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Proposed Indian Child Welfare Act Regulations

I am writing to you today to submit comments regarding Proposed Indian Child Welfare Act Regulations on behalf of the Sault Ste. Marie Tribe of Chippewa Indians. Sault Tribe's comments are attached.

Sault Ste. Marie Tribe of Chippewa Indians is located in the Upper Peninsula of Michigan. Although the majority of the tribe's population was once located in this region, today, Sault Tribe's citizens are located throughout the country. Consequently, it is imperative to Sault Tribe that the agencies and state courts affecting our children not only adhere to the laws created to protect the future of our tribe, but to do so conscientiously and uniformly.

Sault Tribe offers these comments on the proposed ICWA Regulations with the goal of strengthening implementation of ICWA for future generations. It is the tribe's hope that with the regulations, there will be more understanding and uniformity in the application of ICWA throughout the United States.

On Feb. 21, 2014, Secretary Kevin Washburn sent a "Dear Tribal Leader" letter asking for comments on the Bureau of Indian Affairs Guidelines for the Indian Child Welfare Act. 25 U.S.C. §§ 1901 et seq. As a result of those comments and testimony, on March 20, 2015, the Bureau of Indian Affairs released a proposed rule that would add a new subpart to the Department of the Interior's regulations implementing ICWA. Specifically, this proposed rule would establish a new subpart to the regulation implementing ICWA at 25 CFR Part 23 to address Indian child welfare proceedings in state court.

This tremendous step forward in ICWA enforcement is appreciated. The inconsistency in interpretation of ICWA provisions has led to a tremendous amount of litigation that requires the constant vigilance and dedicated efforts of tribes and their tribal ICWA attorneys. Federal regulations that strongly support the goals and intent of ICWA will provide a much needed underpinning to the work tribes and their tribal ICWA attorneys do every day.

Respectfully,

Aaron Payment, Chairperson,
Sault Ste. Marie Tribe of Chippewa Indians

Sault Ste. Marie Tribe of Chippewa Indians
Proposed Indian Child Welfare Act Regulations
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I. Introduction

Congress passed the Indian Child Welfare Act (ICWA) in 1978 to address the widespread practice of state entities removing American Indian children from their homes without an understanding of traditional American Indian child-rearing practices. Throughout the 1960s and 1970s, American Indian / Alaskan Native children were six times more likely to be placed in foster care than other children. See H.R. Rep. No. 95-1386 (1978), at 9. Congress found "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions . . .." 25 U.S.C. § 1901(4).

Congress enacted ICWA to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes or institutions which will reflect the unique values of Indian culture." H. Rep. 95-1386, at 8 (emphasis added). ICWA thus articulates a strong "federal policy that, where possible, an Indian child should remain in the Indian community." Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 37 (1989) (citing H. Rep. 95-1386 at 24). Federal regulations supporting this policy will be helpful to create some consistency across the States.

II. Regulatory Authority of the Bureau of Indian Affairs

The Indian Child Welfare Act states "[w]ithin [180] days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." 25 U.S.C. § 1952. Under this section, the Secretary of the Interior has a broad grant of authority from Congress to issue rules in order to ensure the statute [ICWA] is fully and properly implemented. In addition, the Secretary of the Interior is charged with "the management of all Indian affairs and of all matters arising out of Indian relations," 25 U.S.C. § 2, and may "prescribe such regulations as [s]he may think fit for carrying into effect the various provisions of any act relating to Indian affairs." 25 U.S.C. § 9.

Furthermore, as stated by Congress in ICWA, "the United States has a direct interest, as trustee, in protecting Indian children." 25 U.S.C. § 1901(3). The regulations, promulgated by the Secretary of the Interior, are intended to improve the implementation of ICWA and uphold "the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902.

These proposed regulations are not the first time the Department of the Interior has issued regulations. Following ICWA's enactment in July 1979, the Department of the Interior issued regulations addressing notice procedures for involuntary child custody proceedings involving Indian children, as well as governing the provision of funding for, and administration of, Indian

child and family service programs authorized by ICWA. See 25 CFR Part 23. In addition, the Bureau of Indian Affairs in 1979 also published guidelines for s to use in interpreting ICWA's requirements in Indian child custody proceedings, which have since been replaced by updated guidelines. See 44 Fed. Reg. 67584 (Nov. 26, 1979) and 80 Fed. Reg. 10,146-02 (Feb. 25, 2015).

III. Special Considerations of ICWA Tribal Attorneys

Uniform interpretation of key provisions is necessary to ensure compliance with ICWA. In the more than thirty years since the law was passed, states have applied ICWA inconsistently, creating a multitude of different standards for Indian child welfare cases. These inconsistencies make it especially difficult for tribal attorneys who represent the tribe wherever tribal children are located—not just in the state or county closest to the tribe. Instead of being an expert on one federal law, tribal ICWA attorneys must know each individual state's case law interpreting ICWA. In addition, state appellate decisions change ICWA's interpretation, not just by state, but also sometimes within the state itself. For example, California has long had splits in its appellate divisions on notice and the existing Indian family exception. These regulations will provide a stronger measure of consistency in the implementation of ICWA, which has been interpreted in different, and often conflicting, ways by various s and agencies and has resulted in different minimum standards being applied across the United States, contrary to Congress' intent. See e.g., Holyfield, 490 U.S. at 45–46 (describing the need for uniformity in defining ''domicile'' under ICWA).

Many courts also completely cut the Tribe out of the equation by endorsing witnesses as qualified expert witnesses in cases with Sault Tribe children, where the expert has no practical knowledge of or experience with Sault Tribe. The proposed rules provide relief to that longstanding concern—such a witness has no knowledge of the culture, traditions, lifestyles or child rearing practices of Sault Tribe.

Under this legal and policy background, Sault Tribe recommends the Department of Interior add the following elements and questions to the ICWA regulations in order to create a more comprehensive national standard.

IV. Proposed ICWA Regulations

Section 23.2 Definitions

A. Active Efforts

The DOI proposes to define "active efforts" as "actions intended primarily to maintain and reunite an Indian child with his or her family or tribal community and constitute more than reasonable efforts as required by Title IV-E of the Social Security Act (42 U.S.C. 671(a)(15))." Active efforts may include for example: engaging the child, parents, extended family members,

or custodians; taking steps to keep the siblings together; providing services; identifying, notifying, and inviting representatives of the child's tribe; employing family preservation strategies; and many more.

Sault Tribe recommends the DOI include a section that states there are no time limits on "active efforts" to distinguish ICWA cases from other cases where the Adoption and Safe Families Act (ASFA) may impose timelines.

The definition and requirements of "active efforts" varies from State to State. Although ASFA and ICWA have many similar provisions, some of their technical terms regarding timelines and definitions contradict one another. By setting a separate standard, the DOI will ensure that s do not deviate from ICWA by applying ASFA standards to Indian children.

Sault Tribe also recommend the DOI add a section that active efforts include assisting the child in establishing the paternity of the biological father, if that has not yet been established, as this is sometimes critical to determining whether ICWA applies.

B. Continued Custody

The DOI proposes to define "continued custody" as "physical and/or legal custody that a parent already has or had at any point in the past." In addition, "continued custody" also refers to when "the biological mother of a child has had custody of a child."

Sault Tribe recommends the DOI include a provision that allows a putative father who either acknowledges or establishes he is the biological father to assert custodial rights.

By including this provision, the proposed ICWA regulations do not create a presumption that only a mother may have custody of a child, while a father does not. In addition, by including this provision, the proposed ICWA regulations will take into account that sometimes an Indian child's heritage may come from a father who is unknown or not established at the time of the child custody proceedings.

C. Domicile

The DOI proposes to define domicile as "[f]or a parent or any person over the age of eighteen, physical presence in a place and intent to remain there;" and "[f]or 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."

Sault Tribe recommends the DOI change the domicile definition to the common law definition of domicile. For example, "[t]he place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere." See DOMICILE, Black's Law Dictionary (10th ed. 2014).

By including this provision, the DOI will take into consideration the American Indian / Alaskan Native population that may only leave the reservation for a short period of time to obtain education, pursue work, or enter the military. Although they are physically located away from the reservation, this change in location may not establish a permanent domicile, and should not deprive them of domicile on a reservation when these situations may be only temporary.

This was mentioned in the Supreme Court case Mississippi Band of Choctaw Indians v. Holyfield, where the Court stated " 'domicile' is not necessarily synonymous with 'residence,'" and "[f]or adults, domicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there." 490 U.S. 30, 48 (1989); see also Texas v. Florida, 306 U.S. 398, 424 (1939). The Court stated that "[o]ne acquire a 'domicile of origin' at birth, and that domicile continues until a new one (a 'domicile of choice') is acquired." Id.

By changing the regulations to state "was physically present" rather than "physically present" the regulations will take into consideration the differences between "domicile of choice" and "domicile of origin" as elaborated in Holyfield.

Sault Tribe also recommends the DOI change the second part of the domicile definition to state that the Indian child has the domicile of the custodial parent.

This way the ICWA regulations take into account that a father or Indian custodian may have obtained custody of a child. As stated in Holyfield, domicile for children and minors are "determined by that of their parents." 490 U.S. at 48. In addition, it is only "[i]n the case of an illegitimate child" that the child's domicile "has traditionally meant the domicile of its mother." Id. If a "father" has established or acknowledged paternity, or has custody, his domicile should be considered.

D. Include Definition for Tribal Representative

The DOI does not include a definition for this term, but it can be used in connection to several provisions under the new proposed ICWA regulations. Specifically, Sections 23.2 referring to "representatives of the Indian child's tribe;" Section 23.104 referring to tribal agents; Section 23.109 when referring to Tribes acting as "representatives" for other Tribes in child custody cases; and Section 23.115 transfer of a child custody proceeding.

Sault Tribe recommends the DOI include a definition that defines "tribal representative." This definition may include, "a person who is representing a Tribe in a child custody proceeding, who is not required to be an attorney; and if the representative is an attorney, they are not required to be licensed in the jurisdiction where the Indian child's proceeding is located."

By including this definition, the proposed ICWA regulations will provide clarification to s what a tribal representative is, and whether they can appear in the various sections that refer to the representation of the Tribe and tribal agents. For many tribal nations across the United States, a licensed attorney or tribal representative may not always be available, and tribal attorneys may not be licensed to practice in the jurisdiction where the child custody proceeding is located.

Section 23.103: When does ICWA apply? The DOI proposes that "ICWA applies whenever an Indian child is the subject of a State child custody proceeding as defined by the Act. ICWA also applies to proceedings involving status offenses or juvenile delinquency proceedings if any part of those proceedings results in the need for placement of the child in a foster care, preadoptive or adoptive placement, or termination of parental rights."

Sault Tribe recommends the DOI include as a proceeding that ICWA applies to (1) "any domestic violence protection order proceeding in which the Court restricts the parent's access to the Indian child during the minority of the child," and (2) "any placement of an Indian child in foster care as the result of a juvenile delinquency proceeding in which a determines that it is not safe to return a child to the parental or guardian's home, or that it is inconsistent with the rehabilitation of the child."

In addition, Sault Tribe recommends the DOI also include third party custody or guardianship actions; and termination of parental rights actions brought by the other parents, third parties, or Indian custodians, which are all actions when the child cannot be returned upon demand of the parent.

By including these specific child custody proceedings, the proposed ICWA regulations would clarify what may be considered within the definition of a child custody proceeding. There is confusion in many jurisdictions regarding the extent to which ICWA covers involuntary proceedings.

Section 23.103(f): Voluntary Placements. The DOI proposes that "[v]oluntary placements that do not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand are not covered by ICWA." In addition, "[s]uch placements should be made pursuant to a written agreement, and the agreement should state explicitly the right of the parent or Indian custodian to regain custody of the child upon demand."

Sault Tribe recommends the DOI include a section that states: "In general it is not appropriate for an involuntary proceeding to be commenced based upon an assertion that a parent consented to a previous voluntary placement of the child as proof of abandonment of the child."

Sault Tribe recommends the DOI include a section that specifically indicates that "[t]hird party custody or guardianship actions are covered by ICWA." These should be specifically named because they could be voluntary or involuntary, and there is confusion regarding these actions within many jurisdictions.

Including this language into the proposed ICWA regulations will give protection to parents that enter into voluntary placements, from having that placement used as evidence against them in another child custody proceeding. If voluntary placements are not covered by ICWA, using voluntary placements as evidence should also be prohibited.

Section 23.104: This information is helpful to assist with compliance and uniformity. Hundreds of notices get sent to multiple Sault Tribe addresses, despite the designated tribal agent information in the Federal Register. This provision should assist with this issue.

Section 23.106: This is helpful to assist with compliance and uniformity. Pretrial active efforts are often misunderstood by caseworkers, attorneys, judges; as well as guardians and Indian custodians who are filing for termination of parental rights so they can adopt the children in their care.

Section 23.107(c): This section is helpful to assist with compliance and uniformity. Often, caseworkers and courts are not aware they are able to move forward in a case as an ICWA case upon a belief that a child is an Indian child based on information other than from the tribe itself, at least until such status is confirmed or discounted by the Tribe.

Section 23.110(a): When must a dismiss an action? Under the new regulations, "[s]ubject to § 23.113 (emergency procedures), the following limitations on a 's jurisdiction apply: (a) [t]he court must dismiss any child custody proceeding as soon as the court determines that it lacks jurisdiction."

Sault Tribe recommend the DOI also allow an exemption for emergency cases, such as: "unless an emergency situation exists and in that case the state court must make every effort to contact the Tribe with exclusive jurisdiction over the matter to ensure the safety of the child."

Even when a state court does not have the jurisdiction to hear an emergency child custody proceeding, in order to ensure the safety and well-being of the child, these proceedings should not be dismissed until the Tribe has been contacted and afforded the opportunity to assert jurisdiction. This would be conditioned on the Court making every effort to contact the Tribe with exclusive jurisdiction.

Section 23.111(c): Each subpart in this section is necessary to the Tribe's ability to timely respond to notice and participate/intervene in the proceeding. This is especially helpful for the Tribe to coordinate, cooperate and prepare.

Section 23.111 (f): Many jurisdictions are requiring the parents whether reunited or not to begin making payments for their legal fees, accrued during the child custody proceeding, immediately after the children have been returned to the parents or the case has been dismissed, causing the parents to be subjected to show cause/contempt of court proceedings.

Section 23.111(h): What are the notice requirements in child custody proceedings involving an Indian child? The DOI proposes to require "[n]o substantive proceedings, rulings or decisions on the merits related to the involuntary placement of the child or termination of parental rights may occur until the notice and waiting periods in this section have elapsed."

Sault Tribe recommends the DOI include in this section the right of the Tribe "when notice was not provided as required for an emergency removal hearing, that the state court's findings made at the hearing shall not be binding upon the Tribe or other party who was not notified of said

hearing." Thus, the party not notified would be able to make arguments at a subsequent hearing regarding the emergency removal findings.

Section 23.113(a)(i): The language "or placement" implies any or all placements, not just emergency removal placement. This language should be stricken or changed, accordingly. Removal due to risk of serious emotional or physical damage testified to by the expert should continue to be the level of harm required for foster care placement. This section is captioned with "emergency removal," however, if it is not clear, some will take it out of context.

Section 23.113(i): What is the process for the emergency removal of an Indian child? The DOI proposes to require that "[t]he court should allow, if it possesses the capability, alternative methods of participation in state court proceedings by family members and tribes, such as participation by telephone, videoconferencing, or other methods."

Sault Tribe recommends the DOI mention in this section the possibility of a "tribal representative" being present at child proceedings, and participating in the proceedings before the state court, remotely or physically.

By including this language, the ICWA regulations will also take into consideration "tribal representatives" that may not be an attorney, licensed to practice in that jurisdiction, or be licensed to practice in any State. Please also see the recommend definition of "tribal representative" in Section 3(c) of this comment.

Section 23.115: How are petitions for transfer of proceeding made? The DOI proposes to require that "petitions for transfer may be requested, in writing or orally on the record, by either parent, Indian custodian, or Indian child's tribe." In addition, the right to transfer occurs with each proceeding, and is available at any stage of an Indian child custody proceeding.

Sault Tribe recommends the DOI include a provision that permits a party requesting transfer, including the Tribe, "need not be represented by legal counsel in order to file a motion for transfer."

By including this language, the ICWA regulations will also take into consideration "tribal representatives" that may not be an attorney, licensed to practice in that jurisdiction, or be licensed to practice in any State. Please also see the recommend definition of "tribal representative" in Section 3(c) of this comment.

Section 23.116: What are the criteria and procedure for ruling on transfer petitions? The DOI regulation permit that "either parent [may] object to such transfer" of the case to the Tribe during a child custody proceeding.

Sault Tribe recommends the DOI include a provision that "either parent, unless that parent's rights have been terminated by tribal or order, has a right to object to transfer provided the objection is put into writing and the consequences of an objection are explained to a parent by the judge."

By including this provision, the proposed ICWA regulations will protect the rights of the parent that has custody of the child, and will not allow a parent whose rights have been terminated to interfere in child custody proceedings under ICWA.

Section 23.117(e): How is a determination of "good cause" not to transfer made? The DOI proposes to require "[t]he burden of establishing good cause not to transfer is on the party opposing the transfer."

Sault Tribe recommends the DOI add "clear and convincing evidence" to the end of this statement.

By adding this standard of evidence to the determination of "good cause" it will give state courts more guidance regarding the level of scrutiny they should apply when evaluating "good cause." In addition, by establishing a federal standard to be applied, it will prevent state courts from adopting a lesser standard of evidence based on State common law, and keep the regulations in uniformity across the nation.

Section 23.118(b): What happens when a petition for transfer is made? The DOI proposes to require "[i]f the tribal court accepts the transfer, the state court should promptly provide the tribal court with all court records."

Sault Tribe recommends the DOI revise the requirement of the timing of the provision of the court records from after the tribal court accepts the transfer to the time tribal court is requested to make a decision to accept or decline the transfer. The tribal court can make a determination whether it has reasons, based on the file, to accept or decline the transfer if it has information regarding the case. The tribal court, the parties, and the children would benefit from the tribal court making such an important decision with as much information the transferring court can provide.

Section 23.119(a): The courts should also be required to provide a tribe with information regarding a child custody proceeding when the tribe is in need of the information to determine whether or not the tribe will intervene. Many courts deny the Tribe information based on "confidentiality" to the extent that it forecloses the Tribe from intervening in the case because the tribe does not have enough information to intervene. The courts and agencies are not complying with ICWA by not giving notice and an opportunity for us to intervene. The Tribe cannot always prove that because it cannot get enough information.

Section 23.123: What actions must an agency and state court undertake in voluntary proceedings? The DOI regulations propose to require "[a]gencies and state courts must provide the Indian tribe with notice of the voluntary child custody proceedings, including applicable pleadings or executed consents, and their right to intervene under § 23.111 of this part."

Sault Tribe recommends the DOI add "in order to permit the Tribe to determine whether the child involved in the voluntary proceeding is an Indian child."

Under ICWA, a Tribe may only receive notice if the pending court proceeding is an "involuntary proceedings." 25 U.S.C. § 1912(a). By adding this language, although the DOI regulation would be placing limitations on the right to notice, it would preserve the language of ICWA and its purpose.

Section 23.125(c): What information should a consent document contain? The DOI proposes certain information the consent documents should contain is subsection (a) and (b).

We propose the DOI add subsection (c) "Any consent document shall also contain the consequences of the consent in detail, including those contained in § 23.124 of this part." This proposed section would provide the rights, including how to withdraw consent, to those who after providing consent may not remember or know they are able or how to withdraw their consent.

Section 23.129: What placement preference applies in adoptive placements? In any adoptive placement of an Indian child under State law, "preference must be given in descending order, as listed below, to placement of the child with: (1) A member of the child's extended family; (2) Other members of the Indian child's tribe; or (3) Other Indian families, including families of unwed individuals." In addition, the court should, where appropriate, "also consider the preference of the Indian child or parent."

We recommend the DOI include a provision that allows consideration of the Tribe's recommended placement for an Indian child.

By adding the "Tribe's recommended placement" to this provision, the ICWA regulations will take into consideration tribal custom, law, and practice when determining the welfare of tribal children. Currently under ICWA, an "Indian child's tribe shall establish a different order of preference by resolution." 25 U.S.C. § 1915(c).

Section 23.130: What placement preferences apply in foster care or preadoptive placements? In any foster care or preadoptive placement of an Indian child, preference is given to a member of the Indian child's extended family; a foster home, licensed, approved or specified by the Indian child's tribe, whether on or off the reservation; an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs."

Sault Tribe recommends the DOI include a provision that allows consideration of the Tribe's recommended placement for an Indian child.

By adding the "Tribe's recommended placement" to this provision, the ICWA regulations will take into consideration tribal custom, law, and practice when determining the welfare of tribal children. Currently under ICWA, an "Indian child's tribe shall establish a different order of preference by resolution." 25 U.S.C. § 1915(c).

Section 23.131(c): How is a determination for "good cause" to depart from the placement preferences made? Under this section, the DOI proposes that determination of "good cause" to depart from placement preferences must be based on the request of the parent, or the request of the child.

In regards to (c)(1) and (2) we recommend the DOI include a provision that allows consideration of a Tribe's request to deviate from placement preferences.

By adding this provision, the proposed ICWA regulations will take into consideration the Tribe's placement preference. Tribes should have a say in determining the welfare of tribal children.

Section 23.135: When must notice of a change in child's status be given? The DOI regulations propose to require that notice of a change in child's status be given to the child's biological parents and the child's tribe whenever there is "[a] final decree of adoption," "the adoptive parent has voluntarily consented to the termination of [their] parental rights," or "[w]henver an Indian child is removed from a foster care home or institution to another foster care placement, preadoptive placement, or adoptive placement."

We recommend the DOI include a provision that requires the names and addresses of placement of a child are forwarded to the Tribe when a child is removed from a parent, there is a termination of parental rights proceeding, the child is placed with a relative, or any other form of placement.

Without adding this requirement to the proposed regulations, there is no other way for the Tribe to track where the child has gone when they are removed from one placement to another. By adding this requirement, a Tribe will be able to keep track of a child, update the child/placement of services, programs, or activities of the tribe, and be prepared to intervene if they are already on notice and actively made aware of the status of the child.

V. Conclusion

It is the hope of Sault Tribe that these recommendations are helpful to the Department of Interior in its commitment to creating nationwide standards for compliance with the Indian Child Welfare Act.

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May 15, 2015

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Sam Hirsch, Principal Deputy Assistant-Attorney General,
Environmental and Natural Resources Division,
Department of Justice

Delivered via Email: icwa@usdoj.gov; comments@bia.gov

Regarding ICWA Implementation and ICWA Compliance Issues

I am writing today with comments on implementation and compliance issues regarding the Indian Child Welfare Act, in response to your letter requesting input. In particular, the Department of the Interior and the Department of Justice seek answers to three questions: 1. What is working well to promote ICWA compliance and positive outcomes for Indian children? 2.) Ideas for strengthening ICWA compliance. 3.) Examples of innovation and collaboration between states and tribes on Indian child welfare matters. Please see the attached responses.

In general, there no reliable data sources for any Indian tribe to obtain information regarding its children who are in care through state courts and agencies. States' numbers regarding Indian children in care are woefully inadequate compared to tribes' numbers.

Tribal, state and federal governments base many child welfare decisions on how many children fitting certain criteria are in need of services. Without accurate numbers, it is difficult to ascertain, with any precision, the needs of Indian children anywhere in the United States. The statistics we have indicate there are an alarming number of Indian children in care, being adopted, having adoptions disrupted with rates much higher than non-Indian children.

Reports are often received by the Sault Ste. Marie Tribe of Chippewa Indians that refer to our children as Caucasian, even though the children are tribal and the tribe has intervened in the child custody proceeding. The data needs to be accurate. Obtaining appropriate data would be a monumental step toward improving ICWA compliance.

Thank you.

Respectfully,

Aaron A. Payment

Aaron Payment, Tribal Chairperson,
Sault Ste. Marie Tribe of Chippewa Indians

Regarding ICWA Implementation and ICWA Compliance Issues
Sault Ste. Marie Tribe of Chippewa Indians
May 15, 2015

1. What is working well to promote ICWA compliance and positive outcomes for Indian children?

When the attorneys and judges are knowledgeable of the state and federal laws that are applicable to ICWA and child welfare, there are better results for Indian children. When case workers are knowledgeable about the policies of their departments and agencies, there are better results for Indian children.

The more widespread the circulation of binding and persuasive authority regarding Indian child welfare in the respective locations, the better the outcome for Indian children. The jurisdictions that do not seem to have many laws, court rules, etc., within their jurisdictions that deal with Indian child welfare seem to be less compliant than those states and jurisdictions with ICWA awareness and supporting laws, cases, court rules, etc.

Jurisdictions that are quick to recognize the tribes' involvement or interventions, allow the tribes to appear by phone, and do not require legal counsel be the tribal representative generally also seem to be more compliant with other aspects of ICWA. Jurisdictions that are adversarial on the relatively minor issues at the beginning of a case generally continue to be so throughout the case, often misunderstanding how and why the tribes are able to be involved in the case.

2. Ideas for strengthening ICWA compliance.

Education regarding the legal, social and historical components of Indian Child Welfare would go a long way to strengthen ICWA compliance. Education on the core concepts of justice and the ethics of the various positions also strengthen ICWA compliance. For example, LGALs fail repeatedly to visit their child clients, yet speak in court as to what is in their client's best interest. Providing standards to such staff would give them demonstrated ethical standards to follow as well as knowledge and understanding of the laws that apply to their clients.

Attorney costs for indigent parents has been an issue in ICWA cases throughout the country. Some parents do not have the funds to hire an attorney and are not provided one through the court in Indian child welfare cases. Those who are provided an attorney through the court must often be concerned with incurring the cost of those attorneys and not being able to afford legal costs once the case in completed. In some situations, parents are found in contempt of court for not paying attorney fees to the court after the children have been returned to the care of the parents. The added court hearings, additional expenses and potential jail time as a result of contempt of court causes these families to face new removals after reunification.

Initially, 25 USC 1912(b), recognizing such issues, sought to assist families in this regard.

The 1979 Guidelines, Section B5 Notice Requirements (f), do not explain or comment regarding the assistance of counsel or the expense of counsel, except state the right to appointed counsel.

The 2015 Guidelines, Section B6(c)(4)(iv), states the parents have a right to counsel, but there is no indication regarding the cost and whether it may be cost prohibitive to some parents, even where court appointed counsel is concerned.

The state and federal governments supporting the Michigan Indian Family Preservation Act, the 2015 BIA Guidelines and the proposed federal rules are instrumental in strengthening compliance.

3. Examples of innovation and collaboration between states and tribes on Indian child welfare matters.

Tribal-State Partnership —The Michigan Department of Health and Human Services and the Sault Ste. Marie Tribe of Chippewa Indians have signed a Consultation Agreement that outlines to whom the tribe and state will address common issues related to Indian Child Welfare. This agreement outlines a quarterly meeting, specific topics of discussion and designated representatives with a goal of facilitating a true government-to-government relationship between the DHHS and Sault Tribe. Through this partnership and process, there have been changes implemented in the state of Michigan to include the addition of ICWA information in the Michigan Court Rules, the collaborative development of an ICWA bench book for Judges and Referees, and, most recently, the passage of the Michigan Indian Family Preservation Act. There have also been numerous changes to DHHS policy, procedures, forms and increased access to various funding opportunities based on this quarterly collaboration.

Tribal Court Relations — As part of the State Court Administrative Office Court Improvement Project, tribal representatives, SCAO employees, state judges, tribal organizations, etc., meet three times per year to discuss legislation, receive updates regarding tribal-state projects and bring any issues to discuss with the group.

Tribal ICWA Attorney Meetings — Michigan State University College of Law-Indigenous Law and Policy Center joined with Casey Family Foundation to bring all ICWA attorneys for each of the federally recognized tribes together annually or biannually to discuss issues and develop a network that could assist each of the tribes in their work in the future.

Clerical Support — Michigan State University College of Law-Indigenous Law and Policy Center joined with Casey Family Foundation to provide a legal intern/law clerk to the ICWA attorney for the Sault Ste. Marie Tribe of Chippewa Indians.

Tribe-Local Agency Meetings — County prosecutors and local county agencies hold informal meetings regarding ICWA cases in which Sault Tribe intervened.