



# LOWER ELWHA KLALLAM TRIBE

ḥəḥlax̣ə nəx̣ˀsλ'ay'əm "Strong People"

2851 Lower Elwha Road  
Port Angeles WA 98363

(360) 452-8471  
Fax: (360) 452-3428

May 14, 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 Lower Elwha Klallam Tribe is pleased to provide comments on the Notice of Public Rulemaking (NPRM) regarding Regulations for State Courts and Agencies in Indian Child Custody Proceedings. This NPRM was published in the Federal Register on March 20, 2015, pages 14880–14894. 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.

There are 29 federally recognized tribes located in Washington, a majority of which are found in the western part of the state. The Washington tribes are spread out over 21 of the state's 39 counties. Tribal members and families are highly mobile seeking educational, employment, and other opportunities away from their primary tribal communities. There is a fair concentration of Native Americans and Alaskan Natives living in urban areas.

Since 1989 the state of Washington has maintained the Centennial Accord with Washington Tribes, recognizing tribal sovereignty and the principle of government-to-government consultations. In 2011 Washington enacted the state's version of the Indian Child Welfare Act, which created heightened standards that are consistent with many provisions of the proposed regulations. It is anticipated that with the additional clarity provided by the proposed regulations there will be consistency in interpretation and application by Washington state courts and a more uniform treatment of ICWA cases by the different regional offices of the Washington Department of Health and Human Services-Children's Administration. Without adoption of the proposed regulations, the disparate treatment of ICWA cases by both state courts and the Department charged with the welfare of Indian children in Washington will continue despite the

efforts of individual Tribes, social workers, attorneys, judges/commissioners, and other entities with an interest in preserving an Indian child's connection to her family, Tribe, and cultural heritage.

The Indian Child Welfare Act of 1978 (ICWA) "protects the best interest of the Indian Child and promotes the stability and security of Indian tribes and families" (25 U.S.C. § 1902) and is essential for the protection of Indian Children and their connection to their Tribal families and the culture and traditions of their Tribe. Unfortunately, ICWA has been misunderstood and misapplied for decades. This has, in turn, led to the unnecessary break up of Native families, a loss of connection and identity with their Tribe, and placement instability for Native children. Native children and families and the agencies and courts that implement ICWA need and deserve the clarity that the proposed regulations provide.

The 1979 guidance from the BIA on ICWA, provided by federal guidelines, allowed for wide variations in practice and thus uncertainty for Native children and families. The proposed regulations specifically address the lessons learned and provide uniform guidance with greater legal force. Provisions in the proposed regulations that are particularly helpful include:

- Early identification of ICWA-eligible children. All too often children and families are denied the protections of ICWA because a court or agency did not ask whether the child had Native heritage. Not only can this result in Indian children not being identified at all, it can create a risk of insufficient service provision, delay or repetition in court proceedings, and placement instability once a child is identified. The requirements regarding early identification included in the regulations require good practice and promote compliance with the requirements of the law.
- To contact a tribe to provide notice. There have been many occasions in which the Lower Elwha Klallam Tribe did not receive notification in a timely manner from the Department of Health and Human Services Children's Administration Child Protection Services intake workers concerning an abuse or neglect report on a Tribal child. This has resulted in late intervention and unnecessary hardship on the families. The proposed regulations acknowledge that many tribes designate an agent for receipt of ICWA notices and the website for the BIA Federal Register that provides this contact information.
- Recognition of tribes' exclusive authority to determine membership. ICWA applies to children who are members or are children of members and eligible for membership in a federally recognized tribe. With regard to membership, tribes as sovereign governments are the only entity with the legal authority to determine the membership of a tribe. The regulations are clear on this vital point.
- Clarity with regard to ICWA's application. Too many Native children have been denied the protections of ICWA and the opportunity to know their families, communities, and culture because of the Existing Indian Family Exception, a judicially created rule that is inconsistent with ICWA's intent. The regulations clarify what the Supreme Court in *Adoptive Couple v. Baby Girl* confirmed: that in general ICWA applies to all cases where an Indian child is involved in an Indian custody proceeding. Thus, the Existing Indian Family Exception is an unlawful interpretation of ICWA. The proposed regulations mirror the overwhelming trend in state legislatures and courtrooms and make this clarification.

- Definition and examples of active efforts. The provision of active efforts is required before an ICWA-eligible child can be removed from her home and before parental rights can be terminated, yet this term has never been defined. Without a clear definition of active efforts, state and private agencies have been required to provide services without a clear understanding of the level and types of services required. The regulations provide not only a clear definition of active efforts but illustrative examples to guide state and private agencies practice with Native children and families.
- Notice to tribes in voluntary proceedings. Tribes are *parens patriae* for their member children. In ICWA proceedings this includes the right to intervene in state proceedings or transfer the case to tribal court. When tribes do not receive notice of voluntary proceedings they are effectively denied these rights. Further, because tribes have the exclusive authority to determine which children are members, when tribes are not notified and offered the opportunity to verify that a child is ICWA-eligible, a court cannot ensure compliance with the law. Lastly, tribes are an essential resource for states and agencies seeking placements in line with ICWA's preferences. Without knowledge of a voluntary proceeding, children can be denied possible placements consistent with ICWA's placement preferences. Notice in voluntary ICWA proceedings, provides agencies and courts the clarity necessary to protect these interests.
- Limiting the discretion of state courts to deny transfer of a case to tribal court. The Supreme Court has clarified that tribes have "presumptive jurisdiction" in child welfare cases that involve their member children. Often, however, state courts inappropriately find "good cause" to not transfer a case because they believe the tribal court will make a decision different from its own. The regulations clarify that this reasoning cannot be used to deny transfer.
- Emphasizing the need to follow the placement preference and limiting the ability of agencies to deviate from the placement preferences. One of ICWA's primary purposes is to keep Native children connected to their families, tribal communities, and cultures. Yet, currently, more than 50% of Native kids adopted are placed in non-Native homes. The regulations provide requirements that will promote placement in accordance with ICWA's language and intent.

We strongly support these regulations, but we are also recommending additional changes to consider. We believe that it is important that the general authority to regulate be carefully articulated and that individual regulations be justified with references to supportive cases, state regulations and policies that reflect best practices, and legislative history. Additionally, the regulations should explicitly address the *Adoptive Couple v. Baby Girl* case: (1) clarifying that it should not be applied outside of the private adoption context; and (2) providing guidance on how this interpretation should be implemented in state court and private agency practice. With these additions the proposed regulations will better serve Native children, families, and tribes.

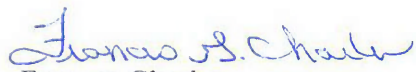
Finally, we urge you to strongly consider technical recommendations that will be provided by national Native organizations and attorneys who have expertise in ICWA.

The Lower Elwha Klallam Tribe applauds the BIA for their work on the proposed Regulations for State Courts and Agencies in Indian Child Custody Proceedings. These proposed rules provide the clarity and certainty necessary for all parties involved in child welfare and private

adoption proceedings to comply with the law and promote the best interest of Indian children. It is this clarity and certainty that will preserve Native families and promote permanency for Native children.

Thank you in advance for consideration of our comments.

Sincerely,

A handwritten signature in blue ink that reads "Frances B. Charles". The signature is written in a cursive style.

Frances Charles  
Chairwoman, Lower Elwha Klallam Tribe