Ho-Chunk Nation Department of Justice

W9814 Airport Road, P.O. Box 667
Black River Falls, WI 54615
Phone (715) 284-3170 - (800) 501-8039 - FAX (715) 284-7851

Attorney General:
Amanda L. WhiteEagle

Tribal Counsel:
Michelle M. Greendeer-Rave
Wendi A. Huling

Tribal Attorneys:
Nicole M. Homer
Erik Shircel
Angelia L. Naquayouma

Child Support Attorney:
Bruce Elliott Reynolds

Tribal Prosecutor:
Rebecca Maki-Wallander

Paralegals:
Sue Thompson
Alana T. DeCora-Ayesh
Amanda J. Glasspoole

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,

Safe Haven is "singlehandedly destroying our clan culture and ways."
~ Ho-Chunk Nation Traditional Court

As a Tribal Attorney for the Ho-Chunk Nation, I submit my comment in conjunction with those submitted by our Attorney General. Because my supervisor has submitted a more comprehensive list of suggested changes, I will focus my comment on a very narrow topic, of which I spoke briefly about during the Public Comment Session held in Portland, Oregon on April 22, 2015. The issuance of these proposed rules is long overdue and we commend the Department of the Interior (DOI) and the Bureau of Indian Affairs (BIA) for proposing much needed regulations in this area. I greatly appreciate the Department in taking the initiative to issue these regulations and am generally extremely supportive of them.

I wish to take the opportunity to focus on the use of relinquishments of a newborn, known in many states as Safe Haven. 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."[1] 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."[2] Further, the ICWA permits Tribes that desire to have a different, more culturally appropriate order of preferences to adopt such preferences to take the place of the standard placement scheme found in the ICWA.[3]

Some might question, why would this still be important of a newborn child that would not "know" they are even Indian? It is very important. Not only to the Tribes fighting to maintain existence in the 21st Century and beyond, but to the children affected by removal from their communities. In fact,

[1] H.R. Rep. No. 95-608, 95th Cong. 2nd Sess. 8 (1978); *see also* 25 U.S.C. § 1902.
[2] *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989).
[3] 25 U.S.C. § 1915(c).

children adopted out of their tribal communities are highly affected by this removal- invoking trauma long after the adoption is finalized.

In a study of Indian adoptees, startling information was discovered. Information that shows just how deep the trauma can be for these children as they reach adolescence and adulthood. Dr. Carol Locust, of the Native American Research and Training Center at the University of Arizona College of Medicine, performed in-depth research on the disorder known as "Split Feather Syndrome." What is that exactly?

> [Dr. Locust] identified unique factors of Indian children placed in non-Indian homes that created damaging effects in these children's lives. Locust found that: Native children placed in non-Native homes were at great risk for experiencing psychological trauma leading to long-term emotional and psychological problems as adults; that the same clusters of long-term psychological problems experienced by naive adult adoptees were recognizable as a syndrome; and 'split feather' syndrome appears to be related to a reciprocal-possessive form of belongingness unique to survivors of cultures subjected to annihilation.[4]

These children grow up, looking in the mirror, knowing that there is something "different" about them- something special. However, without their tribal community there to support them as they go through life, they are simply going through the motions. They lack the tribal connection and cultural leaders to guide them as they transition through these formative years. They lack the guidance as to how they are supposed to act as a male or female of their particular tribe. They lack the support in how to combat the feelings of loss and disconnectedness. A piece of them is missing. And a piece of the tribe is missing too.

The Wisconsin Legislature took the necessary steps to prevent this from occurring when it chose to codify the federal ICWA into state statute (hereinafter WICWA). Throughout the codification process it would have been hard to ignore the Wisconsin specific data that came from the federal adoption of the ICWA. During the late 1970's 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. Here in Wisconsin, the risk of Indian children being separated from their parents was 1,600% greater. The Wisconsin state legislature unanimously declared that Wisconsin's policy is to "protect the best interests of Indian children and promote the stability and security of Indian tribes and families."[5]

Over the course of several years, the tribes in Wisconsin have been actively seeking Wisconsin to bring its Safe Haven Statute into compliance with the ICWA. However, year after year the elephant in the room continues to be ignored under the misguided reliance on a parent's right to anonymity. That elephant is the plain and simple fact that Safe Haven is a back door approach to ICWA and WICWA avoidance. Without obtaining the necessary information to confirm a child's status as an Indian child results in the tribes not receiving notice. Notice is one of the core elements of the ICWA and WICWA. It

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[4] *ICWA from the Inside Out: 'Split Feather Syndrome,'* MINN. DEPT. OF HUMAN SERVS. (July 2005), *available at* http://www.dhs.state.mn.us/main/groups/children/documents/ pub/dhs16_180049.pdf. *See also Georgia Deoudes,* Evan B. Donaldson Adoption Institute, *Unintended Consequences: 'Safe Haven' Laws are Causing Problems, Not Solving Them available at* http://adoptioninstitute.org/publications/unintended-consequences-safe-haven-laws-are-causing-problems-not-solving-them (finding this concept extends to all children, and not Indian alone):

> Safe haven laws also ignore the psychosocial importance to adopted people, as children and later in life, of information about their origins, ethnicity and social backgrounds. The overwhelming majority of adoption practitioners and mental-health professionals today – including ones who do not necessarily embrace the rapidly growing practice of "open adoption" – agree about the benefits of having personal, as well as medical, information; moreover, they maintain that the lack of such information can undermine adoptive families, especially the children in them.

[5] Wis. Stat. § 48.01(2)(b).

is the trigger that must be pulled in order to promote the stability and security of Indian tribes and families. It is what gets the tribes in the door to take that child into custody and place with tribal families or for the tribes to at least intervene in the county court proceedings to advocate for their preferred tribal placement.

It is not unreasonable for questions to be asked that must be answered to determine Indian eligibility. If anonymity is the primary goal of Safe Haven, then obviously you cannot force someone to answer. However, it was my belief that the primary goal of Safe Haven was to have safe children. And a safe Indian child is a child placed within his/her community.

There is certainly an argument that anonymity is what is needed to prevent infanticide. However, this is weak at best. And considerably weaker with the lack of any hard data to suggest that anonymity is indeed what is required to prevent infanticide. There is quite a bit of legal literature that instead speaks of how anonymity does not prevent infanticide- as people are still abandoning children- despite states having "Safe Haven Laws." Instead, the literature illustrates the role anonymity has in being more of a detriment to the adoptees than assistive. And in fact, there is no place that this becomes a larger detriment than in the hospital setting.

> These anonymity provisions are particularly vexing because a vast majority of abandoned newborns are abandoned at the hospital after birth even without any safe haven laws (citation omitted). These infants do not seem to have been at risk of harm or death since they were left at sheltered places with attendants and medical care, and there is no indication that need for anonymity or fear of criminal prosecution prevents mothers who give birth in the hospital from leaving their newborns there. Yet the statutes, nearly all of which designate hospitals as safe havens [citation omitted], may now permit these hospital abandonments to be classified as safe haven relinquishments with the attendant anonymity and barriers to obtaining family and medical information that may be useful to the child and adoptive parents and, in the case of Native American children, the tribe. Thus the statutes potentially have injected anonymity onto tens of thousands of babies born, and abandoned, at hospitals each year [citation omitted].[6]

It is fully understood the difference between anonymity and confidentiality. When the tribes proffer that they have stringent confidentiality, it is not a misconceived understanding of anonymity. Instead, it is to show that the intent of the Safe Haven Laws can still be achieved. We can handle these actions in a manner that the parent(s) remain anonymous. We need the basic information to verify eligibility of membership though. Yet, we can protect them through this process to ensure the child is safe and healthy, while recognizing the desire of the parent(s) to be unknown among our tight knit tribal communities.

Whether these actions are considered involuntary or voluntary makes no difference with regards to ICWA and WICWA noncompliance. If these are to be considered voluntary, those arrangements to sever one's parental ties to their Indian child must be recorded before a judge who can explain in detail the terms and consequences of the proposed action.[7] Furthermore, any consent given under a voluntary proceeding is not valid if given prior to or within 10 days after the birth of an Indian child.[8] Additionally, placement preferences of the tribes are to be followed with regards to placing the infant.[9] If they are to be instead treated as involuntary, as is the fact that the relinquishment ground falls under the involuntary procedures set forth in the Wisconsin Children's Code (Chapter 48), then the tribe shall receive notice and

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[6] Annette R. Appell, *Safe Haven to Abandon Babies, Part III: The Effects*, ADOPTION QUARTERLY Vol. 6(2) 2002.
[7] 25 U.S.C. § 1913; Wis. Stat. § 48.028(5)(b).
[8] *Id.*
[9] Wis. Stat. § 48.028(7)(c)(finding that placement preferences of the tribes should be followed, absent good cause, for preadoptive placements).

be permitted to intervene, among other federally and state provided rights.[10] So, no matter how one cuts it, the Safe Haven Law of Wisconsin is in direct conflict with the federal ICWA.

There is nothing more important to a tribe than its children. They are our future, and they will ultimately be the links to our past. It is likewise in their best interests to know and have the opportunity to learn about their Indian heritage and be connected with their tribal communities. For this reason we must word towards an explicit regulatory fix before we lose any more of our tribal children and before our tribal children lose us. One suggested step is to add another section under proposed Rule 23.103.

Rule 23.103

1) 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. I suggest that (h) be created to read: Cases where a parent relinquishes their child under a state Safe Haven statute, regardless if treated as a voluntary or involuntary action under that state's laws, is covered by ICWA.

This will hopefully alleviate any misunderstanding about whether these actions are subject to the ICWA- as they are indeed Indian child custody proceedings. This appears to be perfectly in line with the proposed rules addressing voluntary actions, where anonymity shall not prevent notice to tribes and placement preferences from being followed. While it does seem counterintuitive to permit anonymity in an involuntary action, this is the law of the land in Wisconsin. And we thus need stronger language to ensure that federal law is not being preempted by state law- as it is clearly supposed to be the other way around. Anonymity should not trump the protections owed to Indian children, families, and tribes under the ICWA in involuntary actions either.

Thank you again for the opportunity to comment on the proposed rule. I strongly support these regulations in general- as they will help fill statutory gaps, provide clarity, and improve consistency across the country. It is my hope that the aforementioned suggestion will prevent the further loss of Indian children through the backdoor approach of ICWA avoidance known as Safe Haven.

Sincerely,

Nicole M. Homer, Tribal Attorney
HCN Department of Justice

[10] 25 U.S.C. §§ 1911-12; Wis. Stat. § 48.028(3)(e); (4)(a).