PECHANGA INDIAN RESERVATION
Temecula Band of Luiseño Mission Indians

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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 Pechanga Band of Luiseño Indians very much supports the issuance of the proposed ICWA regulations by the Bureau of Indian Affairs ("BIA"). We believe that these updated regulations are critically important if states are to fully comply with the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §1901 *et seq*.

The ICWA was enacted in 1978 in response to a crisis affecting Indian children, families and tribes. Studies revealed that large numbers of Indian children were being separated from their parents, extended families, and communities and placed in non-Indian homes. Congressional testimony documented the devastating impact this was having upon Indian children, families and tribes. As a result, Congress enacted mandatory legal requirements to be followed by state courts adjudicating the rights of Indian children and their families who live outside of an Indian reservation (in states where the tribe has exclusive jurisdiction over on-reservation children) and those children and families residing both on and off an Indian reservation where jurisdiction is vested in the state by "existing federal law" (commonly assumed to refer to Public Law 280). The Pechanga Band is located in California, a mandatory Public Law 280 state and as such, state courts adjudicate child custody proceedings for our children and families who reside both on and off the reservation.

Although progress has been made as a result of the ICWA, removal and 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 regularly placed in non-Indian homes. Compliance with the ICWA by states is erratic and state court decisions are inconsistent, at best. In California, this is of particular concern because we have 52 separate counties, which means there are 52 different approaches to compliance with ICWA and coordination with tribes. While California has adopted more stringent standards for ICWA cases (as allowed by the federal law), there remains a great need for the 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.

We particularly support the following provisions in the proposed regulations:

- Requiring that state agencies and courts inquire in every proceeding whether a child is Indian. This will help ensure that all of our children are identified and afforded ICWA protections.
- Recognition of a tribe's exclusive authority to determine tribal membership. We very much support the affirmation of this key principle of tribal sovereignty.

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- Rejection of the so-called "Existing Indian Family Exception." This section ensures that the ICWA will be applied to all Indian children in any child custody proceeding and that no Indian children will be left behind.
- Notice to tribes in voluntary cases. We are *parens patriae* for our children. By providing notice, this ensures that we will be able to assert our jurisdiction (which may be exclusive) and/or intervene in the case if necessary. Notice to the tribe is also critical if the state court is to confirm (as it is required to do) whether the child is an Indian child and covered by the ICWA.
- Defining active efforts to prevent the breakup of Indian families and requiring that such efforts begin immediately, even prior to the commencement of a child custody proceeding. This provision is vitally important to keeping Indian families together, a central and critical purpose of the ICWA.
- Limiting the discretion of state courts to deny transfer of a case to tribal court. Too often state courts refuse to transfer a case because they think that a tribal court will make a decision with which they disagree, or they openly question the ability of tribal courts to handle child welfare matters, which considerations are often based on prejudice or lack of understanding regarding tribal courts. The regulations make clear that this is not an appropriate reason to deny transfer.
- Emphasizing the need to follow ICWA's placement preferences and limiting the ability of agencies to deviate from the preferences. The failure of state courts and agencies to place Indian children in relative, tribal and Indian homes is one of the biggest problems with the Act's implementation. Keeping children with their families and within their tribal communities and cultures is vitally important to their well-being and a central purpose of the ICWA.

We believe that the legal basis for regulatory action is strong. ICWA 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. In the last 35 years, however, there have been divergent interpretations of a number of ICWA provisions by various state courts and uneven implementation by state agencies. This undermines ICWA's purpose to create consistent minimum federal standards. In addition, case law decided since 1979 supports the exercise of regulatory authority by the BIA.

In California, tribes are challenged with 52 different county approaches to compliance with ICWA and best practices for Indian children and families. Moreover, some courts have found unique ways to circumvent application of the federal law, even going so far as to question the authority of both the Guidelines and the regulations. Clarifying the legal authority supporting these revised regulations, particularly in light of the strong opposition by non-Indian interests to the adoption of these enhanced regulations, will help ensure better state court compliance with the federal law.

The Pechanga Band is fortunate to have an in-house legal office that employs legal professionals with a long history of tribal representation in ICWA cases in California, as well as other states. We rely on their technical expertise in reviewing these proposed regulations and providing the comments below. Many of these suggestions stem from their real world interactions and experiences with state courts and child welfare agencies over the years. In addition to clarifying the legal authority for these regulations, we suggest further modifications in the following areas of the regulations:

- We have several comments under the definition of "active efforts" in §23.2. We recognize that "active efforts" are the burden of the party seeking removal of the child (i.e., state child welfare agencies). However, involving the tribe as much as possible during the active efforts process helps reduce unwarranted removals and ensures safe reunification of children with their families.
    - (3): Define what "barriers" may exist, such as transportation, adequate housing, and language, as well as how poverty and historic trauma may adversely affect the way in which an Indian parent interacts with a state court and child welfare agencies.

- (3): Clarify what "actively assisting" the parents in obtaining services means. In our experience, state social workers rarely do more than provide referrals. "Active" assistance needs to ensure that the proposed services are accessible to the parent, both in terms of transportation and time, as well as learning level; ensuring the parent understands precisely what the services are (again, parents with drug abuse histories, mental illness, and/or learning disabilities may have a more difficult time understanding what they are supposed to do); and listening to the parent when there are issues with their service providers and seeking solutions to those issues.
- (4): Unfortunately, we have encountered resistance from our local child welfare agencies in coordinating early with our tribal child welfare agencies. We recommend adding in "at the earliest possible point." We have found that early coordination with our tribal child welfare agency has not only led to less trauma for the family during an investigation or removal, but has also resulted in fewer removals due to services that the tribe can provide, as well as the immediate provision of services if removal is warranted, in addition to finding immediate relative placement in such cases.
- (5): Searching for relative or tribal placement should be done in coordination with the tribe. We recommend this be clarified.
- (7): How is a state social service agency going to identify available and culturally appropriate family preservation strategies? The only way to ensure this is actually implemented is to coordinate with the child's tribe and tribal agencies. Again, there remains resistance by state child welfare agencies to work with tribes and having federal authority to support these efforts is key to improving the outcomes for Indian children and their families.
- (8): What will this "comprehensive assessment" entail? Will it include relationships with extended family members, other tribal members, and/or the tribe? We recommend providing some guidance for child welfare agencies tasked with this responsibility to ensure that they are able to meet the requirements contained herein.
- (10): The tribe can also provide assistance with these family interactions.
- (11): Again, we suggest providing some guidance on what "actively" means in this context.
- (12-15): Having state child welfare agencies engage the tribe and the tribe's child welfare agency will help ensure better outcomes for children and families. We strongly urge some inclusion of working with the child's tribe in these activities, maybe even mandating a checklist for state agencies to utilize to simplify the process.
- We also suggest that another aspect of active efforts may be for child welfare agencies to assist with enrollment of children who are eligible but not yet enrolled in their tribes. There are many benefits that are offered to Indian children, but some tribes may require formal enrollment for such benefits (aside from the tribe's involvement in the child custody proceeding). In addition, if family reunification fails and the child is adopted, depending on the tribe's enrollment process it can make it more difficult for the child to be enrolled following an adoption. Further, some tribes only allow enrollment up to the age of 18 and under ICWA, even with the ability to unseal birth records for enrollment, that authority only applies to those adoptees over the age of 18. Thus, adult adoptees would be precluded from membership if their tribe's enrollment processes have such a requirement. As such, ensuring the child is enrolled before the proceedings terminate will help foster the child's ongoing relationship with their tribal community and any benefits thereto.
- Some states, like California have adopted a "bypass" provision where services can be denied to a parent under certain circumstances, such as the failure to reunify with the parent's other children. A legislative "fix" for Indian children has been made to require that the court consider "active efforts" on a case-by-case basis, thus attempting to overcome this "bypass" provision. However, even with this fix in place, courts still try to bypass services in ICWA cases and we face an uphill battle in arguing for services in these situations. We request support for this interpretation – that active efforts are required for ***every*** Indian child, regardless of the parent's prior failures at reunification – be added into the definition of active efforts to ensure each Indian child has the opportunity to remain connected to their parents and tribal communities.

  - Finally, regarding the "active efforts" finding, this has become a perfunctory process where courts simply make the finding without reference to testimony and evidence that active efforts have actually been made. We strongly recommend that the regulations include a requirement that the court's finding be made on the record referencing relevant testimony and evidence. This provision is one of the strongest substantive protections afforded Indian children through the Act and it deserves much more validation than a simple finding.
- Under the definition of "continued custody," we have concerns, particularly in light of the *Adoptive Couple v. Baby Girl* decision, for cases in which a child is born positive for drugs ("pos-tox" births), as just one example. While the definition in the regulation makes clear that the biological mother has had custody of the child – presumably because she carried the child *in utero* – what about the biological father? In the pos-tox scenario, which sadly makes up a large number of the ICWA cases our tribe addresses, a court could find that the biological father never had "custody" of the child and thus, circumvent application of the procedural and substantive protections afforded by the ICWA. That outcome discriminates against men and fathers and leads to the break-up of not only the Indian family, but destroys the child-father relationship, resulting in further trauma to the child and family.
- The definition of "Domicile" must also include the domicile of the Indian child's father when the parents are not married. In today's society, there are myriad parenting arrangements, including single fathers who care solely or largely for their children. To exclude them from the definition of domicile is not only nonsensical but also ignores a very common parenting arrangement. This means that even more Indian children will fall through the cracks by the failure of state courts to apply the Act's procedural and substantive protections in these instances.
- We also recommend adding into the definition of Domicile, "where the child resides." This makes practical sense that the place the child resides with their parent or Indian custodian at the time of removal is their domicile. Relying only on the parents' particular residence to determine domicile makes sense in certain situations, such as when children are born off the reservation (as in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989)) or when children are born "pos-tox" and immediately removed, and thus never have technically resided anywhere. However, many cases do not involve these considerations and a more expansive definition of Domicile is necessary to include modern child-rearing realities.
- The regulations should contain clear direction that a foster care placement does not become an "Indian home" just because an Indian child is placed temporarily in that non-Indian foster care home. Some courts have used the placement of an Indian child in a non-Indian foster home to create, somehow, an "Indian" home, thus finding compliance with the Act's placement preferences. This unique obfuscation of the Act's express language is a clever attempt to circumvent the law's express language, as well as, Congress' explicit mandate that Indian children should be with Indian families.
- Under §23.107 (b)(2), the use of "active efforts" is included when a court must work with a tribe to confirm whether the child is a member or eligible for membership with that tribe. We urge that this be revised to include a definition of what "active efforts" mean in this context since that term has a very specific meaning under ICWA and relates to efforts (i.e., services) to keep the Indian family together. If the BIA wishes to expand the use of that term, it should be clearly defined in this context to avoid confusion by state courts and child welfare agencies.
- Under §23.113, we encourage including coordination with the child's tribe during the investigation to ensure that unwarranted removals do not occur. As noted above, including the tribe's child welfare agency at the very beginning has demonstrated in our community a decreased number of removals, as well as in the overall trauma experienced by the family during an investigation or removal.
- The ICWA provides parties the opportunity to access reports and records in child custody proceedings. (§23.119.) We continue to struggle, however, with obtaining information from local child welfare agencies during the child custody proceedings. Often, we are told that the agency cannot disclose that information to the tribe's child welfare agency. Further, we rarely, if ever, receive "timely" information from state agencies, if we receive at all. It is certainly not "timely" to receive information the morning of the hearing, which is our most common experience. We suggest two additions to this provision.
  - Make it clear that "parties" include the child's tribe and tribal child welfare agency.

  - Define what "timely" means. In order for the information to be relevant or helpful in the tribe's assessment of the case, we need the information a minimum of three business days before the hearing. Usually, the court demands that the tribe take a position immediately, without benefit of discussing the matter with its child welfare agency, legal counsel, Indian expert and family members, as appropriate. This certainly is not in keeping with either the letter or the spirit of the ICWA.
- Under §23.122, the use of the expert witness in ICWA cases is a key component to ensuring compliance with the law. Unfortunately, this provision has also been approached by some child welfare agencies solely as a "box-checking" exercise, meaning that it has become simply perfunctory. In many cases, the expert only reviews the reports, which are prepared by the agency seeking removal. At a minimum, we believe that the expert should make contact with the parents and further, should make an effort to view interactions between the parents and the child. In addition, the expert should attempt to meet with extended family members who are involved in the child's life. §23.121(c) makes it clear that there must be a causal relationship between the existence of particular conditions in the home that are likely to result in serious emotional or physical harm to the child. How it is possible for the expert to make an informed opinion on this causal connection solely by reviewing reports written by one side – the side seeking removal – and which may be stale by the time the expert is required? Conditions can be improved in a home between removal and the time out of home placement or termination of parental rights are ordered, the points at which the expert is required under ICWA. If the parent(s) have alleviated the conditions in the home, how can out of home placement be supported? We urge the BIA to include language that would require that the expert's opinion be based on a significant causal relationship between the potential harm and conditions in the home that exists ***at the time*** a foster care placement or adoption is ordered. We further recommend that the regulations include suggested actions and efforts that the expert should undertake to form their opinion, such as home visits, interviews with the parents and children, as well as extended family, in addition to consulting with tribal cultural experts from the child's tribe and the tribal social services agency.
- As an additional consideration regarding the expert witness requirement, California has adopted a mandate that the expert may not be an employee of the person or agency seeking foster care or adoptive placement of the Indian child. We believe including this limitation in the regulations is key because of the inherent conflict of interest in allowing an employee of the same agency seeking to remove Indian children to testify and qualify as an expert witness under ICWA.
- In addition, we strongly suggest that a court's use of a state agency employee as the expert be included as additional grounds for invalidation of any proceeding, pursuant to §1914 of the Act.
- We also believe that the regulations should explicitly address the *Adoptive Couple v. Baby Girl* case by: 1) clarifying that it should not be applied outside of the private adoption context (for some of the reasons we have already identified, as well as a plethora of others); 2) providing guidance on how the Supreme Court interpretation of the law should be effectuated in state court and agency practices; and 3) providing greater protections for Indian men and fathers, especially where an Indian father has physical and/or legal custody of their children. The *Baby Girl* outcome is inapposite in a society where child rearing and parenting is a paramount right protected by the U.S. Constitution, yet which outcome allows children to be torn away from their fathers, especially when those fathers strongly desire to parent their children. This is particularly perplexing when the express intent and spirit of ICWA is to keep children with their parents and connected to their tribal communities. If nothing else, the *Baby Girl* case demonstrates all of these issues and highlights the devastating effects of the Supreme Court decision on the well-being of Indian children, the ability of fathers to parent and the future of tribal communities.
- In order to ensure greater state compliance with ICWA, we suggest that noncompliant state agencies and courts be subject to federal funding consequences. As other federal statutes and programs have demonstrated, states are far more likely to comply with federal law when there is a mechanism for losing some sources of federal funding for the failure to follow federal mandates.

- We strongly join with other tribes and family advocates and request that ICWA extend to private adoptions so as to end the cottage industry and commitization of Indian children adoptions. This only makes sense in light of the fact that §1911(c) of the Act provides tribes the right to intervene in any state court proceeding involving the termination of parental rights to an Indian child. If tribes can intervene even in private adoptions (which are terminations of parental rights), the procedural and substantive protections of the law should also be applied. As the non-Indian "adoption industry's" strong opposition to these regulations has shown, the "business" of adopting Indian children out to non-Indian homes continues to be a thriving practice. It is the responsibility of the federal government, as part of its unique trust obligation to Indian tribes, Indian children and Indian families to ensure that the wholesale adoption of Indian children by non-Indians stops now.
- In ICWA matters, there should be an exception to the requirement that tribal attorneys be admitted to practice in that state in order to appear and practice, even through pro hac vice, in state ICWA proceedings. If the attorney is licensed in good standing in one state that should be sufficient for an ICWA practice exception. Requiring tribes to retain local counsel or have their counsel apply to practice pro hac vice may be a barrier to appearing in ICWA cases, essentially limiting the tribe's right to participate as a party since many tribes lack the resources required to retain counsel or apply pro hac vice, which still requires retention of counsel licensed in the state to "sponsor" the tribal attorney. Either way, this increases the cost and exacerbates the existing burdens placed on tribes whose children and families live in other states.
- In California, we have the unique situation where some courts have found that a foster care placement makes that foster parent a "de facto parent," thus giving that non-parent, non-Indian stranger standing to weigh in on the Indian child's placement. ICWA is clear on who are a parent or Indian Custodian and this idea of a "de facto parent" having essentially the same status as a party is nonsensical. We strongly urge the BIA to address this issue by clarifying that the parties to a child custody proceeding involving an Indian child does not extend to a lesser relationship that may be recognized by state law. While this may be a situation unique to California, it can be easily addressed on a national level by clarifying that foster care placements do not give rise to a legal status on par with a parent or Indian custodian, nor does such a placement provide standing or other substantive protections to the placement under ICWA.

Thank you for the opportunity to comment on these regulations. Once again, the Pechanga Band appreciates the issuance of these proposed regulations and urges you to adopt strong ICWA regulations to ensure that the ICWA fulfills its essential purposes of protecting the rights of Indian children, families, and tribes.

Sincerely,

Mark Macarro
Tribal Chairman