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May 12, 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

By E-mail: comments@bia.gov **Subject Line: ICWA**

Re: *Notice of Proposed Rulemaking—Regulations for State Courts and Agencies in Indian Child Custody Proceedings—RIN 1076-AF25—80 Federal Register 14880 (March 20, 2015)*
Comments of Confederated Tribes of Siletz Indians of Oregon ("Siletz Tribe")

Dear Ms. Appel,

I am submitting comments on behalf of the Confederated Tribes of Siletz Indians ("Siletz Tribe"), which is headquartered in Siletz, Oregon. I am pleased to provide comments on the Notice of Public Rulemaking (NPRM) regarding Regulations for State Courts and Agencies in Indian Child Custody Proceedings. This NPRM was published in the *Federal Register* on March 20, 2015, Volume 80, pp. 14880–14894. The issuance of these proposed rules is long overdue and the Siletz Tribe commends the Department of the Interior (DOI) and the Bureau of Indian Affairs (BIA) for proposing much needed regulations in this area.

The Indian Child Welfare Act of 1978 (ICWA) "protects the best interest of the Indian Child and promotes the stability and security of Indian tribes and families" (25 U.S.C. § 1902). Substantive ICWA regulations that provide rules for its implementation in state courts and by state and public agencies have never been issued. The BIA issued "Guidelines" interpreting the ICWA on November 26, 1979, 44 Fed. Reg. 67584, but these guidelines were not binding regulations and have often been ignored or rejected by state agencies and courts and private entities for reasons inconsistent with or undermining of the purposes of the ICWA. Without guiding regulations, ICWA has been misunderstood and misapplied for decades. This has, in turn, led to the unnecessary break up of Native families and placement instability for Native children. The Siletz Tribe has suffered in particular from this history, due to the Tribe's dispersal as a non-reservation tribe and its mistaken treatment as non-recognized by the federal government. Native children and families and the agencies and courts that implement ICWA need and deserve the clarity that the proposed regulations will finally provide.

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The BIA has the authority to issue these regulations. This authority is broadly, expressly expressed at 25 U.S.C. §1952, which gives the Secretary authority to 'promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." The ICWA vests broad authority in the DOI and the BIA. The ICWA was designed to establish "minimum federal standards" governing state court proceedings. In the last few decades there have been divergent interpretations of a number of ICWA provisions by state courts and uneven implementation by state agencies. This undermines ICWA's purpose: to create consistent minimum federal standards.

For those who would argue that the BIA has waited too long to enact the proposed regulations or that the new regulations are inconsistent with the Bureau's past policies and practices, legal precedent contradicts their position. The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C.§2701 et seq., and other federal laws aptly illustrate and support this point. IGRA was enacted in 1988. The BIA did not enact regulations interpreting Section 20 of IGRA, 25 U.S.C. §2719, until 2008. *See* 25 C.F.R. Part 292, 73 Fed. Reg. 29375 (May 20, 2008). Those regulations were challenged as being inconsistent with prior interpretation of Section 20 by the BIA in *Redding Rancheria v. Jewell*, 776 F.3d 706, 714 (9th Cir. 2015), where the Court ruled:

> What is more, an agency is permitted to change its policy so long as it provides some minimal explanation for the change. *See Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 493 (9th Cir. 2007). Even assuming the Elk Valley decision was inconsistent with the current regulation and the agency's treatment of the Tribe's application in this case, the agency provided a sufficient explanation for its change of policy. In promulgating 25 C.F.R. §292.12, the agency stated that it wanted to "explain to the public how the Department interprets th[is] exception[ ]." 73 Fed. Reg. 29,354. It further explained, that the temporal requirement was designed to "effectuate[ ] the IGRA's balancing of the gaming interests of . . . restored tribes with the interests of surrounding tribes and the nearby community." *Id.* at 29,367. More extensive explanation was not required. *See Robles-Urrea v. Holder*, 678 F.3d 702, 710 n.6 (9th Cir. 2012) (noting that even a "sparse" explanation suffices).

Morales-Izquierdo goes into this subject at greater length, rejecting the argument that a change in regulations or policy must be overturned as arbitrary and capricious. "We also understand Morales to be arguing that the agency's change in policy was impermissibly inconsistent with its past practice. . . . This rule . . . is reserved for rare instances, such as where an agency provides no explanation at all for a change in policy, or when its explanation is so unclear or contradictory that we are left in doubt as to the reason for the change in direction. A broader rule would deny agencies the necessary flexibility to change policies in light of 'changed factual circumstances, or a change in administrations.' (*Quoting Nati'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)). Indeed, *Chevron* itself involved a 180-degre reversal in an agency's position that survived judicial scrutiny."

In *Brand X*, the Supreme Court stated: "For if the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating, since the whole point of *Chevron* is to leave discretion provided by the ambiguities of a statue with the implementing agency.'" (*Quoting Smiley v. Citibank*, 517 U.S. 735, 742 (1996). In *Chevron v. NRDC*, 467 U.S. 837, 857-58 (1984), the Supreme Court held: "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis."

The BIA has presented a clear and lengthy explanation of its reasons for adopting regulations implementing the ICWA after so long a period of relying on guidelines. Under the authority presented above, the BIA's action is clearly valid under prevailing legal standards, and any argument to the contrary is meritless.

Using this authority, the BIA has proposed federal regulations that will ensure courts and agencies working with ICWA-eligible children and their families understand how the law is to be applied, and actually follow through. Previous guidance from the BIA on the ICWA provided in the form of federal guidelines allowed state courts and agencies to ignore or overrule the BIA's interpretation and led to wide variations in practice and in outcomes for Indian children and families. The proposed regulations specifically address the lessons learned since the ICWA was enacted, and provide uniform guidance with greater legal force. Some of the provisions in the proposed regulations that are particularly helpful include:

- Early identification of ICWA-eligible children. All too often children and families are denied the protections of ICWA because a court or agency did not ask whether the child had Native heritage. Not only can this result in Indian children not being identified at all, it can create a risk of insufficient service provision, delay or repetition in court proceedings, and placement instability once a child is identified. The requirements regarding early identification, particularly imposing a duty of inquiry into Indian status and requiring certification of these efforts, in the regulations require good practice and promote compliance with the requirements of the law.

- Recognition of tribes' exclusive authority to determine membership. ICWA applies based on a child's political status. Specifically, it applies to children who are members or are children of members and eligible for membership in a federally recognized tribe. With regard to membership, tribes as sovereign governments are the only entity with the legal authority to determine the membership of a tribe. The regulations are clear on this vital point.

- Clarity with regard to ICWA's application. Too many Native children have been denied the protections of ICWA and the opportunity to know their families, communities, and culture because of the Existing Indian Family Exception, a judicially created rule that is inconsistent with ICWA's intent. The regulations clarify what the Supreme Court in

Mississippi Band of Choctaw Indians v. Holyfield and *Adoptive Couple v. Baby Girl* confirmed: that in general ICWA applies in all cases where an Indian child is involved in an Indian custody proceeding as defined by the Act. The Existing Indian Family Exception is an improper interpretation of ICWA that undermined Congress's intent in passing the Act, and attacked the integrity of Indian tribes, culture and families. The proposed regulations mirror the overwhelming trend in state legislatures and courtrooms in clarifying that the EIF is not a proper interpretation of the ICWA.

- Definition and examples of active efforts. The provision of active efforts is required before an ICWA-eligible child can be removed from his or her home and before parental rights can be terminated, yet this term has never been defined except by a vague reference in the legislative history to the ICWA and by commentators, some of whose definitions have been adopted by state courts. Without a clear federal definition of active efforts, state and private agencies have been required to provide services and make representations to the court without a clear understanding of the level and types of services required, and there has been ongoing dispute about whether this standard has been met in a specific case. Such uncertainty can undermine the best interests of an Indian child. The regulations provide not only a clear definition of active efforts but illustrative examples to guide state and private agencies practice with Native children and families.

- Notice to tribes in voluntary proceedings. Tribes are granted substantial rights under the ICWA in voluntary proceedings, including the right to intervene in termination proceedings and the right to enforce (and modify) the placement preferences of the Act. Yet the only express notice provision in the ICWA at Section 1912(a) is limited to involuntary proceedings. Uncertainty and inconsistency therefore exists about whether tribes are entitled to notice in voluntary proceedings under the ICWA. Tribes are *parens patriae* for their member children. In ICWA proceedings this includes the right to intervene in state proceedings or transfer the case to tribal court. When tribes do not receive notice of voluntary proceedings they are effectively denied their rights under the ICWA, a violation of due process. Further, because tribes have the exclusive authority to determine which children are members, when tribes are not notified and offered the opportunity to verify that a child is ICWA-eligible, a court cannot ensure compliance with the law. Lastly, tribes are an essential resource for states and agencies seeking placements in line with ICWA's preferences. Without knowledge of a voluntary proceeding, children can be denied possible placements consistent with ICWA's placement preferences. Notice in voluntary ICWA proceedings, provides agencies and courts the clarity necessary to protect these interests.

- Limiting the discretion of state courts to deny transfer of a case to tribal court. The Supreme Court has clarified that tribes have "presumptive jurisdiction" in child welfare cases that involve their member children. Often, however, state courts inappropriately find "good cause" to not transfer a case for minor reasons, or because they believe the

tribal court will make a decision different from its own. The regulations clarify that this reasoning cannot be used to deny transfer.

- Emphasizing the need to follow the placement preference and limiting the ability of agencies to deviate from the placement preferences. One of ICWA's primary purposes is to keep Native children connected to their families, tribal communities, and cultures or, even more importantly, to allow an Indian child who has previously been denied contact with his or her culture the opportunity to initiate such contact and to develop a cultural identity. Yet, currently, more than 50% of Native children who are adopted are placed in non-Native homes. The regulations provide requirements that will promote placement in accordance with ICWA's language and intent.

Other provisions also strongly support implementation of the ICWA, and the preservation, protection and enhancement of tribal culture.

The Siletz Tribe strongly supports the proposed regulations, and also recommends additional changes for the Department to consider. For example, one issue that should addressed is the burden of proof that should be applied in related parts of an ICWA proceeding, beyond the burden expressly stated in the Act for foster care placement and termination of parental rights. State courts have varied tremendously on whether the burden of proof for active efforts under the Act or good cause to deny transfer of jurisdiction or to avoid the placement preferences of the Act should be the same as that for the underlying proceeding – clear and convincing for foster care; beyond a reasonable doubt for termination – or whether mere preponderance of the evidence is all that is required for ancillary issues. The proposed regulations include a requirement that good cause to avoid the placement preferences of the Act must be shown by clear and convincing evidence (§23.131), but do not include a burden standard for good cause to deny transfer of jurisdiction (§23.116). Other recommended changes to the proposed regulations include:

- §23.107(b)(2). The Tribe recommends that the regulations do not use the term "active efforts" in this section addressing efforts to identify whether a child is an Indian child. Use of the term here creates potential confusion because the ICWA specifically uses that term of art with regard to rehabilitative and remedial services designed to reunite the Indian family. A different term should be used here instead.

- §23.108. While the Tribe strongly supports the policy of this section – that the tribe should have sole and exclusive authority to determine whether a child is a member of or eligible for membership in the tribe, the language as written does not provide the state court with the option to make a determination of Indian child status in the situation where the tribe does not respond for some reason. The ICWA should be applied even if the tribe in question chooses not to respond, but

this last option should only apply if all of the options currently set out in this proposed section have not worked.

- §23.113(h). The language of this proposed section says that a regular ICWA proceeding does not have to be initiated until the emergency proceeding (under §1922 of the ICWA) has ended. The Tribe strongly believes that an ICWA proceeding should be initiated as expeditiously as possible at the same time the emergency proceeding is going on, with the emergency proceeding terminating once the regular ICWA proceeding has kicked in. Emergency removal under the ICWA takes place under state law and not all of the protections of the rest of the ICWA apply. A regular ICWA proceeding should be initiated as soon as possible so all the provisions and protections of the Act apply to the proceeding as soon as possible.

- §23.120. As written, this proposed section seems to require that active efforts to avoid the need to remove the child from his or her parents or Indian custodian only have to be made up to the commencement of an ICWA proceeding. Rather, active efforts should be required to continue during the entirety of the proceeding, or at least up to the point that it is decided to petition for termination of parental rights.

- §23.126 and §23.127. These two sections require that a withdrawal of consent to foster care or adoption in a voluntary proceeding must be filed in writing in the same court where the original consent document was executed or filed. The problem is that a consent document may be filed in a completely different court or even state, and the consenting parent may not be informed which court his or consent has been filed in. To require the parent of an Indian child to file a withdrawal of his or her consent in a court he or she may not know the identity of would be unduly burdensome. If the court is not readily available, the parent should be able to file his or her withdrawal of consent with the current custodians, their attorney or the agency that originally took the consent, or as a last resort with the BIA. In all such cases the withdrawal of consent should be effective.

- §23.131(c)(2). While the tribe agrees with the proposed regulation's language in this subsection getting rid of the requirement that a child be 12 or older to express his or her request for a placement, there should still be language that the child's consent be completely voluntary, in addition to being able to understand and comprehend the decision that he or she is making. Too often the potential for influence, pressure, or guilt may make it difficult for a child to make a truly voluntary request for a specific placement option.

The Siletz Tribe also believes that it is important that the general authority to regulate be carefully articulated and that individual regulations be justified with references to supportive

cases, state regulations and policies that reflect best practices, and legislative history. Additionally, the regulations should explicitly address the *Adoptive Couple v. Baby Girl* case: (1) clarifying that it should not be applied outside of the private adoption context; defining what it means for relatives and others who meet the placement preferences of the ICWA to "formally petition" for custody of an Indian child in a timely and culturally acceptable fashion so as to maintain the placement preference order in Section 1915; and (3) providing guidance on how a proper interpretation of the decision should be implemented in state court and private agency practice. With these additions, the proposed regulations will better serve Native children, families, and tribes. Finally, I urge you to strongly consider technical recommendations that will be provided by national Native organizations and attorneys who have expertise in ICWA.

The Siletz Tribe applauds the BIA for taking this bold step to finally issue regulations to fully implement the ICWA, and for its work on the proposed Regulations for State Courts and Agencies in Indian Child Custody Proceedings. These proposed rules provide the clarity and certainty necessary for all parties involved in child welfare and private adoption proceedings to comply with the law and promote the best interest of Indian children. It is this clarity and certainty that will preserve Native families and promote permanency for Native children.

Thank you in advance for consideration of the Tribe's comments.

Sincerely,

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