Ho-Chunk Nation Department of Justice

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May 18, 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

Re: Notice of Proposed Rulemaking- Regulations for State Courts and Agencies in Indian Child Custody Proceedings- RIN 1076-AF25- Federal Register (March 20, 2015)

Dear Ms. Appel:

The Ho-Chunk Nation offers its support of the proposed regulations addressing Indian child custody proceedings. These regulations will foster consistency in the manner in which state courts address the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 *et seq*.

During the late 1970s, Congress found that 25% to 35% of all Indian children in the country had been removed from their families at a rate five times greater than non-Indian children. In Wisconsin, the risk of Indian children being separated from their parents was 1,600% greater. While Congress enacted the ICWA in 1978, the Bureau of Indian Affairs established non-binding guidelines in 1979 and again in 2015. The State of Wisconsin codified the ICWA into state statute in 2009; nonetheless, additional work must occur to protect Indian children, families, and tribes. Binding and enforceable regulations are desirable to prevent the continued disproportionate rate that Indian children are being subject to removal, whether through involuntary or voluntary actions, across the United States.

The continued disproportionality and inconsistent judicial decision-making, occurring 37 years after the passage of the ICWA, proves the essential need to have binding regulations to ensure the ICWA's enforceability within Wisconsin and beyond. The Ho-Chunk Nation is greatly supportive of the Bureau of Indian Affairs using its unique expertise of Indian Affairs to exercise its statutorily explicit and administratively inherent authority to "promulgate such rules and regulations as may be necessary to carry out the provisions of the Act."[1] The Ho-Chunk Nation offers the following

[1] Where Congress established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow. But in rigorously applying the latter rule, a court need not pause to puzzle over whether the interpretive question presented is "jurisdictional." If "the agency's answer is based on a permissible construction of the statute," that is the end of the matter. *City of Arlington, Tex. v. FCC*,

comments to assist in making these regulations stronger and clearer in an effort to prevent the further divergent interpretations of the ICWA throughout the country.

Rule 23.2 Definitions

1) "Parent." The definition of "parent" is stronger in the new ICWA Guidelines, than in the proposed regulations.
   a. Consequently, the Ho-Chunk Nation suggests adopting the definition found in the new ICWA Guidelines with the addition of language to take into account paternity established by tribal law and custom, as this is permitted under Title IV-D of the Social Security Act for the establishment of a tribally operated child support agency.[2]
   b. Suggested Definition of "Parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include an unwed father where paternity has not been acknowledged or established. To qualify as a parent, an unwed father need only take reasonable steps to establish or acknowledge paternity. Such steps may include acknowledging paternity in the action at issue, establishing paternity through DNA testing, or establishing paternity through tribal law and custom.
2) "Domicile." The definition of "domicile" is too restrictive, particularly for the Ho-Chunk Nation. The Ho-Chunk Nation does not have a contiguous land base; and the largest concentrations of Ho-Chunk members reside within 14 counties in central Wisconsin and the urban areas of Minneapolis and St. Paul, Minnesota; Madison and Milwaukee, Wisconsin; and Chicago, Illinois. As such, our tribal members have become transitory between Ho-Chunk Nation communities. Despite this, they are political citizens of the Ho-Chunk Nation and retain the ability to vote regardless of their location. Oftentimes, when one considers one's domicile, political and governmental questions arise. For example, the Wisconsin Department of Revenue's Legal Residence/Domicile webpage suggests that examples of where one votes and where one registers their vehicle to be considered illustrative of domicile. Ho-Chunk Nation members vote in one of five areas, with the fifth being "at-large." The Ho-Chunk Nation is working towards having license plates and vehicle registration for our tribal membership, just as many of the other Tribes in Wisconsin have been able to do. Accordingly, domicile for American Indians is a much larger theory than simply "physical presence in a place and intent to remain there."
   a. "Domicile" should be tied closer to the political status of American Indians. Thus, a definition of domicile should very likely encompass one's Tribal Nation.
3) "Imminent Physical Damage or Harm." The definition of "imminent physical damage or harm" is slightly different in the new ICWA Guidelines and thus slightly less suggestive of why this definition is so important.
   a. For consistency, the Ho-Chunk Nation suggests adopting the definition found in the ICWA Guidelines.

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133 S.Ct. 1863, 1874-75 (2013)(citing to *Chevron v. NRDC*, 476 U.S. 837, 842 (1984)).
[2] 45 CFR § 309.100.

b. Guidelines' Definition of "Imminent Physical Damage or Harm" means present or impending risk of serious bodily injury or death *that will result in severe harm if safety intervention does not occur* (emphasis added).

4) "Indian Child's Tribe." The definition is too restrictive, and thus could close the door on opportunities for multiple tribes to be involved in a case where the child is eligible in all. A child could have equal contacts between various tribes of which they are eligible for, and each of those tribes should have the opportunity to ensure that the connection is maintained between the tribe and eligible child.

5) "Indian Child" should be added and defined in the proposed rules, and it should be clarified that in instances where the child is only eligible that they need not be eligible in the same tribe that the parent is a member. Current cases exist where the child is eligible for the Ho-Chunk Nation, but his or her parents are members of different tribal nations. Of note, states are also extending their jurisdiction in cases where a child reaches the age of eighteen, but is still in school. Wisconsin recently expanded their jurisdiction in these limited circumstances, and thus this may be something for the BIA to consider.

a. The Ho-Chunk Nation suggests the addition of: "Indian child" means any unmarried person who is under age eighteen and is either: (1) a member of an Indian tribe; or (2) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe, which need not be the same tribe of which the child is eligible for.

6) "Best Interests of an Indian Child" should be added and defined in the proposed rules. The concept of best interests of an Indian child is different than the best interests of a child standard. The best interests of an Indian child would be served by protecting "the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society."[3] One example of a definition that we suggest (with minor tweaks to remove any Wisconsin specific language) as an addition to the proposed rules is found within the Wisconsin Indian Child Welfare Act (WICWA), Wis. Stat. § 48.01(2):

a. In Indian child custody proceedings, the best interests of the Indian child shall be determined in accordance with the Indian Child Welfare Act, 25 USC 1901 to 1963, and the policy specified in this subsection. It is the policy of this state for courts and agencies responsible for child welfare to do all of the following:

(a) Cooperate fully with Indian tribes in order to ensure that the federal Indian Child Welfare Act is enforced in this state.

(b) Protect the best interests of Indian children and promote the stability and security of Indian tribes and families by doing all of the following:

1. Establishing minimum standards for the removal of Indian children from their families and placing those children in out-of-home care placements, preadoptive placements, or adoptive placements that will reflect the unique value of Indian culture.

2. Using practices, in accordance with the federal Indian Child Welfare Act, 25 USC 1901 to 1963, this section, and other applicable law, that are designed to prevent the voluntary or involuntary out-of-home care placement of Indian children and, when an

[3] H.R. Rep. No. 95-1386, 95th Cong. 2nd Sess. 23 (1978); *see* 25 U.S.C. §§ 1901-02.

out-of-home care placement, adoptive placement, or preadoptive placement is necessary, placing an Indian child in a placement that reflects the unique values of the Indian child's tribal culture and that is best able to assist the Indian child in establishing, developing, and maintaining a political, cultural, and social relationship with the Indian child's tribe and tribal community.

Rule 23.103(e)

1) Clarification should be added to (2) and (3). The Ho-Chunk Nation participated in a Wisconsin Circuit Court case in which the ICWA does not apply in any private family custody disputes, despite the fact that the Court awarded placement to a non-Indian pre-adoptive couple. We also have instances where an action begins as a delinquency for an offense that would be a crime if the child was an adult, but then it becomes apparent that the child cannot be returned to the home, not for reasons associated with the delinquent offense, but rather the conditions in the home present concerns for the emotional and physical safety of the child.
   a. We suggest that at the end of (2) it be added: However, if it is apparent that the child cannot be returned home for reasons other than the mere offense that would be a crime if an adult, the proceeding shall be treated as an Indian child custody proceeding.
   b. We suggest at the end of (3) it be added: If the court awards custody and placement to a person other than the parents, the proceeding shall be treated as an Indian child custody proceeding.
2) An (h) should be added to address States that include relinquishments, known by many as Safe Haven, under involuntary sections of their Children's Codes, such is the case in Wisconsin. Because of the deference to anonymity, American Indian children are being lost through a backdoor approach to avoid the ICWA.
   a. We suggest that (h) be created to read: Cases where a parent voluntarily relinquishes their child under a Safe Haven statute, whether subject to involuntary or voluntary procedures under state statute, is covered by the ICWA.

Rule 23.108

1) The use of the word "may" throughout this section is problematic. Only an Indian tribe can determine its membership. "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."[4]
   a. (a) "may" should be deleted and replaced with "shall."
   b. (c) "may" should be deleted and replaced with "shall."
   c. (d) "may" should be deleted and replaced with "shall."

Rule 23.109

1) While the Ho-Chunk Nation understands that the ICWA makes mention of the tribe

[4] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 32 (1978).

having more significant contacts, we do not believe the door should be closed upon any tribe that wishes to participate in an action involving one of their tribal children. Allowing a state court to make a determination as to which tribe is the child's tribe in the event the tribes cannot reach an agreement is a severe encroachment on tribal sovereignty, seems to be in direct contradiction to Rule 23.108(d), and most importantly seems to deviate from the spirit of the ICWA which was passed in part to ensure tribal connection to tribal children, as "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[5]

Rule 23.111

1) Tribes are often limited in the funds necessary to hire attorneys in every state in which an ICWA proceeding occurs. As with citizens of the United States, citizens of tribes are transitory between communities. Further, the effects of forced assimilation, termination of reservations, boarding school era removals, and removals of Indians to urban areas still plague tribes today. Tribal people live all across the country. As such, it becomes a financial strain on tribes to be able to afford to hire attorneys in every single state to handle a case either alone or in concert as associated counsel under the various states' requirements for association with counsel in order to practice *pro hac vice*. By forcing tribes to pay for such legal services, it can constructively close the door on tribal participation in ICWA hearings. And the very purpose and spirit of the ICWA was to have tribal participation and to protect the tribal interest in their children and the children's interest in their tribal connections.
   a. 23.111(c)(4)(ii) & (iii) should be clarified to state that the Tribe (a) need not have an attorney to intervene and (b) that tribal attorneys may appear through a generic *pro hac vice* without having to associate with local counsel.[6]
   b. 23.111(h) "may" should be deleted and replaced with "shall" or "should."

Rule 23.112

1) (d) should be amended to read "[t]he court should allow, if it possesses the capability, alternative methods of participation in State court proceedings by family members and *tribal attorneys and/or representatives*, such as participation by telephone, videoconferencing, or other methods."

Rule 23.113

1) The Ho-Chunk Nation is very supportive of this section generally. Far too often removals occur without true need, and once the removal occurs it seems to set a force in motion with such centrifugal force that it is nearly impossible for families to escape the system once they are in, which is quite problematic when they likely should not have been brought into it in the first instance. We further appreciate the requirements to more readily involve the tribes in this process.

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[5] 25 U.S.C. § 1901(3); *see also Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32-37 (1989).

[6] *People v. ex rel. A.T.* (Colorado case and description found at http://www.narf.org/cases/people-ex-rel-at/); *In re the Interest of Elias L.*, 277 Neb. 1023 (Neb. 2009); *State ex rel. Juv. Dept. v. Shuey*, 850 P.2d 378 (Or. App. 1993).

a. (a)(6) should be clarified. It could be confused that all of the requirements for an ICWA child custody proceeding notice are required prior to the emergency removal hearing. We understand that there are true instances of emergency removals. And thus, we do not want protection of children to be hindered by confusion. Perhaps (a)(6) should be moved and added to (h)(3).
b. (f)(1) should be clarified. Is this to mean qualified expert witness in the sense that it is within an ICWA child custody proceeding? Or is this something in addition to? To prevent confusion it is suggested that this section be clarified.
c. (i) should be amended to read "[t]he court should allow, if it possesses the capability, alternative methods of participation in State court proceedings by family members and *tribal attorneys and/or representatives*, such as participation by telephone, videoconferencing, or other methods."[7]

Rule 23.117

1) While the Ho-Chunk Nation agrees with the enumerated factors as to what should not be considered as good cause not to transfer, we believe an exhaustive list of what is good cause would close the gaps on further detrimental interpretation of this statutory language. Tribal courts are best situated to understand the dynamics and intricacies of tribal culture and familial structures. Tribal social services agencies are best situated to address culturally appropriate services to rehabilitate and reunify families. As such, there really should only be a *forum non conveniens* argument for good cause, although we would also consider hearing objections from children who can make decisions for themselves.
   a. (c) "may not" should be deleted and replaced with "shall not."
   b. (d) this section should be changed to a list of what is good cause (in the alternative, if this approach is not deemed acceptable, the "may not" should be deleted and replaced with "shall not"). We suggest the following change:

   (d) The court may determine that good cause exists to deny the transfer only if the person opposing the transfer shows by clear and convincing evidence that either of the following applies:

   a. The Indian child is 12 years of age or over and objects to the transfer.

   b. The evidence or testimony necessary to decide the case cannot be presented in tribal court without undue hardship to the parties or the witnesses and that the tribal court is unable to mitigate the hardship by making arrangements to receive the evidence or testimony by use of telephone or live audiovisual means, by hearing the evidence or testimony at a location that is convenient to the parties and witnesses, or by use of other means permissible under the tribal court's rules of evidence.

Rule 23.121

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[7] *Id.*

1) While "may not" is the actual wording found within the ICWA, using "shall not" throughout this section would be the preferred word choice. This greater protection does not appear to be a departure from the intent of the ICWA, as the intent was to address the fact that state courts have "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."[8]
   a. (a) "may not" should be deleted and replaced with "shall not."
   b. (a) the language should be amended to mirror the language found within the ICWA, thus it should be worded to state "serious emotional or physical damage to the child."
   c. (b) "may not" should be deleted and replaced with "shall not."
   d. (b) the language should be amended to mirror the language found within the ICWA, thus it should be worded to state "serious emotional or physical damage to the child."

Rule 23.122

1) A hierarchal system for qualified expert witnesses is utilized in several jurisdictions, including Wisconsin. Additional language may be useful to address how to best utilize this type of system.
   a. The current (c) should be moved to a new (d), and the following language is suggested to become (c):
      i. A qualified expert witness from a lower order of preference may be chosen only if the party calling the qualified expert witness shows that it has made a diligent effort to secure the attendance of a qualified expert witness from a higher order of preference. A qualified expert witness from a lower order of preference may not be chosen solely because a qualified expert witness from a higher order of preference is able to participate in the Indian child custody proceeding only by telephone or live audiovisual means. The fact that a qualified expert witness called by one party is from a lower order of preference than a qualified expert witness called by another party may not be the sole consideration in weighing the testimony and opinions of the qualified expert witnesses. In weighing the testimony of all witnesses, the court shall consider as paramount the best interests of the Indian child as set forth in the definitions section.

Rule 23.125

1) This section could be abused in a manner to avoid providing adequate information to identify Indian children.
   a. Specifically, the requirement of the names of both parents should be required to be within the consent document, and not solely the name and address of the consenting parent. This could be read to mean that one parent, who could be non-Indian, lists their information alone and hides the identity of the other parent, who is Indian. This information is particularly useful if the child is only eligible with obtaining future membership.

[8] 25 U.S.C. §1901(5).

Rule 23.126 & 23.127

1) There is a notable difference in the language as to when the child should be returned after a withdrawal of a voluntary consent in these two sections. However, in both situations, there could be possible underlying child protection issues, despite being a "voluntary" action. The Ho-Chunk Nation has witnessed counties utilize voluntary placement agreements to avoid the ICWA and tribal involvement or voluntary termination of parental rights consents to avoid long drawn out trials. If a consent is withdrawn, the child is either returned immediately or as soon as practicable depending on whether it was a foster care or termination of parental rights situation. In a true voluntary action, without an underlying child protection matter, it makes perfect sense for immediate return of the child. However, in a voluntary action that stems from a child protection matter and has hints of fraud/duress or where a consent is obtained simply as strategic bargaining chip, then it might be appropriate to use the "as soon as practicable" language. The differentiating factor is likely not foster care versus termination of parental rights/adoption though, but instead the underlying reasons for the consent- child protection matter or no child protection matter.
   a. 23.126(b) is suggested to read "[w]hen a parent or Indian custodian withdraws consent to foster care placement, the child must be returned to the parent or Indian custodian immediately, unless there is clear and convincing evidence that custody of the child by the parent or Indian custodian is likely to result in imminent physical damage or harm to the child, at which time the procedures of 23.113 shall be followed or an underlying Indian child custody proceeding shall be reinstated."
   b. 23.127(b) is suggested to read "[t]he clerk of the court in which the withdrawal of consent is filed must promptly notify the party by or through whom any preadoptive or adoptive placement has been arranged of such filing and the child must be returned to the parent or Indian custodian immediately, unless there is evidence by clear and convincing evidence that custody of the child by the parent or Indian custodian is likely to result in imminent physical damage or harm to the child, at which time the procedures of 23.113 shall be followed or an underlying Indian child custody proceeding shall be reinstated."

Rule 23.131

1) One of the paramount purposes of the Indian Child Welfare Act (hereinafter ICWA) is to ensure "the placement of [ ] children in foster or adoptive homes or institutions which will reflect the unique values of the Indian culture."[9] The ICWA's mandate that an adoptive placement is preferred to be with members of the child's extended family, other members of the same tribe, or other Indian families is "[t]he most important substantive requirement imposed on the state."[10] Further, the ICWA permits Tribes that desire to have a different, more culturally appropriate order of preferences to adopt such

[9] H.R. Rep. No. 95-608, 95th Cong. 2nd Sess. 8 (1978); *see also* 25 U.S.C. § 1902.
[10] *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989).

preferences to take the place of the standard placement scheme found in the ICWA.[11]

It was the intent of Congress to ensure that "white, middle-class standards" not be utilized in determining whether preferred placements are suitable.[12] "Discriminatory standards have made it virtually impossible for most Indian couples to qualify as foster or adoptive parents, since they are based on middle-class values."[13]

The importance of unique Indian social and cultural standards cannot be overemphasized – the historical lack of understanding of such standards by state courts and agencies, and the resulting effects on the populations of Indian tribes and the self identification of Indian children, is precisely why the ICWA was enacted, as "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[14]

Thus, in determining the suitability of a potential home, the relevant standards must be "the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties."[15] This language illustrates that Congress intended state courts to look beyond just the reservation boundaries, and focus on social and cultural ties as well.

The placement preferences shall be followed unless there is a finding of "good cause" to deviate.[16] Between the legislative history of the ICWA and the lack of a clear definition of good cause within the Act itself, it has been assumed that state courts are left with the discretion to determine whether good cause exists to depart from the placement preferences. However, "[t]his flexibility is not a license to impose non-Native standards when courts consider the suitability of statutorily preferred placement candidates."[17]

Interestingly, one court in California has found that emotional bonding between a child and his/her placement which occurs as a result of a local or state agency's failure to comply with the ICWA does not constitute good cause for deviating from the ICWA's placement preferences, even if considerable trauma to the child may occur as a result.[18]

Whether the child's best interests should be used as one of many factors or not used at all in making a good cause deviation is handled differently in various jurisdictions. "Conspicuously absent from the list of justifications for deviating from the placement preferences is a determination that adherences to the preferences would not be within the child's best interests – presumably because the BIA did not wish to invite state courts to engage in a highly discretionary and potentially biased analysis."[19] In *In re S.E.G.*, the

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[11] 25 U.S.C. § 1915(c).
[12] H.R. Rep. No. 95-1386, 95th Cong. 2nd Sess. 24 (1978).
[13] H.R. Rep. No. 95-608, 95th Cong. 2nd Sess. 11 (1978).
[14] CALIFORNIA INDIAN LEGAL SERVICES, CALIFORNIA JUDGES BENCHGUIDE: THE INDIAN CHILD WELFARE ACT 46 (May 2010 ed.); *see also* 25 U.S.C. § 1901; *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32-37 (1989).
[15] 25 U.S.C. § 1915(d).
[16] 25 U.S.C. § 1915(a)-(b).
[17] *In the Matter of the Adoption of Sara J.*, 123 P.3d 1017, 1027 (AK 2005).
[18] *In re Desiree F.*, 83 Cal. App. 4th 460, 476 (Cal. Ct. App. 2000).
[19] Barbara Ann Atwood, *Flashpoints under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 643-44 (2002).

Minnesota Supreme Court determined that the plain language of the ICWA and the legislative history:

> [c]learly indicate the state courts are a part of the problem the ICWA was intended to remedy ... The best interests of the child standard, by its very nature, requires a subjective evaluation of a multitude of factors, many, if not all of which are imbued with the values of the majority culture. It therefore seems "most improbable" that Congress intended to allow state courts to find good cause whenever they determined that a placement outside the preferences of § 1915 was in the Indian child's best interests.[20]

The use of such subjective standards can arguably lead to the focus shifting from maintaining a child's connection to families and the Tribe, which is the main purpose of the ICWA, to arguments about the child's separation from non-Indian foster homes and cultural adjustment if the child was not formerly a physical part of the Indian community.

a. It is suggested that both (c)(1) & (2) should have the following added to the end of each sentence, "unless the request is made for the purpose of avoiding the application of this section and the federal Indian Child Welfare Act, 25 USC 1901 to 1963."

Rule 23.133

1) (d) should be amended to read "[t]he court should allow, if it possesses the capability, alternative methods of participation in State court proceedings by family members and *tribal attorneys and/or representatives*, such as participation by telephone, videoconferencing, or other methods."

Rule 23.134

1) While it is true that the tribe's enrollment office is more likely than not the appropriate office to be contacted to fulfill the requirements of this rule, tribal sovereignty should be considered and the agency should communicate with the office designated by the tribe.
   a. (c) should be amended to read "[i]n States where adoptions remain closed, the relevant agency should communicate directly with the tribe's enrollment office *or other office designated by the particular tribe* and provide the information necessary to facilitate the establishment of the adoptee's tribal membership."

Enforcement Tools

1) Health and Human Services should begin to better enforce the requirements of the ICWA by overseeing state compliance with the requirements of Titles IV-B and IV-E of the Social Security Act, with a focus on withholding federal monies for noncompliance with the ICWA.
2) Department of Justice should assist with bringing lawsuits based upon the trust relationship between the federal government and the tribes.

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[20] *See In re S.E.G.*, 521 N.W.2d 357, 362-63 (Minn. 1994) (citations omitted).

Thank you again for the opportunity to comment on the proposed rule. The Ho-Chunk Nation strongly supports these regulations in general, as the regulations will assist any perceived statutory gaps, provide clarity, and improve consistency across the country. It is our hope that our aforementioned suggestions will assist and provide adequate ideas on how to further strengthen the regulations to ensure the ICWA fulfills its essential purpose of protecting the rights of Indian children, families, and tribes.

Sincerely,

Amanda L. WhiteEagle

Amanda L. WhiteEagle, Attorney General
HCN Department of Justice