

GILA RIVER INDIAN COMMUNITY

Executive Office of the Governor & Lieutenant Governor

“Putting Our People First”

Stephen Roe Lewis
Governor



Monica Lynn Antone
Lieutenant Governor

May 13, 2015

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

Re: Written Comments prepared by the Gila River Indian Community on the Proposed Rule Regarding Regulations for State Courts and Agencies in Indian Child Custody Proceedings- RIN 1076-AF25- Federal Register (March 20, 2015)

Dear Ms. Appel:

The Gila River Indian Community (the “Community”) hereby respectfully submits the following comments regarding the new proposed rule for State courts and agencies in Indian child custody proceedings under the Indian Child Welfare Act (“ICWA”), 25 U.S.C. 1901 *et seq.*

I. Gila River Indian Community

The Community is a federally recognized Indian tribe composed of the Akimel O’odham (Pima) and Pee-Posh (Maricopa) tribes. The total enrollment of the Community is approximately 21,500 members. The Gila River Indian Reservation (the “Reservation”) is located in southern Arizona and encompasses nearly 600 square miles in Pinal and Maricopa counties. The Community is both an urban and rural Community and shares a border with the cities of Phoenix, Coolidge, Casa Grande, Chandler, Gilbert, Maricopa and Queen Creek.

The Community’s close proximity to many state courts allows our attorneys and Tribal Social Services case managers to be actively involved in state child dependency cases. Currently, the Community is involved in approximately 70 ICWA cases within the state of Arizona; and approximately 9 out-of-state ICWA cases.

As a Community, we take great pride in becoming involved in state dependency cases as early as possible so that we may identify ICWA compliant placement, establish contacts with all parties involved, and work with state agencies to ensure that the best interests of our children are being addressed.

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II. Indian Child Welfare Act

Originally, Congress enacted ICWA in 1978 (Public Law 95-608) after hearings which found that an alarmingly high percentage of Indian families had been broken up when public and private agencies subjected Indian children to unwarranted removal, most of whom were eventually placed in non-Indian foster and adoptive homes and institutions.

ICWA's purpose is to protect the best interests of Indian children and to promote stability and security for tribal communities and families by establishing minimum federal standards for the removal of Indian children from their families and the placement of such children in homes or institutions which will reflect the unique values of Indian culture. Federal policy recognizes that, where possible, an Indian child should remain in the tribal community.

Although progress has been made as a result of ICWA, out-of-home placement of Indian children is still much greater for Indian youth than it is for the general population; and Indian children continue to be placed in non-Indian homes, inconsistent with ICWA. Compliance with the ICWA by states is erratic and state court decisions inconsistent. There is a great need for federal government to provide binding regulations to ensure that the ICWA is enforced and applied properly in all states so that our children and families are fully protected.

III. Proposed Rules

The Community supports the implementation of the proposed rules. The proposed rules will establish the Department of Interior's interpretation of ICWA as binding interpretation and will ensure consistency in implementation of ICWA across all states in Indian child welfare and voluntary child custody proceedings.

The Gila River Indian Community submits the following comments and proposed revisions to the proposed regulations:

- A. § 23.2 Definitions - Active Efforts - defining active efforts and providing examples for state courts and agencies is a very important step in providing consistency and accountability for state case workers and others parties directly involved in providing services to Indian families and children. Active efforts should refer to a continuous concept that focuses on the safe reunification of Indian children with parents, family and tribe as most desirable goals of ICWA. We support the concept that active efforts begin the moment an Indian child is removed and subsequently placed into state custody. Preventing removal of Indian child from their homes should also be addressed.
- B. § 23.103 – When does ICWA apply: Voluntary placement and voluntary terminations should not be excluded from ICWA. Voluntary placements and voluntary terminations can result in wholesale separation of Indian children from their families, culture and Native communities. The Community has experienced a situation where a Community member voluntarily consented to adoption. After the Community received notice and intervened, the Community member changed her mind and the child was placed with a

relative placement in the Community thereby preserving the child's ties to his family, culture and community.

- C. § 23.103(b) - Rejecting the Existing Indian Family Exception. This section ensures that the ICWA will be applied to all Indian children in any child custody proceedings regardless of parental connection and the courts will not be able to make the determination that ICWA is not applicable based on prior minimal standards and connections. This revision would further support the tribe's position that the Indian child is fully protected and supported by the tribal community regardless of parental actions or connections.
- D. § 23.103(g) - Notice to tribes in voluntary cases. In circumstances where a parent consents to foster care or preadoptive/adoptive placement, notice to tribe allows a tribe to intervene, assist and/or take jurisdiction if appropriate. This also assists the tribe in knowing or locating all the tribe's children. Although anonymity and confidentiality needs to be protected, this should not relieve the agency or court of the obligation to comply with the placement preferences. This further supports the Community's position that the tribe should be an interested party when it comes to the tribe's children and the children have a right to remain connected to the tribe.
- E. § 23.108 (a) - Recognizing the tribe's exclusive right to determine its membership. This acknowledgement of independence and identity is a key component of our tribal sovereignty.
- F. §23.109 – What is the procedure for determining an Indian child's tribe when the child is a member or eligible for membership in more than one tribe: Determination of membership in more than one tribe should allow both tribes to intervene and be involved. The procedure outlined in the rule states the if an Indian child is eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts be designated as the Indian child's tribe, and allows the court to designate the Indian child's tribe. In some cases the Indian child may have the same amount of contacts with two tribes. More than one tribe may have a bona fide interest in the proceedings and both should be permitted to intervene and represent the tribe's interests.
- G. § 23.111 - When an agency or court knows or has reason to believe that the subject of voluntary or involuntary child custody proceeding is an Indian child, the agency or court must provide tribes with notice. This notification helps our tribe because the sooner we are notified of a dependent child the sooner the tribe is able to work on family placement, enrollment and other services offered locally within the Community that may benefit the family.
- H. §23.113(i) - What is the process for the emergency removal of an Indian child, and § 23.115 (d) - How are petitions for transfer of proceeding made: The rules should mandate rather than permissively allow a tribe to appear by other methods (telephonic, video conferencing, etc.). Travel and expenses can prohibit a tribe from appearing in person.

The state of California currently operates a system that permits telephonic participation, but requires payment for the service. Costs to participate should not be another barrier for tribes to participate in hearings. Tribes should be permitted access to hearings by other methods of participation at no extra cost.

- I. § 23.117 (d) - in determining good cause to deny transfer, the court can not consider 1) whether or not the case is at an “Advance stage” 2) whether transfer would result in a change in placement for the child, 3) the child’s contacts with the tribe or reservation, 4) the socio-economic conditions or any perceived adequacy of the tribe; agency or court, or 5) the tribal court’s prospective placement for the child. The burden to establish good cause to not transfer should be on the party opposing the transfer. This is helpful because it allows our tribe and our tribal courts independence in making our own determination of what the best interests of our Indian children will be. Furthermore, bonding and attachment should not be determine factors since they often do not include the tribal extended family network and bonding and attachment to tribal identity connectedness is very different for Indian children.
- J. § 23.128 (b) - the agency seeking preadoptive, adoptive or foster care placement of an Indian child must always follow the placement preferences. If these preferences cannot be met, the agency must prove by clear and convincing evidence that a diligent search was conducted and also explain why the preferences could not be met, which should include notification and documented detailed explanations to all interested parties, all known and identifiable family, and the tribe. This will help ensure that the agency is not simply deferring to the tribe’s efforts to locate ICWA compliant placements, but that the agency is also mandated to engage in their own continuous efforts. This will also ensure that priority in placement, from the beginning, must be in accordance with the tribe’s preferences and placed on tribal values. The Community also supports the position that it is inappropriate to conduct an independent analysis, inconsistent with the ICWA’s placement preferences of the “best interests” of an Indian child and that such analysis does undermine Congress’s findings interest (i.e. placement is with the Indian family is in the best interest of the child).
- K. § 23.129 – What placement preferences apply in adoptive placements, and § 23.130 – What placement preferences apply in foster care or preadoptive placements: Should include the preferences established by the child’s tribe as stated in §23.128(a).
- L. § 23.137 (a) - The state must establish a single location where all records of every voluntary or involuntary foster care, preadoptive placement and adoptive placement of Indian children by courts of that state will be available within seven days of a request by an Indian child’s tribe or the Secretary. This should also include, at minimum, the complaint, all substantive orders, and record of placement determination. This will help adult adoptees ability to gain information in a timely manner pertaining to their rights, which may include tribal membership. Such requests will also establish a connection between the adult adoptee and the Community i.e. eligibility for health services, social services, housing, etc.

The legal basis for the Department of Interior's proposed rules is strong and highly necessary. The statute provides that "the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this Act," which is a broad grant of authority. The Act was designed to establish "minimum federal standards" governing state court proceedings. The Community supports the implementation of the proposed rule, which seeks to establish the Department of Interior's interpretation of ICWA as a binding interpretation and ensures consistency in implementation of ICWA across all states in Indian child custody proceedings.

On behalf of the Gila River Indian Community, thank you for the opportunity to comment on the proposed rule. We very much appreciate the issuance of the proposed rule and urge you to adopt strong ICWA regulations to ensure that the ICWA fulfills its purposes of protecting the rights of Indian children, families and tribes.

Sincerely,

A handwritten signature in black ink that reads "Stephen R. Lewis". The signature is written in a cursive, flowing style.

Stephen R. Lewis, Governor
Gila River Indian Community

cc: Monica Antone, Lieutenant Governor
Community Council Members
Linus Everling, General Counsel