidelines, and the BIA's authority to enact it.¹⁵³ 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.¹⁵⁴

A.D. et al. v. Washburn is a case filed by the Goldwater Institute, a group working for Native American affairs, challenging ICWA.¹⁵⁵ It is one of several cases being filed to challenge the constitutionality of the 2015 guidelines.¹⁵⁶ *A.D. et al.* is seeking declaratory and injunctive relief against provisions in ICWA and the new guidelines they deem to be discriminatory.¹⁵⁷ The Goldwater Institute brought this class action lawsuit arguing that child placement should be race neutral.¹⁵⁸ Currently, this case is still awaiting oral arguments; however, the state and federal governments have submitted motions to dismiss.¹⁵⁹

Recently, *In the Interest of J.M.B.*¹⁶⁰ was decided in the Court of Appeals of Kansas.¹⁶¹ This is one of the first cases decided that cited the BIA guidelines in the decision.¹⁶² 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.¹⁶³ The court held that the guidelines state that ICWA

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).

¹⁶⁰ No. 112,578, 2015 Kan. App. Unpub. LEXIS 562, at *1 (July 10, 2015).

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.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.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.¹⁶⁶ *National Council for Adoption v. Jewell*¹⁶⁷ was filed in Virginia on behalf of two Native American children.¹⁶⁸ The complaint was filed in opposition to the guidelines new placement preferences.¹⁶⁹ The case was dismissed in October 2015 on lack of standing to challenge the guidelines.¹⁷⁰ Aside from the *Jewell* case and the *A.D. et al.* case, there are cases in other states as well that challenge ICWA and the 2015 guidelines.¹⁷¹ These cases are in the initial stages and have not gone past complaints being

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

¹⁶⁵ See *id.* (discussing application of ICWA, but not legality of new guidelines). See also *Memorandum from the ICWA Defense Project, Synopsis of Recent Attacks on the Indian Child Welfare Act (ICWA)*, (Oct. 19, 2015) http://narf.org/narf/documents/20151019_icwa_defense_memo.pdf?_ga=1.112710340.1950704103.1451494261, [hereinafter *Synopsis of Recent Attacks on ICWA*] (discussing current litigation involving constitutionality of ICWA).

¹⁶⁶ See *Synopsis of Recent Attacks on ICWA*, *supra* note 164 (discussing cases pending on ICWA).

¹⁶⁷ 156 F. Supp. 3d 727, 727 (E.D. Va. 2015).

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. *Id.*

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.”).

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/doj-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.”).

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. 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.”).

¹⁷⁶ See *Indian Child Welfare Act Proceedings Final Rule*, 81 Fed. Reg. 38,778, 38,778 (Jun. 14, 2016) (codified at 25 C.F.R. § 23) (adopting aspects of guidelines into new rule). See also *Brewer*, *supra* note 5 (explaining new federal rule and implications).

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.¹⁸⁰ If the child is deemed to be Native American, then ICWA will apply.¹⁸¹ The aim with this new regulation is that all cases that fall under ICWA will now be properly screened and handled.¹⁸² 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.¹⁸³

Another major change in the new Final Rule pertains to the reunification standard.¹⁸⁴ Traditionally, the reunification standard was that “reasonable efforts” must be made to reunify the child with his/her family.¹⁸⁵ 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.¹⁸⁶

Further, the Final Rule clarifies when ICWA applies, and that there are to be no exceptions of applicability.¹⁸⁷ Other important aspects of the Final Rule include the handling of emergency proceedings to ensure child

¹⁸⁰ See Indian Child Welfare Act Proceedings Final Rule, 81 Fed. Reg. at 38,778 (stating inquiry must occur at beginning of proceedings).

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).

[C]ommenters 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).

¹⁸⁷ See Indian Child Welfare Act Proceedings Final Rule, 81 Fed. Reg. at 38,783 (stating continued need for ICWA means applicability must be enforced).

safety,¹⁸⁸ proper handling of voluntary proceedings and records,¹⁸⁹ and notice requirements to parents and tribes.¹⁹⁰

III. ANALYSIS

The purpose of ICWA is to prevent abuses by courts in the removal of Native American children from their communities.¹⁹¹ The BIA enacted the 2015 guidelines with the intention of resolving issues with ICWA and enforcing uniform implementation of the federal law.¹⁹² As the BIA states in the 2015 guidelines, the intention is to help resolve issues that have arisen since the implementation of the statute.¹⁹³ Landmark cases, such as *Adoptive Couple*, are just examples of the issues that presently exist involving ICWA.¹⁹⁴

There is a lack of uniform application and understanding of when the rules apply;¹⁹⁵ however, the guidelines set forth more in-depth explanations of the application of the rules.¹⁹⁶ As previously mentioned, the new guidelines were the first part of a two-part plan.¹⁹⁷ The Final Rule will

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

Recognizing that emergency removal and placements are sometimes required to protect an Indian child's safety and welfare, the final rule clarifies the distinction between the requirements for emergency proceedings and other child-custody proceedings involving Indian children and includes provisions that help to ensure that emergency removal and placements are as short as possible, and that, when necessary, proceedings subject to the full suite of ICWA protections are promptly initiated.

Id.

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.¹⁹⁸ The guidelines, while controversial, serve an important purpose in preserving congressional statutes and intent.¹⁹⁹ 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.²⁰⁰ By states choosing when to apply ICWA, there are situations that cause unnecessary harm to families and undue delay in cases.²⁰¹

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.²⁰² For example, in *Jewell*, where the guidelines were challenged, the court dismissed the case because of a lack of subject matter jurisdiction.²⁰³ Yet, the *In the Interest of J.M.B.* court, applied the new guidelines to determine if ICWA was at play.²⁰⁴ The tension arising out of the two holdings further demonstrates historically differing opinions on ICWA, how to apply it, and how far it extends.²⁰⁵

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

¹⁹⁸ See Indian Child Welfare Act Proceedings Final Rule, 81 Fed. Reg. 38,778, 38,779 (Jun. 14, 2016) (codified at 25 C.F.R. § 23) (establishing binding regulations on ICWA).

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).

²⁰³ See *Nat'l Council for Adoption v. Jewell*, 156 F. Supp. 3d 727, 727 (E.D. Va. 2015) (holding guidelines cannot be challenged because not binding); *Synopsis of Recent Attacks on ICWA*, *supra* note 164 (discussing progress of *Jewell* case).

²⁰⁴ See *In re J.M.B.*, No. 112, 578, 2015 Kan. App. Unpub. LEXIS 562 at *1 (Kan. Ct. App. Jul. 10, 2015) (reversing district court's lack of application of ICWA.).

²⁰⁵ See *Synopsis of Recent Attacks on ICWA*, *supra* note 164 (discussing cases challenging the new guidelines). See also Press Release, Am. Acad. of Adoption Attorneys, Am. Acad. of Adoption Attorneys (AAAA) Submits Official Reply to Bureau of Indian Affairs in Response to Proposed ICWA Amendments (May 13, 2015) (on file at), <http://www.adoptioninstitute.org/news/american-academy-of-adoption-attorneys-aaaa-submits-official-reply-to-bureau-of-indian-affairs-in-response-to-proposed-icwa-amendments/> [hereinafter *Am. Acad. Of Adoption Attorney*] (stating opposition to new ICWA guidelines); *Setting the Record Straight: The Indian Child Welfare Act Fact Sheet*, NATIONAL INDIAN CHILD WELFARE ASS'N, (Sept. 2015), http://www.nicwa.org/government/documents/Setting-Record-Straight-About-ICWA_Sep2015.pdf [hereinafter *Nat'l Indian Child Welfare Ass'n*] (discussing necessity of ICWA and new guidelines).

determine how to follow ICWA.²⁰⁶ For example, *A.D. et al.*, in Arizona, is also challenging the guidelines, and a motion to dismiss was also recently filed.²⁰⁷ If the case is dismissed, it will support the proposition made in *Jewell*, that the guidelines cannot be challenged.²⁰⁸ However, if the reverse happens it may set precedent for the courts limiting the scope of ICWA and guidelines.²⁰⁹ Presently, there are other cases in various states all with similar objectives, which are to challenge ICWA through the newly enacted guidelines.²¹⁰ 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.²¹¹ New cases questioning the validity of ICWA and the new guidelines continue to emerge.²¹² 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.²¹³

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. *Id.*

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. *Id.*

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. *Id.* 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. *Id.*

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.²¹⁴ Changes such as the initial inquiry rule and the reunification standard are highly important, and if applied correctly could help numerous children and families.²¹⁵ Historically, ICWA has not been implemented in a way that would be seen as uniform or consistent.²¹⁶ This has led to major Supreme Court cases and public outrage.²¹⁷ The Final Rule is an attempt to fix this.²¹⁸ The rule is lengthy and detailed, which will be helpful in explaining the proper processes and requirements that the statute entails.²¹⁹ The new reunification standard is important because it places an emphasis on the entire purpose of ICWA as a whole.²²⁰ Further, the initial inquiry rule helps to clarify when ICWA applies and to whom it applies.²²¹ These changes are important because they are the crux of the long standing problems of ICWA.²²² Just as the BIA hopes, consistency and uniformity are the necessary factors in ensuring the future success of ICWA.²²³

²¹⁴ See Indian Child Welfare Act Proceedings Final Rule, 81 Fed. Reg. 38,778, 38,779 (Jun. 14, 2016) (codified at 25 C.F.R. § 23) (citing main purpose for the enactment of Final Rule); see also Brewer, *supra* note 5 (suggesting new rule will be beneficial in reaching this goal).

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).

²¹⁷ See Indian Child Welfare Act Proceedings Final Rule, 81 Fed. Reg. at 38,779-84 (citing past cases, like *Adoptive Couple*, as reasoning for needing new rule).

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

²¹⁹ See Indian Child Welfare Act Proceedings Final Rule, 81 Fed. Reg. at 38,779-82 (providing lengthy explanations on application of ICWA). See also Brewer, *supra* note 5 (explaining new rule).

²²⁰ See Indian Child Welfare Act Proceedings Final Rule, 81 Fed. Reg. at 38,791 (explaining new reunification standard).

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).

²²³ See *Washburn Press Release*, *supra* 141 (aiming to reform ICWA); Indian Child Welfare Act Proceedings Final Rule, 81 Fed. Reg. at 38,779 (explaining need for ICWA reform).

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.²²⁴ It stems from the decision in *Adoptive Couple*, and also Congress' plenary power.²²⁵ The new BIA rule is binding on the states, whereas the guidelines are not.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.²²⁷

The opposition towards the 2015 guidelines stems from those believing that ICWA is more problematic than it is probative.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.²²⁹ Currently, the AAAA serves as one of the biggest organized opponents to the actions being taken by the BIA.²³⁰ The AAAA's main concern is the constitutionality of the Final Rule and the 2015 guidelines.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.²³²

²²⁴ See Brewer, *supra* note 5 (discussing how ICWA returned to national attention).

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).

²²⁶ See Regulations for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 14,880, 14,881-82 (Mar. 20, 2015), available at <http://www.bia.gov/cs/groups/public/documents/text/idc1-029629.pdf> [hereinafter *Proposed Rule*] ("The proposed rule makes several of the provisions issued in the recently published *Guidelines* . . . binding as regulation. These proposed mandatory provisions . . . are authorized by ICWA."). See also Indian Child Welfare Act Proceedings Final Rule, 81 Fed. Reg. at 38,779 (establishing proposed regulations as binding principles).

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).

²²⁸ See *Am. Acad. of Adoption Attorneys*, *supra* note 203 (explaining AAAA and its motives).

²²⁹ See *id.* (citing constitutional and statutory violations as basis for opposition).

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].").

²³¹ See *id.* (stating constitutionality of ICWA is still debatable).

²³² See Indian Child Welfare Act Proceedings Final Rule, 81 Fed. Reg. 38,778, 38,779 (Jun. 14, 2016) (codified at 25 C.F.R. § 23) (citing congressional and statutory authority to enact rule and guidelines).

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.²³³ The group contends that the actions are within the constitutional authority of the BIA.²³⁴ According to the group, congressional plenary power allows for a unique relationship between the tribes and the Federal Government.²³⁵ Also, Congress allows for the BIA to issue rules that are in furtherance of the intended purpose of the bureau.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.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.²³⁸

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

²³³ See *Nat'l Indian Child Welfare Ass'n*, *supra* note 203 (advocating for ICWA).

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).

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.”).

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.’”).

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.”).

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.”).

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).

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).

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 . . .”).

intended purpose.²⁴² 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.²⁴³ It is an area that is often overlooked; however, it is necessary to promote the welfare of Native American children.²⁴⁴ The Final Rule is a new solution to old problems.²⁴⁵ 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.²⁴⁶ 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.²⁴⁷

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.²⁴⁸ Thus, the Final Rule is binding.²⁴⁹ It is important that it is followed in order to appropriately apply ICWA.²⁵⁰ Historically, Native American tribes have had a special relationship with the Federal Government.²⁵¹ ICWA, the Final Rule, and the 2015 guidelines are an attempt by Congress to correct the wrongs of the past.²⁵² For these reasons, the Final Rule serves a special purpose for both the Federal Government, and

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).

²⁴³ See *Proposed Rule*, *supra* note 227, at 14,880 (describing potential regulations to rectify misapplication of ICWA); see Indian Child Welfare Act Proceedings Final Rule, 81 Fed. Reg. 38,778, 38,779 (Jun. 14, 2016) (codified at 25 C.F.R. § 23) (implementing changes from Proposed Rule 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).

²⁴⁶ See Indian Child Welfare Act Proceedings Final Rule, 81 Fed. Reg. at 38,779-85 (requiring uniform application and compliance through established regulations and processes).

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).

²⁵² See Indian Child Welfare Act Proceedings Final Rule, 81 Fed. Reg. at 38,779-81 (stating purpose of Final Rule); see also Brewer, *supra* note 5 (announcing Final Rule and explaining terms).

most importantly, the Native American tribes.²⁵³ It should be uniformly applied and adhered too unless a higher court states otherwise.²⁵⁴

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

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).

²⁵⁴ See Indian Child Welfare Act Proceedings Final Rule, 81 Fed. Reg. at 38,779-80 (requiring uniform application of ICWA).

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

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