ATTORNEYS
Heather R. Kendall-Miller
Natalie A. Landreth
Erin C. Dougherty
Matthew N. Newman

Native American Rights Fund

745 W. 4th Ave., Suite 502, Anchorage, AK 99501 (907) 276-0680 FAX (907) 276-2466

EXECUTIVE DIRECTOR
John E. Echohawk

MAIN OFFICE
1506 Broadway
Boulder, CO 80302-6926
(303) 447-8760
FAX (303) 443-7776

WASHINGTON OFFICE
1712 N Street N.W.
Washington, D.C. 20036-2976
(202) 785-4166
FAX (202) 822-0068

WEBSITE ADDRESS
www.narf.org

May 19, 2015

Ms. Elizabeth Appel
Office of Regulatory Affairs & Collaborative Action
Indian Affairs, U.S. Department of the Interior
1849 C Street NW, MS 3642
Washington, DC 20240

Re: Notice of Proposed Rulemaking—Regulations for State Courts and Agencies in Indian Child Custody Proceedings—RIN 1076-AF25—Federal Register (March 20, 2015)

Dear Ms. Appel,

The Native American Rights Fund (NARF) Alaska Office is pleased to provide comments on the Notice of Public Rulemaking regarding Regulations for State Courts and Agencies in Indian Child Custody Proceedings (Proposed Rule), 80 Fed. Reg. 14,880-94 (Mar. 20, 2015).

NARF is a national non-profit law firm that has 45 years of experience with litigation and policy pertaining to Indian child welfare. NARF authored A PRACTICAL GUIDE TO THE INDIAN CHILD WELFARE ACT (ed. 2007)—the preeminent resource on the Indian Child Welfare Act (ICWA) for practitioners and judges—and NARF maintains an extensive and updated online edition[1] as well as ICWA INFO, a national blog that publishes up-to-date court decisions and developments in Indian child welfare law.[2]

NARF fully supports the Proposed Rule in its entirety as well as the extensive technical comments and suggestions submitted by our colleagues at the National Indian Child Welfare Association (NICWA). In addition, our Executive Director John E. Echohawk offered comments in support of the Proposed Rule at the public meeting in Tulsa, Oklahoma. We write separately to support the Proposed Rule and offer additional analysis for why the

[1] http://www.narf.org/nill/documents/icwa/.

[2] http://icwa.narf.org/.

Proposed Rule is essential to the future of Indian children and Tribes, especially those in Alaska.

THE PROPOSED RULE IS GREATLY NEEDED GIVEN THAT DISPROPORTIONALITY REMAINS AN ENORMOUS PROBLEM AND STATE AGENCY AND STATE COURT COMPLIANCE WITH ICWA IS INCONSISTENT

Congress enacted ICWA in 1978 to address the widespread practice of State agencies removing Native children from their homes. ICWA established minimum federal jurisdictional, procedural, and substantive standards aimed to achieve the dual purposes of protecting the right of an Indian child to live with an Indian family and stabilizing and fostering continued tribal existence. In the intervening thirty-six years, state agencies and state courts have eroded ICWA's protections through inconsistent interpretation, resulting in constant and contentious litigation and uncertainty for Native children, Tribes, foster and adoptive families, and state agencies.[3] Although state agencies have been bound by ICWA's mandates for thirty-six years, Native children are still present in the child welfare system at far higher rates than the general population.[4] Perhaps nowhere has this been more evident than in Alaska, where the State has a long and unfortunate history of removing Alaska Native children from their homes at rates that are severely disproportionate to non-Native children both in state and nationwide.

When drafting ICWA, Congress was presented with Alaska-specific statistics that showed that from 1973 to 1976, 1 out of every 29.6 Alaska Native children was adopted—a rate five times higher than non-Native children (1 out of 134.7).[5] Of the Native children who were adopted, 93% were placed in non-Native families.[6] Similarly, Alaska Native children were three times more likely than non-Native children to be in foster care.[7] Congress was thus keenly aware that adoptions of Alaska Native children into non-Native homes, through state court proceedings, were removing Native children from their Tribes and their cultures.

---

[3] *See, e.g.*, CASEY FAMILY PROGRAMS, INDIAN CHILD WELFARE ACT: MEASURING COMPLIANCE (2015).

[4] *See* NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, DISPROPORTIONALITY RATES FOR CHILDREN OF COLOR IN FOSTER CARE (2014).

[5] S. Rep. No. 95-597, at 46 (1977).

[6] *Id.*

[7] *Id.*

Despite ICWA's additional protections and requirements for state agencies and state courts, the conditions that moved Congress to enact ICWA thirty-six years ago are still alive and well in Alaska today. The survival of Alaska Native cultures continues to be seriously impacted by the adoption rate of Alaska Native children, which is still severely disproportionate to the adoption rate of the general population of children in Alaska and nationwide. In 2005, the United States Government Accountability Office found that 62% of the children in Alaska's foster care system were Native, the highest percentage of any state in the country.[8] Ten years later, this statistic remains unchanged—though Alaska Native children comprise only 17.3% of the children in Alaska, they still represent over 60% of children in foster care.[9] Alaska Native children are thus represented in foster care at more than three times the rate of the general population—a disproportionality rate that has actually been increasing in recent years.[10]

ICWA'S PLACEMENT PREFERENCES MUST BE FOLLOWED AND STATE AGENCIES MUST ACTIVELY WORK TO IDENTIFY, CONTACT, AND ASSIST PREFERRED PLACEMENTS

ICWA imposes a statutory mandate on state agencies to make proactive efforts to identify family and tribal members who may be § 1915 preferred placements, and to assist those preferred placements in actually obtaining custody. Yet the proactive efforts required by ICWA stand in sharp contrast to the reality in many states, where Native children continue to

---

[8] U.S. GOV. ACCOUNTABILITY OFFICE, INDIAN CHILD WELFARE ACT: EXISTING INFORMATION ON IMPLEMENTATION ISSUES COULD BE USED TO TARGET GUIDANCE AND ASSISTANCE TO STATES 13 (April 2013).

[9] *See, e.g.*, ATTORNEY GENERAL'S ADVISORY COMMITTEE ON AMERICAN INDIAN AND ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE, ENDING VIOLENCE SO CHILDREN CAN THRIVE 133 (2014), available at http://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2014/11/18/finalaianreport.pdf. *See also* STATE OF ALASKA, DEP'T OF HEALTH & SOC. SERV'S, OFFICE OF CHILDREN'S SERV'S, ALL CHILDREN IN ALASKA OCS OUT-OF-HOME PLACEMENT FOR THE MONTH OF OCTOBER 2014 by Race, available at http://dhss.alaska.gov/ocs/Documents/statistics/pdf/201410_Race.pdf; STATE OF ALASKA, DEP'T OF HEALTH & SOC. SERV'S, OFFICE OF CHILDREN'S SERV'S, PROVIDER/PLACEMENT RACES STATISTICS OF CHILDREN PLACED IN FOSTER HOMES ON OCTOBER 1, 2014, available at http://dhss.alaska.gov/ocs/Documents/Statistics/pdf/201410_FstrPrvdrRc.pdf.

[10] ENDING VIOLENCE SO CHILDREN CAN THRIVE, *supra* note 9 at 133-34, 146-48 (noting that efforts to address disproportionality "are outlined in state Child and Family Services Plans, yet Alaska appears to be making little or no progress according to recent annual reports").

be regularly placed in non-Native homes.[11]

ICWA cases in Alaska and elsewhere tend to have a disturbingly similar fact pattern:

> (1) Native child is removed from their parents' care due to substance abuse by a parent.
>
> (2) The child's tribe informs the state agency of Native family members or preferred tribal placements who are willing to care for the child, but state agency either fails to contact the ICWA preferred placements, or rejects them as suitable placements for vague reasons and never notifies them that they have the right to appeal that decision.
>
> (3) Native child is placed in a non-Native, non-ICWA-compliant household, so the child can be closer to the parent in treatment or because the state agency claims it can find no ICWA preferred placements.
>
> (4) State agency begins termination proceedings and "bonding" with the initial non-compliant placement is used as the catchall rationale for good cause to depart from ICWA's placement preferences.

The Alaska Supreme Court's recent decisions in *Native Village of Tununak v. Alaska*[12] is an example of this fact pattern and vividly illustrates how state agencies fail to follow ICWA and how state courts fail to hold the agencies accountable.

In August 2008, after a Native child was taken into custody by the Alaska Office of Children's Services (OCS), the child's Tribe immediately sent OCS a list of Native relative placements and listed the child's grandmother as its first choice. Yet OCS's efforts to research and contact the Tribe's preferred placements or other § 1915 placements were virtually nonexistent. The trial court noted that it was "troubled by the fact that it was unclear whether OCS had pursued any of the Tribe's proposed placements" for the child "and that an OCS social worker had testified that she had not spoken with the Tribe's ICWA representative since being assigned" to the case.[13]

---

[11] ROSE M. KREIDER, INTERRACIAL ADOPTIVE FAMILIES AND THEIR CHILDREN: 2008, IN NATIONAL COUNCIL FOR ADOPTION, ADOPTION FACTBOOK V (2011).

[12] *Native Village of Tununak v. State* (*Tununak II*), 334 P.3d 165 (Alaska 2014); *Native Village of Tununak v. State* (*Tununak I*), 303 P.3d 431 (Alaska 2013).

[13] *Tununak I*, 303 P.3d at 435.

Unfortunately, OCS's actions in the *Tununak* case are not unique. In just the last few years the Alaska Supreme Court has seen numerous examples of OCS's failure to meet its obligation under § 1915 to investigate ICWA-compliant placements and to give a placement preference to a member of the Indian child's extended family and other priority placements. For example, in recent cases before the Court, OCS workers either failed to contact biological relatives, even after being told of their existence, or significantly delayed in contacting relatives.[14] The Court has also seen examples of significant OCS delay in completing home visits for potential § 1915 placements, as well as significant delay in initiating the necessary paperwork for potential placements who live out of state.[15] Frustrated with these examples, individual justices have recognized "OCS's failure to train its caseworkers on ICWA's placement preferences,"[16] and the Court has cautioned that there is "no excuse for OCS to lose track of its responsibility to investigate potential ICWA-compliant placements."[17] *Yet in the majority of these cases, the Alaska Supreme Court nonetheless upheld the adoption of Native children to non-Native, non-ICWA compliant households.*

Although OCS has been bound by § 1915's mandate to identify and support family and tribal members who may be preferred placements for the last thirty-six years, routine federal reviews have found that OCS procedures to comply with § 1915 *still* do not substantially conform to federal standards. The U.S. Department of Health and Human Services (HHS) routinely assesses the performance of State child welfare agencies. In a 2002 federal review of Alaska's child and family services, HHS found that in thirty percent of cases, OCS[18] had

---

[14] *Roy S. v. State, Dep't of Health & Soc. Servs., Office of Child Servs.*, 278 P.3d 886, 891-92 (Alaska 2012) (describing OCS's efforts as "distracted and inefficient at best" and noting OCS's failure to contact the paternal grandmother even after her name was provided); *Josh v. State, Dep't of Health & Soc. Servs., Office of Child Servs*, 276 P.3d 457, 473-75 (Alaska 2012) (Winfree, J. and Stowers, J., dissenting) (noting failure to contact and adequately consider the "small universe" of relatives, including parental grandparents and paternal aunts); *Jon S. v. State, Dep't of Health & Soc. Servs., Office of Child Servs*, 212 P.3d 756, 771-72 (Alaska 2009) (Christen, J., dissenting) (noting OCS's delay of *over a year* in contacting paternal family members after their names were given to OCS).

[15] *Roy S.*, 278 P.3d at 892; *Jon S.*, 212 P.3d at 771-72 (Christen J., dissenting) (noting OCS did not fill out an Interstate Compact for the Placement of Children (ICPC) packet for grandparents until *a year and half* after their names were provided to OCS).

[16] *Jon S.*, 212 P.3d at 772 (Christen J., dissenting).

[17] *Roy S.*, 278 P.3d at 891-92.

[18] The predecessor to OCS was the Division of Family and Youth Services, which was the

not made diligent efforts to locate and assess relatives as potential placements—a number far above what HHS considers acceptable.[19] Stakeholders reported to HHS that OCS's "lack of sufficient relative searches for children needing placement is a general problem for the agency, particularly for Native children" and that if OCS "does not search for relatives early on, then the children usually end up" in a non-ICWA compliant placement.[20] HHS found the same deficiencies in its next review of OCS in 2009.[21]

In passing ICWA, Congress gave a preference to Indian families because, as § 1915's legislative history explains, Congress sought "to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society."[22] Consistently poor federal reviews of OCS's efforts to locate § 1915 preferred placements demonstrates that indeed, "ICWA is not working the way it should in Alaska."[23] To be blunt, OCS's consistent lack of efforts exemplified in *Tununak* and other cases have made Congress's instructions to provide a preference to § 1915 preferred placements meaningless in effect.

Given OCS's history of inability or unwillingness to identify and support family and tribal members who may be § 1915 preferred placements, NARF enthusiastically supports **Sections 23.128, 23.129, and 23.130** of the Proposed Rule addressing when placement preferences apply and what placement preferences apply in adoptive and foster care or

---

subject of the 2002 review. We refer to the agency as OCS to avoid confusion.

[19] U.S. DEP'T OF HEALTH & HUMAN SERVS., CHIDREN'S BUREAU, FINAL REPORT: 2002: ALASKA CHILD AND FAMILY SERVICES REVIEW 7 (Sept. 2002), available at https://library.childwelfare.gov/cwig/ws/cwmd/docs/cb_web/SearchForm (search "CFSR Final Reports" and "Alaska").

[20] *Id.* at 43.

[21] U.S. DEP'T OF HEALTH & HUMAN SERVS., CHIDREN'S BUREAU, FINAL REPORT: ALASKA CHILD AND FAMILY SERVICES REVIEW 19, 39 (Feb. 2009) available at https://library.childwelfare.gov/cwig/ws/cwmd/docs/cb_web/SearchForm (search "CFSR Final Reports" and "Alaska") (noting that in a survey of 130 Alaska tribes, only 63 percent agreed "that OCS makes efforts to place children in an ICWA-preference placement setting with a relative or Tribal care provider" and only 75 percent agreed "that OCS involves the Tribes in relative searches for children in foster care.").

[22] H.R. Rep. No. 95-1386, at 23 (1978).

[23] *Tununak II*, 334 P.3d at 183 (Winfree, J. dissenting).

preadoptive placements.[24]

For **Section 23.128**, we suggest adding the following language:

> For the purposes of triggering application of the placement preferences in an adoption proceeding, a party shall be deemed as having demonstrated that he or she is willing to adopt a particular child if (1) the individual so informs the court orally during a court proceeding or in writing or (2) an agency or tribe informs the court orally in a court proceeding or in writing that a specific individual or individuals has indicated to the agency or tribe that they are willing to adopt the child. An agency must inform the court whenever it has been so notified.[25]

For **Sections 23.129 and 23.130**, we suggest including a provision that allows consideration of a Tribe's recommended placement for a Native child. By adding the "Tribe's recommended placement" to these section, the Regulations will take into consideration tribal placement preferences as required by § 1915(c), which provides that an "Indian child's tribe [may] establish a different order of preference by resolution." Adding the "Tribe's recommended placement" to these sections will also require state courts and agencies to take into consideration Tribal custom, law, and practice when determining the welfare of Tribal children, in accordance with the requirements of the statute.

THE USE OF GOOD CAUSE TO DEVIATE FROM ICWA'S PLACEMENT PREFERENCES HAS BECOME SO LIBERAL THAT IT HAS ESSENTIALLY SWALLOWED ICWA'S MANDATE

Under § 1915(a), "[i]n any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." The exception permitting deviation from the placement preferences when "good cause" is present is ambiguous and has led to confusion and inconsistency among states in applying ICWA. In Alaska, the liberal interpretation of this exception actually encourages deviation from the preferences, undermining the purposes of the statute. The term "bonding" has essentially become a magic word that state agencies use to justify continued placement with and adoption to non-Native, non-ICWA compliant

---

[24] 80 Fed. Reg. 14,880, 14,892 (proposed Mar. 20, 2015) (to be codified at 25 C.F.R. §§ 23.128-23.130).

[25] *See* Filed Emergency Regulations: Petition of Adoption of children in state custody, 7 AAC 54.600 (Apr. 15, 2015).

homes.[26] Indeed, judges' willingness to accept the "bonding" argument has created a *disincentive* for state child welfare workers to actively investigate or support ICWA-compliant placements as described above. Colleagues who also focus on ICWA cases have observed to us that they rarely see a case that does *not* follow this fact pattern; OCS often immediately places in a non-ICWA compliant home, leaves a child there during the pendency of the proceeding, and then argues that good cause to deviate from the placement preferences exists because the child has "bonded" with the non-ICWA complaint placement.

We thus enthusiastically support the inclusion of **Section 23.131's Provision (c).**[27] It is vitally important that "good cause" to deviate from the placement preferences be defined and limited, and this section acts as a preventive measure to encourage compliance with ICWA. Without this provision, those advocating for departure from the placement preferences are actually *rewarded* for the attachment or bonding that occurs from intentional or unintentional noncompliance with ICWA. Quite simply, without this provision there is no incentive for stage agencies to actually seek ICWA-compliant placements.

In addition, the underlying basis for the bonding/attachment criteria used by courts (so-called attachment theory), is based squarely on Western cultural norms.[28] The viability of its application outside that context, particularly in the context of indigenous cultures, should be seriously questioned.[29] Furthermore, there has been increasing criticism of the use of bonding and attachment in child custody proceedings and serious questions raised about how probative such evaluations are for all children, not just Native children.[30]

---

[26] *See, e.g.*, *Roy S.*, 278 P.3d at 886; *Tununak I*, 303 P.3d at 431; *Paula E. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 276 P.3d 422 (Alaska 2012); *In re Adoption of Keith M.W.*, 79 P.3d 623 (Alaska 2003); *L.G. v. State, Dep't of Health & Soc. Servs.*, 14 P.3d 946 (Alaska 2000); *In re Adoption of F.H.*, 851 P.2d 1361 (Alaska 1993); *Adina B. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, Case No. S-14314 (Alaska Feb. 15, 2012), 2012 WL 516007.

[27] 80 Fed. Reg. at 14,892.

[28] *See generally* JOHN W. BERRY ET AL., CROSS-CULTURAL PSYCHOLOGY: RESEARCH AND APPLICATIONS (1992).

[29] *See, e.g.,* Raymond Neckoway et al., *Rethinking the Role of Attachment Theory in Child Welfare Practice with Aboriginal People*, 20 CANADIAN SOCIAL WORK REV. 105.

[30] *See generally* David. E. Arrendondo & Leonard P. Edwards, *Attachment, Bonding, and Reciprocal Connectedness: Limitations of Attachment Theory in the Juvenile and Family Court*, 2 J. CENTER FAMILIES, CHILDREN & COURTS 109, 122-23 (2000) (discussing at length the difficulty with using bonding and attachment theory in family courts).

In this Section, we suggest providing that if the child's tribe approves of the placement, "good cause" exists to depart from the preferences. Tribes sometimes decide that a placement with a non-preferred placement is in the child's best interests, and these regulations should defer to such determinations by a tribe who is acting as *parens patriae*.[31]

We also suggest clarifying that ICWA's placement preferences represent the presumptive best interest of the child. Congress has determined that placing Indian children with their families, with tribal members, or with other Indian families is presumptively in their best interests. If more Indian children are placed in preferred placements by reason of these regulations, then more children will have been placed consistent with their best interests.

ENGLISH-ONLY NOTICES ARE NOT UNDERSTOOD BY MANY LIMITED ENGLISH PROFICIENT (LEP) PARENTS AND INDIAN CUSTODIANS

Finally, we add that we support **Section 23.111(g)** providing that if a parent or Indian custodian is limited English proficient, the court or agencies must, at no cost, provide a translated version of the notice or have the notice read and explained in a language that the parent of Indian custodian understands.[32] The U.S. Census Bureau has long recognized the large numbers of Alaska Native limited English proficient citizens. There are likely significant numbers of potential foster care and adoptive families in the Wade Hampton, Bethel, and Dillingham Census Areas, in particular, who are unable to read and understand the complicated, English-only court and agency forms used in child custody proceedings. Although our LEP work has been focused in these Census Areas, theses circumstances likely exist across the state. Section 23.111(g) is key to allowing all potential placement preferences to understand their rights under ICWA and is long overdue.

Thank you for the opportunity to submit these comments. We believe the Proposed Rule provides excellent guidance to state agencies and state courts and believe that it will provide needed stability and predictability for Native children, Tribes, state agencies, and foster and adoptive families.

---

[31] *See Alaska, Dep't of Health & Soc. Servs, Div. of Family and Youth Servs. v. Native Village of Curyung*, 151 P.3d 388, 402 (Alaska 2006) (recognizing that Indian tribes have a right to bring suit "as *parens patriae* to prevent future violations" of ICWA); *see also Native Village of Venetie IRA Council v. Alaska*, 155 F.3d 1150, 1152 (9th Cir. 1998) (same); *State v. Native Village of Tanana*, 249 P.3d 734, 736 (Alaska 2011) (same).

[32] 80 Fed. Reg. at 14,889.

Most Sincerely,

Heather Kendall Miller
Senior Staff Attorney

Natalie A. Landreth
Senior Staff Attorney

Erin C. Dougherty
Staff Attorney

Matthew N. Newman
Staff Attorney