The SHOSHONE-BANNOCK TRIBES

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Shoshone-Bannock Tribes

Testimony for Tribal Consultation Session

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Regarding ICWA Proposed Rule

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First, the Shoshone-Bannock Tribes wish to thank the Bureau of Indian Affairs (BIA) and Assistant Secretary Washburn for their work on the proposed rule and in increasing state compliance with the Indian Child Welfare Act (ICWA).

Recommendations:

- Add/create definitions for the following:
  - *ICWA-compliant placement* means any foster care, preadoptive, or adoptive placement that meets one of the specifically identified placement preferences as identified in 25 U.S.C. §1915. ICWA-compliant placement does not include a placement made outside of the identified placement preferences, whether there has been a good cause finding to deviate from the placement preferences or not.
  - *Party* means any actual party to a child custody proceeding and does not include the placement resource family.

- The definition for Domicile needs to be amended to include the possibility that the father or an Indian custodian could have custody of the child. So, as amended:
    - (2) For an Indian child, the domicile of the Indian child's parents. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's mother, unless custody is otherwise established by court order with either the father or an Indian custodian.
- Please set out that when a term, such as Indian family or Indian community is used, that is not specifically defined in the ICWA or these regulations, the term "Indian" should be used as defined to qualify the trailing noun. We have had an agency take the position that a non-Indian foster family was an Indian home, based upon some vague tribal connections (i.e. dad fought in Viet Nam with a Hopi, who granted him honorary Hopi Warrior status), and were allowed to argue the issue before the court because the term 'Indian family' was not specifically defined to mean a family that contained at least one Indian person.
- In §23.11 (a), please correct to read "In any involuntary proceeding …tribe by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." So that the term 'registered mail' replaces 'certified mail,' to be consistent with 25 U.S.C. §1912 (a).
- In §23.102, please remove the term "State-licensed" as the ICWA applies to all agencies, whether or not they are public, private, or State-licensed.
- In §23.109 (d), there is a typo; "child custody case" should read "child custody proceeding." (By the way, this same typo occurs in the new Guidelines at section B.4. (d)).

- In §23.111 (g), you may want to specify that to secure an 'Indian language' translator/interpreter to contact the BIA or tribe, because tribes/BIA may not have Spanish or other translator/interpreter information.
- Proposing a modification to §23.113(b)(1) to read "Treat the child as an Indian child until there is a legal determination that the child is not an Indian child…." To clarify that it isn't just a court determination (which sounds discretionary), but a legal determination that the child is not an Indian child.
- Further, in §23.113(f)(2), the term "extraordinary circumstances" needs to be better defined or the exception to the 30 day emergency custody rule will swallow the intended rule.
- In §23.117, we would like to see the language from the new Guidelines at C.3.(c) added, which, in relevant part, says "whenever a parent or tribe seeks to transfer the case it is presumptively in the best interest of the Indian child, consistent with the Act, to transfer the case to the jurisdiction of the Indian tribe." This language was been disregarded by a local court, as the court determined that the Guidelines were not binding.
- In §23.122(a) the word 'child's' was erroneously left out. The sentence should read "A qualified expert witness should have specific knowledge of the Indian child's tribe's culture and customs." To set forth that the knowledge is of the Indian child's tribe, specifically.
- Further, in §23.122, we would offer that a QEW should not be an employee or other agent of the agency that is a party to the child custody proceeding. We believe this is a conflict of interest for the agency seeking placement of an Indian child to claim to be the expert in whether the child should be placed.

- In §23.131(c)(3), we request that the term 'ordinary bonding' be amended to read 'bonding' as there is no definition for what is ordinary bonding versus extraordinary bonding. In a local case, the court found that the bonding between an Indian child and a non-ICWA compliant adoptive placement was extraordinary, not just ordinary, so there was good cause to deviate from the placement preferences.
- In §23.133(1) should read "An Indian child who is or was the subject of any action for foster care placement or termination of parental rights...." To add 'or was' to account for actions that occurred in the past.
- Please amend the language after the final comma in §23.133(b), as there is no court discretion in 25 U.S.C. §1914 about whether it is appropriate to invalidate an action once there is a showing that the specific ICWA provisions were violated. So it should then read "Upon a showing that an action for foster care placement or termination of parental rights violated any provision of 25 U.S.C. 1911, 1912, or 1913, the court must invalidate the action."
- In §23.136(a), the first line should read, in relevant part, "Any state entering a final adoption decree or order of an Indian child must furnish...."
- While these regulations will add strength to ICWA, what will be the penalty for not complying with the regulations? ICWA compliance must be tied to funding, sanctions or other consequences. The agencies responsible for the non-compliance must also shoulder some of the consequences. Our suggestion is that it has the same consequences for non-compliance as the Adoption and Safe Families Act.

- ICWA placement preferences must be universally applies in all adoptions, including voluntary adoptions. When ICWA was written, no one predicted the big business that voluntary adoptions are today. Indian children are routinely being permanently placed in non-Indian homes. The adoption agencies control which homes the birth mothers choose from, so the argument that it is the mother's freedom of choice is false. There are hundreds, if not thousands, of home-studied, eligible and appropriate Native homes who would like to complete private adoptions. We understand that this is threatening to the private adoption industry but Native children are not commodities and they belong in Native homes.
- The same standards which are used to screen children for possible tribal connections, should be used to screen Indian foster homes. Our state has attempted created 'ICWA-complaint' placements out of non-Indian homes by motion to the court. The State has too often attempted to place our Indian children into 'ICWA-compliant' homes who are, in reality, non-relative, non-Indians. These are people who have lived next door to Indians or have an Indian as a friend and the state will label them as an 'ICWA-compliant' placement. There needs to be some sort of standard to determine what is an ICWA-compliant home, such as receiving benefits or being eligible for benefits at Indian Health Services is a screening question applied to our children, this would be a good standard for determining if a foster home, who is not a relative, is otherwise ICWA-compliant. Not having a standard to determine if a home is ICWA-compliant gives an easy out for states to sabotage ICWA.

- We would recommend the BIA to ask the tribes involved in ICWA proceedings if the State or agency followed ICWA. If the BIA relies on agency documentation alone, only half the picture will be represented. There are cases that have occurred in Idaho when the State has claimed ICWA compliance, but the Tribes strongly feel the State was out of compliance. The BIA needs to listen to the tribes regarding ICWA compliance.
- In summary, we do not live in a state that is Native-friendly, and have ICWA cases in many other states across the United States. Leaving too much interpretation up to the states and other agencies hurts our Tribes and our children. We strongly feel, based on years of experience in these matters, that states will actively work to sabotage ICWA and Indian placement preferences without the additional safeguards found in these draft regulations as well as our requested additions to or modifications to the regulations, as set forth herein.