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April 30, 2015

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

Re: ICWA—In Support of Proposed Rule

Dear Ms. Appel:

The Board of Directors of the National American Indian Court Judges Association ("NAICJA") hereby submits this letter in support of Bureau of Indian Affairs Rule, Docket IC: BIA-2015-0001 which was published in Volume 80, Federal Register 14880-14894 (March 20, 2015.) NAICJA, established in 1969, is a non-profit 501(c)(3) membership organization, which provides a national voice for American Indian and Alaska Native tribal justice systems and strives to strengthen those systems by providing resource materials, information, technical assistance, and training. As detailed below, NAICJA supports the promulgation of the proposed rule as being necessary to improve ICWA implementation and compliance. We specifically applaud the outright rejection of the "Existing Indian Family Exception" (EIF) which has been adopted by a small minority of state courts. The EIF is contrary to the plain language of ICWA and allows for subjective determinations by state courts regarding the cultural connections of an Indian child and his or her family—which is exactly what ICWA set out to foreclose.

Need for ICWA Regulations—Not Just Guidelines

The Indian Child Welfare Act ("ICWA") of 1978, 25 U.S.C. § 1901 et seq. was enacted to stem the tide of the "alarmingly high percentage of Indian families . . . broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and [the] alarmingly high percentage of [Indian] children [being] placed in non-Indian foster and adoptive homes and institutions . . . ." *Id.* at § 1901(4). Following ICWA's enactment in July 1979, the Department of the Interior

issued brief regulations addressing: (1) notice procedures for involuntary Indian child custody proceedings, and (2) funding for the administration of Indian child and family services authorized by ICWA. *See* 25 C.F.R. pt. 23. Most notably the regulations (which were later amended in 1994) did not address the specific mandates and standards that ICWA imposes upon state court Indian child custody proceedings, beyond the requirements for the content of the required notices. Guidance for state courts for interpreting and applying ICWA was provided in 1979 through the BIA's "Guidelines for State Courts; Indian Child Custody Proceedings." 44 Fed.Reg. No. 228, 67584-67595 (Nov. 26, 1979.) The 1979 Guidelines were developed however without the benefit of interpretative caselaw and were flawed in that certain Guidelines were in conflict with the terms of ICWA itself. *See e.g.* 25 U.S.C. § 1917 (which provides an adult Indian adoptee the right to receive directly tribal affiliation information) and 44 Fed.Reg. 67595, Guideline G.2. "Adult Adoptee Rights" (which advises states to ask for the intervention of the BIA to prevent disclosure of the adoptee's biological parents' identities, interfering with the adoptee's federal right to essential tribal affiliation information.) Although there is no federal mechanism in place to monitor states' compliance with ICWA, it is well-acknowledges by Indian tribes, families and Indian child welfare agencies that ICWA has failed to meet its promise. *See* CASEY FAMILIES PROGRAMS, A RESEARCH AND PRACTICE BRIEF: MEASURING COMPLIANCE WITH ICWA 8-9 (2015). *Accord Oglala Sioux Tribe, et. al. v. Van Hunnick, et. al.*, No. 13 Civ. 5020-JLV (W.D. SD. Mar. 30, 2015)(presiding state court judge and state officials found to have engaged in numerous due process and ICWA violations in cases involving 823 Indian children.)

Thirty-six years after the enactment of the BIA Guidelines, after engaging in several listening sessions across the U.S. and reviewing comments received in that process, as well as, considering the recommendations of the Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence, an updated set of BIA guidelines was published on February 25, 2015. 80 Fed.Reg. No. 37, 10146-10159 (Feb. 25, 2015.) While the revised Guidelines are greatly welcome and NAICJA believes they accurately reflect the proper procedures and best practices to be used in Indian child welfare proceedings in state courts, they still remain advisory in nature. *See In Re. J.L.P.*, 870 P.2d 1252, 1257 (Colo.App. 1994.) "Although the BIA followed the notice and comment rulemaking procedures of the federal Administrative Procedure Act, the Guidelines were not published as regulations out of deference to state and tribal courts and because they were not intended to have binding legislative effect. . . . The Guidelines represent the BIA's interpretation of the Act, however, and are useful in interpreting its provisions." (Internal citation omitted.) In the process of updating the Guidelines, Assistant Secretary of Indian Affairs Kevin Washburn heard repeatedly in the listening sessions and through the written comments, that the Guidelines should be promulgated as binding regulations. As regulations, state courts, state and private agencies cannot ignore the procedures and best practices directives contained therein. The proposed rule incorporates many of the positive changes made to the Guidelines. Establishing the Department's interpretation of ICWA as binding will help to ensure consistency in state implementation and compliance with ICWA. Consistency is crucial to ensuring that the Congressional intent of ICWA is carried out. The rule is necessary for the United States to be able to fulfill its trust responsibility to Indian people and ensure that "the best interests of Indian children" and "the stability and security of Indian tribes and families" are protected. 25 U.S.C. § 1901, 1902.

Support for Rule Regarding Transfer Jurisdiction

The overriding purpose of ICWA and the proposed rule is to effectuate Congressional policy "by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing foster or adoptive homes which will reflect the unique values of Indian culture . . . ." 25 U.S.C. § 1902. The federal standards and mandates apply to state and private agencies, not to tribal courts. Nevertheless, the jurisdiction and authority of tribal courts in Indian child custody proceedings are also addressed by ICWA and the proposed rule. The U.S. Supreme Court in *Mississippi Band of Choctaw v. Holyfield*, 490 U.S. 30, 36 (1989) stated that, "At the heart of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings." One of the most significant benefits of the enactment of ICWA was the clarification of tribal courts' exclusive jurisdiction in proceedings concerning Indian children who reside or are domiciled within the reservation of his or her tribe as well as wards of tribal courts regardless of domicile. 25 U.S.C. 1911(a). Under section 1911(b), Congress creates "concurrent but presumptively tribal jurisdiction in the case of children [who are tribal members or eligible for tribal membership] not domiciled on the reservation: on petition of either parent or the tribe, state-court proceedings for foster care placement or termination of parental rights are to be transferred." *Holyfield* at 36 *citing* 25 U.S.C. § 1911(b). Congress found that the "unwarranted" removal of thousands of Indian children prior to the enactment of ICWA occurred because ". . . the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, [had] often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901.

Under ICWA's section 1911(b), a "petition" to transfer a foster care or termination of parental rights proceeding from state court to tribal court is required. No further detail as to the form or timing of the petition is provided. There has been wide variation and confusion in state courts regarding how formal the petition must be or when a petition is to be considered timely filed. The proposed rule, § 23.115 (a) clarifies that either the parent, the Indian custodian or the Indian child's tribe may request, *"orally on the record or in writing"* that the state court transfer *"each distinct Indian child custody proceeding"* to the Indian child's tribe's court. (Emphasis supplied.) The rule will effectuate fulfillment of the presumptive intent that cases be transferred by removing the formal barriers that some state courts have erected. The rule also clarifies that the right to transfer "is available at any stage of an Indian child custody proceeding, including during any period of emergency removal." § 23.115(c). The proposed rule takes into account the situation in which an Indian child's parent, Indian custodian or tribe may initially decide not to petition for transfer in an early stage of proceedings (usually in hopes that the family will be reunified) but later on decide, when a petition for termination of parental rights (a practice not widely adopted by American Indian or Alaska Native tribes) is filed, that transfer is now appropriate.

ICWA sets out three exceptions to the presumptive transfer of cases from state to tribal court upon petition: (1) when either parent objects to transfer, (2) when the tribal court declines the transfer and (3) when the state court finds "good cause" to deny the transfer petition. 25 U.S.C. § 1911(b). There is no definition in ICWA of "good cause." The issue of whether good cause to deny a transfer petition exists is one of the most widely litigated issues arising under ICWA. The 1979 Guidelines provided some direction but the 2015 Guidelines and the

proposed rule have reframed the BIA's guidance almost 180 degrees from the original Guidelines. *See* Guidelines, C.3(c), § 23.117. The rule clearly limits what may constitute "good cause" and reframes the analysis that must be used by state courts. Under the original Guidelines, broad discretion was given to state court judges to find good cause to deny a transfer petition. An appellate court reviewing a denial would, more often than not, uphold the trial judge's ruling as an exercise of discretion that could not be disturbed. The proposed rule outright reverses 1979 Guideline C.3 and now prohibits a state court, in determining whether good cause exists, from considering: (1) whether the case is at an advanced stage, (2) if the transfer will result in a change in the child's placement, (3) the Indian child's contacts with the tribe or reservation (thereby prohibiting application of the EIF), (4) socio-economic conditions or any perceived inadequacy of tribal or BIA social services or judicial systems, and (5) the tribal court's prospective placement for the Indian child. This rule requires the state court to focus on the narrow issue of the exercise of tribal court jurisdiction and leaves all other determinations regarding the best interest of the Indian child to the tribal court.

Proposed Rule Aligns with Supreme Court Precedent

By the time the Supreme Court reached its decision in the *Holyfield* case, the twin Indian babies at the center of the case were over three years old and had developed family ties with the non-Indian Holyfields. The Court was mindful of the potential emotional stress that the children might encounter if they were to be removed from their current home. Rather than opine on where the Choctaw children should live, the Court focused solely on the issue of jurisdiction: "We have been asked to decide the legal question of *who* should make the custody determination concerning these children—not what the outcome of that determination should be. The law places that decision in the hands of the Choctaw tribal court." *Holyfield* at 51. The Court properly "defer[red] to the experience, wisdom, and compassion of the Choctaw tribal court . . . ." *Id.* at 54. The new rule governing the process by which the state court should determine whether there is good cause to deny a petition for transfer of a case to tribal court squarely aligns with the *Holyfield* court's holding. Tribal courts are vested with the responsibility of ensuring the best interests of Indian children and are to be trusted to act with competence, "experience, wisdom and compassion . . . ." *Id.* Given the direction of the proposed regulation, the Congressional intent of presumptive transfer to tribal courts is much more likely to be effectuated.

Conclusion

Since the enactment of ICWA almost four decades ago, no comprehensive regulations giving guidance to state courts have been adopted. The 1979 BIA Guidelines are obsolete and while the 2015 Guidelines correct many of the errors and omissions of the earlier set, nevertheless the Guidelines remain merely advisory and do not carry the force of law. As seen by the recent ruling by the U.S. District Court for the Western District in the case, *Oglala Sioux Tribe et al. v. Van Hunnick, et. al.,* in which the federal court found that the South Dakota courts and agencies engaged in numerous ICWA and due process violations, much work remains to be done to ensure state compliance with this important federal law. The adoption of legally sound regulations that implement best child welfare practices, for all children—not just Indian children—is an important, long overdue step in fulfilling ICWA's promise to American Indian and Alaska Native children, families and tribes. For these reasons, NAICJA supports and urges adoption of the proposed rule in its entirety.

Very truly yours,

Richard C Blake

Honorable Richard C. Blake
President, Board of Directors
National American Indian Court Judges Association