

Supporting Statement A

Indian Child Welfare Act (ICWA) Proceedings in State Court

OMB Control Number 1076-NEW

Terms of Clearance: None.

General Instructions

A completed Supporting Statement A must accompany each request for approval of a collection of information. The Supporting Statement must be prepared in the format described below, and must contain the information specified below. If an item is not applicable, provide a brief explanation. When the question “Does this ICR contain surveys, censuses, or employ statistical methods?” is checked "Yes," then a Supporting Statement B must be completed. OMB reserves the right to require the submission of additional information with respect to any request for approval.

Specific Instructions

Justification

- 1. Explain the circumstances that make the collection of information necessary. Identify any legal or administrative requirements that necessitate the collection.**

The Indian Child Welfare Act (ICWA or Act), 25 U.S.C. 1901 *et seq.*, imposes certain requirements for child custody proceedings that occur in State court when a child is an “Indian child.” In 1979, the Department issued Guidelines for State Courts; Indian Child Custody Proceedings, providing guidance for State courts to implement ICWA. In 2015, the Department updated these guidelines, making them more generally applicable in recognition that state child welfare agencies, as well as state courts, have responsibilities under ICWA. The Department is also developing regulations to mirror the guidelines. Both the regulations and guidelines provide procedural guidance for implementing ICWA, which necessarily involves some information collections to determine whether the child is Indian, provide notice to the tribe and parents/custodians, and maintain records.

- 2. Indicate how, by whom, and for what purpose the information is to be used. Except for a new collection, indicate the actual use the agency has made of the information received from the current collection. Be specific. If this collection is a form or a questionnaire, every question needs to be justified.**

The information collections are conducted during a civil action (i.e., a child custody proceeding). While these civil actions occur in State court, and the U.S. is not a party to the civil action, the

civil action is subject to the federal statutory requirements of ICWA, which the Secretary of the Interior oversees as part of its management of Indian affairs under 25 U.S.C. 2 and 9. Because these information collection requirements are not exempt under a strict reading of 5 CFR 1320.4(a)(2), which require that the administrative action “involves a Federal agency,” the Department has identified these as information collections requiring OMB approval.

Compliance with ICWA requires the following information collections:

All Child Custody Proceedings – Determination & Verification of ICWA Applicability

1. § 23.107 - State child custody agency (agency) must determine whether a child is an “Indian child” under ICWA in each child custody proceeding, including obtaining and providing to the court: genograms or ancestry charts for parents, the address of the domicile of the child, parents (or custodian, if applicable) and whether they are domiciled on an Indian reservation or in Oklahoma or Alaska.
2. § 23.109(c)(3) - If more than one tribe has been identified, the court must provide notice of the tribes’ determinations to each party to the proceeding and those entitled to notice.

Confirmed Indian Child Custody Proceedings—Notice

3. § 23.111, 23.113 - For each Indian child custody proceeding, the agencies and the State courts must provide notice of the child custody proceeding to the Indian child’s parents (or custodians, if applicable) and tribe(s) by registered mail, return receipt requested, containing the following information. This information is necessary to allow the tribe(s) to determine whether the child meets the definition of an “Indian child” (i.e., is a member or is eligible for membership and the biological child of a member):
 - o (1) Name of the child, the child’s birthdate and birthplace.
 - o (2) Name of each Indian tribe(s) in which the child is a member or may be eligible for membership.
 - o (3) In order to assist the Indian tribe(s) in making a determination of whether the child is an Indian child, the agency or court should include additional information such as all names known and current and former addresses of the child’s biological mother, biological father, maternal and paternal grandparents and great grandparents or Indian custodians, including maiden, married and former names or aliases; birthdates; places of birth and death; tribal affiliation, and/or other identifying information.
 - o (4) A copy of the petition, complaint or other document by which the proceeding was initiated.
 - o (5) Statements setting out:
 - (i) The name of the petitioner and name and address of petitioner’s attorney;
 - (ii) The right of the parent or Indian custodian to intervene in the proceedings.
 - (iii) The Indian tribe’s right to intervene at any time in a State court proceeding for the foster care placement of or termination of a parental right.
 - (iv) If the Indian parent(s) or, if applicable, Indian custodian(s) is unable

to afford counsel based on a determination of indigency by the court, counsel will be appointed to represent the parent or Indian custodian where authorized by State law.

- (v) The right to be granted, upon request, up to 20 additional days to prepare for the proceedings due to circumstances of the particular case, the notice must specify the amount of additional time that is available.
- (vi) The right to petition the court for transfer of the proceeding to tribal court under ICWA § 1911, absent objection by either parent: Provided, that such transfer is subject to declination by the tribal court of the tribe.
- (vii) The mailing addresses and telephone numbers of the court and information related to all parties to the proceeding and individuals notified under this section.
- (viii) The potential legal consequences of the proceedings on the future custodial and parental rights of the Indian parents or Indian custodians.

Emergency Removal of Indian Child

4. § 23.113(a) - Agency or State court must document the basis for any determination regarding whether removal or placement is no longer necessary (recordkeeping)
5. § 23.113(b) - Agency must maintain records that detail the steps taken to provide the required notice (recordkeeping)
6. § 23.113(c) - Agency petition for court order authorizing emergency removal/placement must include an affidavit with the following information:
 - o (1) The name, age and last known address of the Indian child.
 - o (2) The name and address of the child's parents and Indian custodians, if any.
 - o (3) If such persons are unknown, a detailed explanation of what efforts have been made to locate them.
 - o (4) Facts necessary to determine the residence and the domicile of the Indian child and whether either the residence or domicile is on an Indian reservation.
 - o (5) If either the residence or domicile is believed to be on an Indian reservation, the name of the reservation.
 - o (6) The tribal affiliation of the child and of the parents and/or Indian custodians.
 - o (7) A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action.
 - o (8) If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, a statement of efforts that have been made and are being made to transfer the child to the tribe's jurisdiction.
 - o (9) A statement of the specific active efforts that have been taken to assist the parents or Indian custodians so the child may safely be returned to their custody.
 - o (10) A statement of the imminent physical damage or harm expected and any evidence that the removal or emergency custody continues to be necessary to prevent such imminent physical damage or harm to the child.

Transfer to Tribal Court

7. § 23.118 - State court notifies tribal court of proposed transfer and provides tribal court with all records

Involuntary Indian Child Custody Proceedings

8. § 23.120 - Agency documents “active efforts” to prevent removal

Voluntary Indian Child Custody Proceedings

9. § 23.125 - Parent provides consent to voluntary termination of parental rights or adoption in writing to court, including: the name and birthdate of the Indian child, the name of the Indian child's tribe, any identifying number or other indication of the child's membership in the tribe, if any, and the name and address of the consenting parent or Indian custodian. If there are any conditions to the consent, the consent document should clearly set out the conditions, plus:
 - For consent to foster care placement: the name and address of the person or entity by or through whom the placement was arranged, if any, or the name and address of the prospective foster parents, if known at the time.
 - For consent to termination of parental rights or adoption: the name and address of the person or entity by or through whom any preadoptive or adoptive placement has been or is to be arranged.
10. § 23.126, 127 - State court must promptly notify the party by or through whom placement has been arranged that child must be returned to parent/custodian

Dispositions

11. § 23.128 - State court must document each placement including petition, all substantive orders, record of and basis for the placement determination, and justification of any deviation from the placement preferences
12. § 23.128 - Agency must maintain records of dispositions

Post-Trial

13. § 23.132 - State court must provide notice of the petition to all parties to the adoption proceedings and the tribe if the parent who executed a consent to termination of parental rights or adoption petitions the court to vacate
14. § 23.135 - State court or agency must provide notice of change in status quo to inform recipient of the right to petition for return of custody of the child or parent/custodian waives right to notice of change in status
15. § 23.136 - State court provides notice of final adoption decree/order
16. § 23.137 - States must establish a single location to maintain records of both voluntary and involuntary foster care, preadoptive placement and adoptive placements and must provide information to tribe or Secretary within 7 days of request by tribe or Secretary.

Each of these information collections is necessary to document compliance with the Act. The Department does not receive any of this information, so it has not made any use of it in the past.

3. **Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological collection techniques or other**

forms of information technology, e.g., permitting electronic submission of responses, and the basis for the decision for adopting this means of collection. Also describe any consideration of using information technology to reduce burden and specifically how this collection meets GPEA requirements.

Notice of Indian child custody proceedings may be made electronically, but only as a supplementary method because ICWA specifies that the notice must be provided by registered mail, return receipt requested. 25 U.S.C. 1912(a). Otherwise, State courts and agencies may choose to use whatever electronic collection techniques they choose.

4. Describe efforts to identify duplication. Show specifically why any similar information already available cannot be used or modified for use for the purposes described in Item 2 above.

These information collections are uniquely required by the Indian Child Welfare Act.

5. If the collection of information impacts small businesses or other small entities, describe any methods used to minimize burden.

This information collection may affect small State courts or State child welfare agencies. The Department has minimized burden by refraining from imposing information collection requirements beyond what is necessary to comply with and document compliance with the Act.

6. Describe the consequence to Federal program or policy activities if the collection is not conducted or is conducted less frequently, as well as any technical or legal obstacles to reducing burden.

If this collection is not conducted, or is conducted less frequently, there will be no direct consequence to a Federal program but Congress's intent in passing the Indian Child Welfare Act would be thwarted. A plain reading of the Act requires the information collection to fully comply.

7. Explain any special circumstances that would cause an information collection to be conducted in a manner:

- * **requiring respondents to report information to the agency more often than quarterly;**
- * **requiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it;**
- * **requiring respondents to submit more than an original and two copies of any document;**
- * **requiring respondents to retain records, other than health, medical, government contract, grant-in-aid, or tax records, for more than three years;**
- * **in connection with a statistical survey that is not designed to produce valid and reliable results that can be generalized to the universe of study;**
- * **requiring the use of a statistical data classification that has not been reviewed and**

- approved by OMB;
- * **that includes a pledge of confidentiality that is not supported by authority established in statute or regulation, that is not supported by disclosure and data security policies that are consistent with the pledge, or which unnecessarily impedes sharing of data with other agencies for compatible confidential use; or**
 - * **requiring respondents to submit proprietary trade secrets, or other confidential information, unless the agency can demonstrate that it has instituted procedures to protect the information's confidentiality to the extent permitted by law.**

Special circumstances exist that may require a respondent to provide information in fewer than 30 days, because States must determine whether ICWA applies as soon as possible and provide notifications as soon as possible to prevent the removal of an Indian child. Special circumstances also exist that may require retention of records for more than three years, to allow adult adoptees to learn about their tribal affiliation and parents. Respondents may be required to submit confidential information regarding parentage; State courts have procedures for protecting such confidential information.

- 8. If applicable, provide a copy and identify the date and page number of publication in the Federal Register of the agency's notice, required by 5 CFR 1320.8(d), soliciting comments on the information collection prior to submission to OMB. Summarize public comments received in response to that notice and in response to the PRA statement associated with the collection over the past three years, and describe actions taken by the agency in response to these comments. Specifically address comments received on cost and hour burden.**

Comment was taken on this information collection in the proposed rule, as part of the proposed rule, in compliance with OMB regulations.

Describe efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping, disclosure, or reporting format (if any), and on the data elements to be recorded, disclosed, or reported.

Consultation with representatives of those from whom information is to be obtained or those who must compile records should occur at least once every three years — even if the collection of information activity is the same as in prior periods. There may be circumstances that may preclude consultation in a specific situation. These circumstances should be explained.

The BIA consulted with a judicial assistant in Children's Court in the Second District of the State of New Mexico (Julie Parras (505) 841-7602). Ms. Parras stated that there were 30 active State child custody proceedings subject to ICWA as of February 23, 2015. Ms. Parras indicated that the Children's Court already fulfills the ICWA requirements. She estimated that compiling the information necessary to provide notice and actually providing notice takes approximately 30 minutes for each proceeding. In the past six years, she has seen only two or three cases

transferred to tribal court. The State of New Mexico already maintains all its placement records in a single location, in its statewide database called “Odyssey.” Ms. Parras stated that, in her view, the information is necessary for ICWA compliance and had no suggestions for reducing burden.

BIA also consulted with the Tribal Affairs Director, Oregon Department of Human Services (Nadja Jones (971) 301-1668). Ms. Jones stated that a head count of all the ICWA-eligible children in the state system on a given day (on April 1, 2014) found there were 127 ICWA-eligible children from tribes in Oregon, and 231 from tribes outside of Oregon, for a total of 358. Regarding burden, Ms. Jones stated that in cases where it is unclear whether the child is an Indian child, it may take approximately 3 hours for an initial assessment, plus up to three meetings of approximately 3 hours each to complete an ancestry chart and other background information to provide the tribe in the notice, for a total of 12 hours to determine whether a child is an “Indian child,” and then 6 hours to send out notices to the tribes and parents/custodians. Ms. Jones mentioned that, in a handful of cases, the State had to send out over 200 letters to determine which out-of-State tribe the child was a member or eligible for membership in. Ms. Jones stated that the process is necessary to ensure that the tribes have sufficient information to determine whether the child is eligible for membership.

9. Explain any decision to provide any payment or gift to respondents, other than remuneration of contractors or grantees.

No payments or gifts are provided to respondents.

10. Describe any assurance of confidentiality provided to respondents and the basis for the assurance in statute, regulation, or agency policy.

State courts and agencies may provide some assurance of confidentiality under applicable State law.

11. Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private. This justification should include the reasons why the agency considers the questions necessary, the specific uses to be made of the information, the explanation to be given to persons from whom the information is requested, and any steps to be taken to obtain their consent.

The State agency may ask questions regarding parentage, which may be considered sensitive, in order to determine whether a child is an “Indian child” under the Act.

12. Provide estimates of the hour burden of the collection of information. The statement should:

- * Indicate the number of respondents, frequency of response, annual hour burden, and an explanation of how the burden was estimated. Unless directed to do so,**

agencies should not conduct special surveys to obtain information on which to base hour burden estimates. Consultation with a sample (fewer than 10) of potential respondents is desirable. If the hour burden on respondents is expected to vary widely because of differences in activity, size, or complexity, show the range of estimated hour burden, and explain the reasons for the variance. Generally, estimates should not include burden hours for customary and usual business practices.

- * If this request for approval covers more than one form, provide separate hour burden estimates for each form and aggregate the hour burdens.
- * Provide estimates of annualized cost to respondents for the hour burdens for collections of information, identifying and using appropriate wage rate categories. The cost of contracting out or paying outside parties for information collection activities should not be included here.

Under the current regulations at 25 CFR 23, the Department receives copies of the notices that States send to tribes of child custody proceedings that may involve an “Indian child” under the Act. The Department receives approximately 200-300 of these notices each week, but estimates conservatively that only about half of these notices result in ICWA eligibility. For estimates in which States are investigating whether a child is an “Indian child” under ICWA, we estimate there to be 250/week, or 13,000 annually. For actual ICWA cases, we estimate that approximately 125 child custody proceedings under the Act occur each week, totaling 6,500 ICWA child custody proceedings each year. The number of ICWA cases may vary greatly by State, with some States having many more and some States having very few; the States we reached out to (Oregon and New Mexico) reflect that variance. These estimates are intended to be averages.

The annual number of State court and agency respondents is estimated to be 50. While there may be several State courts and agencies within each State handling child custody proceedings, for simplification, we have estimated one court and agency per State. The annual number of individual respondents submitting consent to termination of parental rights or adoption is estimated at an average of 5,000, though this number is expected to fluctuate greatly from year to year.

The burdens below reflect only the incremental burden above what a State court or agency would do in a child custody proceeding that does not involve ICWA requirements.

	Sec.	Respondent	Information Collection	Annual Number of Respondents	Frequency of Responses	Annual Number of Responses	Completion Time per Response	Total Annual Burden Hours	\$ Value of Annual Burden Hours*
1	23.107	State agency	Obtain information on whether child is “Indian child”	50	260	13,000	12	156,000	\$6,527,040

2	23.109 (c)(3)	State court	Notify of tribal membership where more than 1 tribe	50	130	6,500	1	6,500	\$271,960
3	23.111, 23.113	State agency	Notify tribe, parents, Indian custodian of child custody proceeding	50	260	13,000	6	78,000	\$3,263,520
4	23.113	State agency or State court	Document basis for emergency removal/placement **	50	260	13,000	0.5	6,500	\$271,960
5	23.113	State agency	Maintain records detailing steps to provide notice	50	260	13,000	0.5	6,500	\$271,960
6	23.113	State agency	Petition for court order authorizing emergency removal/placement (with required contents)	50	260	13,000	0.5	6,500	\$271,960
7	23.118	State court	Notify tribal court of transfer, provide records***	50	5	250	0.25	63	\$2,615
8	23.120	Agency	Document "active efforts"	50	130	6,500	0.5	3,250	\$135,980
9	23.125	Parent	Consent to termination or adoption (with required contents)	5,000	1	5,000	0.5	2,500	\$104,600
10	23.126, 127	State court	Notify placement of withdrawal of consent	50	2	100	0.25	25	\$1,046
11	23.128	State court	Document each placement (including required documents)	50	130	6,500	0.5	3,250	\$135,980
12	23.128	State agency	Maintain records of placements	50	130	6,500	0.5	3,250	\$135,980
13	23.132	State court	Notify of petition to vacate	50	5	250	0.25	63	\$2,615
14	23.135	State court	Notify of change in status quo	50	130	6,500	0.25	1,625	\$67,990
15	23.136	State court	Notify of final adoption decree/order	50	130	6,500	0.25	1,625	\$67,990
16	23.137	State court or State agency	Maintain records in a single location and respond to inquiries	50	130	6,500	0.25	1,625	\$67,990
						116,100	6.75	277,276	\$11,601,186

*To obtain the hourly rate for State and tribal government employees, we used **\$27.89**, the wages and salaries figure for State and local government workers from BLS Release USDL 14-2208, *Employer Costs for Employee Compensation—September 2014 (released December 10, 2014) Table 4, Employer costs per hour worked for employee compensation and costs as a percent of total compensation: State and local government workers, by major occupational and industry group*. To account for benefits, we then multiplied this rate by 1.5, to obtain a total rate of **\$41.84**.

**We estimate the number of emergency removal/placements to be the same as potential ICWA cases because many, and possibly all, cases begin with an emergency removal or placement.

***Number of transfers estimated based on response in no. 8 that only two-three transfers occur every six years (or 0.4 per year) for one of the thirteen districts in New Mexico, meaning approximately 5 annually occur (0.4 x 13) per State.

13. Provide an estimate of the total annual non-hour cost burden to respondents or recordkeepers resulting from the collection of information. (Do not include the cost of any hour burden already reflected in item 12.)

- * **The cost estimate should be split into two components: (a) a total capital and start-up cost component (annualized over its expected useful life) and (b) a total operation and maintenance and purchase of services component. The estimates should take into account costs associated with generating, maintaining, and disclosing or providing the information (including filing fees paid for form processing). Include descriptions of methods used to estimate major cost factors including system and technology acquisition, expected useful life of capital equipment, the discount rate(s), and the time period over which costs will be incurred. Capital and start-up costs include, among other items, preparations for collecting information such as purchasing computers and software; monitoring, sampling, drilling and testing equipment; and record storage facilities.**
- * **If cost estimates are expected to vary widely, agencies should present ranges of cost burdens and explain the reasons for the variance. The cost of purchasing or contracting out information collection services should be a part of this cost burden estimate. In developing cost burden estimates, agencies may consult with a sample of respondents (fewer than 10), utilize the 60-day pre-OMB submission public comment process and use existing economic or regulatory impact analysis associated with the rulemaking containing the information collection, as appropriate.**
- * **Generally, estimates should not include purchases of equipment or services, or portions thereof, made: (1) prior to October 1, 1995, (2) to achieve regulatory compliance with requirements not associated with the information collection, (3) for reasons other than to provide information or keep records for the government, or (4) as part of customary and usual business or private practices.**

In many cases, there are no start-up costs associated with these information collections because State courts are agencies are already implementing child custody actions. However, it is possible that some States may not yet have a single location, or electronic database accessible from anywhere, housing all placement records. For this reason, we are estimating a start-up cost of \$487,500 (or just under \$10,000 per state on average, with the understanding that there will be no start-up costs in some states and up to \$20,000 or more in others).

The annual cost burden to respondents associated with providing notice by registered mail is \$11.95 and the cost of a return receipt green card is \$2.70. For each Indian child custody proceeding, at least two notices must be sent—one to the parent and one to the tribe, totaling \$29.30.

At an annual estimated 13,000 child welfare proceedings that may involve an “Indian child,” this totals: \$380,900.

Together with the start-up cost, the total non-hour cost burden for all 50 States is **\$868,400**.

14. Provide estimates of annualized cost to the Federal government. Also, provide a description of the method used to estimate cost, which should include quantification of hours, operational expenses (such as equipment, overhead, printing, and support staff), and any other expense that would not have been incurred without this collection of

information.

There are no annualized costs to the Federal government associated with this collection, because the Federal government does not administer the collection.

15. Explain the reasons for any program changes or adjustments in hour or cost burden.

These information collections are identified as a program change because, while the Federal ICWA law always required these information collections, the Department has not sought to regulate them until now, and as such, has not sought clearance for them until now.

16. For collections of information whose results will be published, outline plans for tabulation and publication. Address any complex analytical techniques that will be used. Provide the time schedule for the entire project, including beginning and ending dates of the collection of information, completion of report, publication dates, and other actions.

There are no plans to publish the results of this collection of information.

17. If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons that display would be inappropriate.

We plan to display the expiration date for OMB approval on the Department's Guidelines and any other document restating ICWA's information collection requirements.

18. Explain each exception to the topics of the certification statement identified in "Certification for Paperwork Reduction Act Submissions."

There are no exceptions.