WASHINGTON
LEGISLATIVE OFFICE

May 19, 2015

Ms. Elizabeth Appel
Office of Regulatory Affairs and Collaborative Action
Indian Affairs, U.S. Department of the Interior
1849 C Street NW, MS 3642
Washington, DC 20240

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

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Dear Ms. Appel:

The American Civil Liberties Union ("ACLU") respectfully submits these comments on the Notice of Public Rulemaking regarding Regulations for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 14,880-94 (Mar. 20, 2015) ("Proposed Rule").

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. The ACLU takes up the toughest civil liberties cases and issues to defend all people from government abuse and overreach. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin.

The ACLU lobbied in favor of passage of the Indian Child Welfare Act (ICWA) during congressional hearings, and we continue to actively support its implementation. In March 2013, we filed a lawsuit in federal court in Rapid City, South Dakota on behalf of two Indian tribes, the Oglala Sioux Tribe and the Rosebud Sioux Tribe, and on behalf of a class of all American Indian families residing in Pennington County, seeking to enforce certain protections in ICWA. *See Oglala Sioux Tribe v. Van Hunnik*, No. 5:13-cv-05020-JLV (Order Granting Motions for Partial Summary Judgment, D.S.D. Mar. 30, 2015); *Oglala Sioux Tribe v. Van Hunnik*, 993 F. Supp.2d 1017 (D.S.D. 2014) (order denying defendants' motions to dismiss).

Two organizations with special expertise in ICWA, the American Association on Indian Affairs and the National Indian Child Welfare Association, have submitted detailed and comprehensive comments regarding the Proposed Rule. The ACLU strongly endorses their statements. We write to present you with information regarding the *Oglala Sioux Tribe* case in order to illustrate both the difficulties that Indian children, Indian families, and Indian tribes continue to face, and the need for determined and aggressive action. ICWA needs all the help it can get, as this lawsuit demonstrates. The Proposed Rule (especially if strengthened as recommended by AAIA and NICWA) can help achieve ICWA's laudable but as yet elusive goals.

The shameful conditions that created the need for the Indian Child Welfare Act of 1978 did not occur overnight. They took 200 years to develop, during which time biases became ingrained and mindsets became entrenched. Hopefully, it will not take 200 years to undo those biases and mindsets, but statistics from South Dakota--and the facts that gave rise to *Oglala Sioux Tribe v. Van Hunnik*--show that thirty-six years after ICWA's passage, we still have a long way to go

The 1978 House Report that accompanied ICWA documented that an American Indian child in South Dakota was sixteen times more likely than a non-Indian child to be placed in foster care. *See* H.R. Rep. No. 1386, 95th Cong., 2d Sess. 10, *reprinted in* 1978 U.S.C.C.A.N. 7530 at *9. The current situation is slightly better, but woefully short of acceptable: an American Indian child in South Dakota today is eleven times more likely to be placed in foster care than a non-Indian child. Approximately 8.9 percent of South Dakota's population is American Indian/Alaska Native but children from those groups represent 52.5 percent of the children in state foster care.[1]

Moreover, at the time of ICWA's passage, statistics showed that nearly 85 percent of all American Indian children removed nationwide from their homes were placed in non-Indian homes.[2]

As noted in the March 30, 2015 court decision in *Oglala Sioux Tribe*, more than 800 Indian children were removed from their homes in Pennington County between January 1, 2010 and July 2014. There were close to 400 temporary custody hearings conducted in Pennington County during that period, and the South Dakota Department of Social Services ("DSS") won 100 percent of them. These hearings typically lasted less than five minutes, *and many lasted less than sixty seconds*. Indian parents were not given a copy of the petition that had been filed against them, were not permitted to offer any testimony, were not permitted to cross-examine the DSS worker who submitted an affidavit against them, and were not offered an attorney to assist them with the hearing even when the parents were indigent. Despite § 1922 of ICWA, which expresses a clear intent by Congress that ICWA protections apply at the earliest stages of state custody hearings, the presiding judge in Rapid City (a defendant in *Oglala Sioux Tribe*) took the firm position, as noted in the Court's ruling, that none of ICWA's protections apply in his temporary custody hearings. In one hearing, an Indian father asked this judge why DSS would not allow him to retain custody of his child. The judge said that he didn't know, and yet granted custody to DSS anyway.

If enacted, the Proposed Regulations will go a long way towards preventing the type of bleak situation in Rapid City, where state officials, including judges, either were unaware of ICWA's requirements or deliberately ignored them. Indeed, had Section 23.113 of the proposed regulations been enacted years ago, *Oglala Sioux Tribe* might have been avoided.

The ACLU also wishes to call your attention to the following four subjects, although other groups have addressed most of these subjects in great detail.

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[1] *See* http://quickfacts.census.gov/qfd/states/46000.html (population); http://quickfacts.census.gov/qfd/states/46000.html (percentage of the population who are American Indian/Alaska Native); http://dss.sd.gov/statistics/SARAnnual2012.pdf (number of children in foster care, see Table 5C); http://66.227.18/advocacy/statefactsheets/2012/southdakota.pdf (percentage of Indian children in foster care).

[2] *See* H.R. Rep. No. 1386, 95th Cong., 2d Sess. 10, *reprinted in* 1978 U.S.C.C.A.N. 7530 at *9. Recent statistics indicate that in South Dakota today, more than 80 percent of Indian children who have been removed from their homes are living in non-Indian homes or institutions, despite ICWA's § 1915 placement preference provisions. *See* http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf (table at the top of page 63).

1. We are aware that the Proposed Rule sets a 30-day limit on the 23.113 emergency hearing, but we find that troubling, and a shorter time should be the rule. In addition, we recommend that the Proposed Rule place a 45-day presumptive deadline by which the §1912 adjudicatory hearing must be held. The loss of a child for 45 days is a grievous loss and can cause profound and irreparable damage to the child, as well as to the family. The regulations can list circumstances that would justify extending that limit, such as when a tribe or the Indian family has requested extensions of time that would render such a hearing impractical. Whatever exceptions are listed, they should be narrow. For instance, "good cause" should not be one of them. Without a clear presumptive limit, a state can too easily deny a parent a meaningful hearing at a meaningful time.

2. The *Oglala Sioux Tribe* case is designed to "nip in the bud" certain cases where a child either was removed from the home unnecessarily or where the emergency that prompted the removal has ceased to exist at the time of the initial hearing and the child may safely be returned home. For those children who are not immediately returned home and are placed in state custody, the "active efforts" requirement of §1912(d) (requiring that the state prove that "active efforts have been made to provide remedial services and rehabilitative programs" to the family) become critical. Court decisions show that many states are failing to make good faith active efforts to reunite Indian families. We urge the BIA to enact detailed and unambiguous requirements to implement §1912(d), and support the recommendations of AAIA and NICWA in that regard.

3. The placement preferences mandated by §1915 are uniquely important. They seek to guarantee that in those situations in which an Indian child must be removed from the home, she or he will be placed in an Indian home. Given that a large percentage of Indian children involved in involuntary custody proceedings are in fact removed from the home, §1915 must be rigorously enforced. First, the regulations must make certain that §1915 applies at the initial (emergency) hearing. Second, the regulation should state that whenever an Indian child is not immediately placed in an Indian home, the state social services agency should submit a report to the court every seven days thereafter outlining the agency's efforts to move the child to an Indian home. In those reports, the agency should state whether an empty bed exists in a licensed Indian foster home and, if so, why the child was not assigned to that home. Third, the regulations should require each state social services agency to publish its criteria to become a licensed foster home and maintain a centralized registry containing applications for licensing from each Indian home that was rejected. Fourth, the regulations should require the state to work with tribes and families to break down obstacles to the licensing of Indian foster homes, and facilitate the funding of such homes. Lastly, federal officials should be tasked with periodically examining state rejections of licensing applications by Indians and tribes, as well as the manner in which state agencies determine where Indian children will be placed.

4. We support the recommendations made by other groups to require more comprehensive and more aggressive monitoring and enforcement by federal agencies.

Thank you for considering our comments. We heartily commend the Bureau for proposing these regulations and its efforts to enforce the Indian Child Welfare Act.

Please contact Jennifer Bellamy, Legislative Counsel, ACLU Washington Legislative Office, jbellamy@aclu.org, if you have questions or for additional information.

Sincerely yours,

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