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May 19, 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,

California Indian Legal Services (CILS) is pleased to provide comments on the Notice of Public Rulemaking regarding Regulations for State Courts and Agencies in Indian Child Custody Proceedings. (80 Fed. Reg. 14,880 (Mar. 20, 2015) (to be codified at 25 C.F.R. Part 23)[*hereinafter*, "the Proposed Rule"].)

CILS is a not-for-profit law firm devoted exclusively to the cause of Native American rights. CILS has four offices across the state of California, and has been providing free legal assistance to low-income individuals and low-cost legal services to California Indian tribes for over 45 years. CILS provides representation on Indian law matters, including the Indian Child Welfare Act of 1978 (ICWA). (25 U.S.C. §§ 1901-1963.)

Federal policy and California state law acknowledge that Indian children are a vital resource to Indian tribes. In 1978, Congress passed the ICWA in response to alarmingly large numbers of Indian children being removed from their families and consequently lost to their tribes. Over 35 years later, the ICWA remains one of the most important tools tribes can use to protect Indian families and children. Since the adoption of the ICWA, CILS has been the state leader in ensuring that federal, state, and local officials follow its mandates. CILS conducted the initial hearings on the ICWA in California, wrote the California Judges Benchguide on the ICWA, and played a key role in the passage of Senate Bill 678, which codified the requirements of the ICWA into California's Codes. Over the past four decades, CILS has represented virtually every California tribe, as well as many non-California tribes, in state ICWA proceedings.

California is home to 110 federally recognized tribes, which constitute over 20 percent of the nation's tribes. As a state, it has the largest Native American population in the country. The majority of the state's current Native American population represents Indian people from out-of-state tribes, so called "urban Indians," who were relocated.

California also adjudicates the largest number of appellate cases involving the ICWA. In the early years of the ICWA, its application in California varied from county to county. Enforcement was inconsistent, and ad hoc, with most cases focusing on "notice" issues. However, in 2006 the state adopted Senate Bill 678, codifying the ICWA into state law, and in certain instances, exceeding federal law. (Senate Bill No. 678 (2005-2006 Reg. Sess.); 2006 Cal. Stats. Ch. 838.) Many of the heightened standards in SB 678 are consistent with the proposed regulations. Since SB 678 took effect in 2007, the number of California appellate cases involving the ICWA has declined, and it is thought that the additional guidance provided by SB 678 is largely responsible. Therefore, it is anticipated that the additional clarity provided by the proposed regulations will continue this trend. Promulgating federal regulations is another positive step in alleviating the disproportionality of Indian children in the dependency system.

CILS strongly supports the promulgation of ICWA regulations as a means to ensure that federal policy is not thwarted. CILS joins the comments of the National Indian Child Welfare Act (NICWA) and the comments of the Association on American Indian Affairs (AIAA).

Recommendations

Section 23.2: *Definitions*.

Active Efforts

CILS strongly supports the proposed definition of "active efforts," including the 15 examples. In order to ensure maximum clarity, CILS recommends that the proposed rule include the language from the 2015 BIA Guidelines on the ICWA regarding "active efforts" being separate and distinct from the requirements of the Adoption and Safe Families Act and that ASFA's exceptions to reunification efforts do not apply to ICWA proceedings. In California it is important to delineate that *Active Efforts* to preserve an Indian family, exceed the *Reasonable Efforts* standard applied in non-ICWA cases. It is also important to specify when the *Active Efforts* apply, since some counties defer application of the Act until after the Detention and Jurisdictional hearings, when in reality the Act should apply when removal of a child occurs via Agency action.

Child Custody Proceeding

The proposed rule defines "child custody proceeding" as "any proceeding that involves (1) Foster care placement, which is *any action* removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a

guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, although parental rights have not been terminated; (2) Termination of parental rights, which is any action resulting in the termination of the parent-child relationship; (3) Preadoptive placement, which is the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; (4) Adoptive placement, which is the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption."

Existing California law includes guardianships within the application of the ICWA (California Probate Code §§ 1459-1459.5) because it is an action to remove a child from their parent, and even temporary letters of guardianship preclude a parent from having their child returned on demand. To ensure consistency of application, we recommend including guardianships in the definition of foster care placement, which would clarify that they are considered "child custody proceedings" under ICWA.

Existing California law provides for tribal customary adoption as a permanency option for Indian children. (California Welf. & Inst. Code §§ 366.24, 366.26(c) in lieu of severing or terminating parental rights.) We recommend that the definition of "adoptive placement" be expanded to include tribal customary adoption when conducted as part of a state court proceeding.

Domicile

We recommend that the proposed rule clarify that domicile is not necessarily synonymous with residence for the purposes of ICWA, which is consistent with the holding of the U.S. Supreme Court in Holyfield. (*Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 48.)

Indian Child

We recommend clarifying in the regulations that a child does not have to be eligible for membership in the same tribe as the parent.

Also, California law provides an option to extend foster care to the age of 21. Therefore, we also recommend clarifying that so long as the child was under the age of 18 when the child custody proceeding was initiated, and a court retains jurisdiction, that ICWA will apply for the duration of the case.

Parent

In some instances, *Presumed Fathers* have rights superior to *Biological Fathers*. Presumed fathers in California are established under Family Code §§ 7610-7614, but the ICWA's application is to biological children of a member. (25 USC § 1911(4).) The Act should

apply to *both* biological fathers and presumed fathers. Such a gap in application could not have been intended by Congress.

Tribal Representative

We recommend that a definition be included for the term "tribal representative," and suggest the tribal representative may be designated by the tribe and not required to be an attorney licensed to practice law in the state of proceeding. A tribal representative allows the tribe to have a voice and presence in a case, even where a tribe cannot afford to hire legal counsel. Other lay persons participate in dependency proceedings, such as social workers or Court Appointed Special Advocates (CASA), largely because it enhances the information upon which courts make decisions. Since the ICWA applies, whether or not a tribe intervenes, it is important to remove any restrictions on tribes participating via non-lawyer representatives.

Section 23.103: *When does ICWA apply?*

Subsection (a) states that "ICWA applies whenever an Indian child is the subject of a State child custody proceeding as defined by the Act. ICWA also applies to proceedings involving status offense or juvenile delinquency proceedings if any part of those proceedings results in the need for placement of the child in a foster care, preadoptive or adoptive placement, or termination of parental rights."

We recommend clarifying that "placement of a child in a foster care… placement" would include any placement that may use Title IV-E funding, since there are various definitions of foster care in federal statutes.

Subsection (b) clarifies that there is no exception to application of ICWA based on the so-called "existing Indian family doctrine." We support this provision, which is consistent with current California law.

Subsection (d) states: "If there is any reason to believe the child is an Indian child, the agency and State court must treat the child as an Indian child, unless and until it is determined that the child is not a member or is not eligible for membership in an Indian tribe." We support this provision, which is consistent with current California law. (California Rules of Court, rule 5.482(d)(2).)

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Section 23.106: *When does the requirement for active efforts begin?*

This section states:

> "a) The requirement to engage in 'active efforts' begins from the moment the possibility arises that an agency case or investigation may result in the need for the Indian child to be placed outside the custody of either parent or Indian custodian in order to prevent removal. (b) Active efforts to prevent removal of the child must be conducted while investigating whether the child is a member of the tribe, is eligible for membership in the tribe, or whether a biological parent of the child is or is not a member of a tribe."

We strongly support this section. It is consistent with the statute will provide much need clarity in this area.

Section 23.107: *What actions must an agency and state court undertake in order to determine whether a child is an Indian child?*

Subsection (a) of this section states "agencies must ask whether there is reason to believe a child that is subject to a child custody proceeding is an Indian child. If there is reason to believe that the child is an Indian child, the agency must obtain verification, in writing, from all tribes in which it is believed that the child is a member or eligible for membership, as to whether the child is an Indian child."

We recommend that the word "obtain" be replaced with "solicit," so that it reads, "the agency must solicit verification, and document its due diligence in writing…"

Subsection (b)(2) of this section states: "(2) If there is reason to believe the child is an Indian child, the court must confirm that the agency used active efforts to work with all tribes of which the child may be a member to verify whether the child is in fact a member or eligible for membership in any tribe, under paragraph (a) of this section."

A similar provision exists in the California Rules of Court, which is the subject of a pending California Supreme Court case. (*See In re Abbigail A.* (2014) 226 Cal.App.4th 1450, review granted on September 10, 2015, S220187.) Since "active efforts" is a term of art, we recommend using a term other than "active efforts" in this context. We recommend replacing "active efforts" with "continuing efforts, pro-active efforts," or "due diligence," in a manner subject to written verification.

Section 23.108: *Who makes the determination as to whether a child is a member of a tribe?*

We strongly support this section.

Section 23.109: *What is the procedure for determining an Indian child's tribe when the child is a member or eligible for membership in more than one tribe?*

We strongly support the section with two recommendations.

We recommend that "child custody case" be replaced with "child custody proceeding" in *subsection (d)* of this section, in order to provide consistency.

We also recommend that subsection (c) be clarified to require the court (and not the agency) to make the determination of which tribe should be designated as the Indian child's tribe where the child is eligible for membership in more than one.

Section 23.110: *When must a State court dismiss an action?*

Subsection (a). This section states that "subject to § 23.113 (emergency procedures), the following limitations on a State court's jurisdiction apply: (a) the court must dismiss any child custody proceeding as soon as the court determines that it lacks jurisdiction."

We recommend that this section include provision for emergency cases, consistent with the statute at 25 U.S.C. § 1922. In emergency cases, the state court should make diligent efforts to contact the tribe with jurisdiction and to transfer the case immediately upon the tribe asserting jurisdiction.

Section 23.111: *What are the notice requirements for a child custody proceeding involving an Indian child?*

We support the entirety of this section, specifically including the provision of notice in voluntary proceedings and the noticing provisions relating to ICPC.

We recommend that registered mail be replaced with "certified mail, return receipt requested" as is required by the existing BIA regulations at (25 C.F.R. § 23.11(a)) in order to ensure timely delivery.

We also recommend that subsection (c)(4)(iv) be modified to remove "where authorized by State law." This modification will make this subsection consistent with the statute at 25 U.S.C. § 1912(b). In addition, the Notice should specify that Indian tribes, or their representatives have a right to *both* discovery and disclosure of every document filed in court proceedings, or relied upon by the Agency, County, or Court in making recommendations, findings or proposed orders. Tribes should be allowed copies of *all* documents, and not be limited to summary filings, incomplete reports, or be required to pay for photocopying of

documents that all other parties receive. The right of a tribe as and intervening party should be specified, and defined, and state that a tribe, once it intervenes has rights identical to, and coextensive with all other parties in the case, and failure to provide documents or notices or other filings to a tribe once it has intervened, is a basis to dismiss a dependency case.

Subsection (h) states, "[n]o substantive proceedings, rulings or decisions on the merits related to the involuntary placement of the child or termination of parental rights may occur until the notice and waiting periods in this section have elapsed."

We initially recommend that subsection (h) be split into two separate subsections with one addressing involuntary placements and one addressing termination of parental rights. We recommend maintaining the existing language of the proposed rule for termination of parental rights. In regards to involuntary placements, we recommend that a provision be included that findings and orders made at initial hearings are not binding, and reserved for parties who did not receive notice under the ICWA, but should have, and that courts make diligent efforts to ensure timely notice.

Section 23.113: *What is the process for the emergency removal of an Indian child?*

We support this section. It is critical to ensure that cases involving emergency removal do not languish.

Section 23.117: *How is a determination of "good cause" not to transfer made?*

With strong support of this section, we recommend the addition of the "clear and convincing evidence" standard of proof.

Section 23.118: *What happens when a petition for transfer is made?*

We recommend that subsection (a) be modified to mirror the statute at 25 U.S.C. § 1911(b), which does not require a Tribal Court to accept jurisdiction before a transfer.

Section 23.121: *What are the applicable standards of evidence?*

Subsection (a) and (b) should be modified to mirror the statute where is states "continued custody with the child's parents or Indian custodian is likely to result in serious *emotional and* physical damage to the child."

Section 23.122: *Who may serve as a qualified expert witness?*

We strongly support the inclusion of the hierarchy provided at subsection (b).

Section 23.129: *What placement preferences apply in adoptive placements*?

A subsection should be added here to include the language of 25 U.S.C. § 1915(c) to ensure consistency with the statute.

Section 23.130: *What placement preferences apply in foster care or preadoptive placements?*

We support this section.

California statutory law requires the Agency to make active efforts to comply with the applicable placement preference order. (California Welf. & Inst. Code § 361.31(k).) We recommend the inclusion of the active efforts standard in the proposed regulation.

We also recommend adding the language of 25 U.S.C. § 1915(c) here, to ensure consistency with the statute and also to preserve the right of tribes to modify the preference order.

Section 23.131: *How is a determination for "good cause" to depart from the placement preferences made?*

We strongly support this section, especially subsections (b) and (c). We recommend adding the language regarding best interest from the parallel section of the BIA Guidelines.

We also recommend adding the language of 25 U.S.C. § 1915(c) here, to ensure consistency with the statute and also to preserve the right of tribes to modify the preference order.

Authority to Promulgate Regulations

It is our position that the Department of the Interior clearly has the authority to promulgate these regulations. The ICWA at 25 U.S.C. § 1952 specifically provides that "[w]ithin one hundred and eighty days after November 8, 1979, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." The Department of the Interior did in fact issue regulations with regard to the ICWA in July of 1979. (25 CFR Part 23).

Conclusion

In conclusion, we applaud the work of the DOI in drafting these proposed regulations. While we did not comment on every proposed regulation, we do support all of them. They will provide clarity and consistency of the Act's application, which is imperative for Indian children,

families and tribes, and in guiding state courts and agencies, will likely continue the trend of reducing the number of appellate cases involving the Act.

Sincerely,
CALIFORNIA INDIAN LEGAL SERVICES

Delia Parr
Directing Attorney