Confederated Tribes *of the*

Umatilla Indian Reservation

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May 12, 2015

Ms. Elizabeth Appel
Office of Regulatory Affairs & Collaborative Action
Indian Affairs, U.S. Department of Interior
1849 C Street NW, MS 3642
Washington, DC 2024

Dear Ms. Appel,

The Confederated Tribes of the Umatilla Indian Reservation strongly supports the adoption of the proposed Regulations for State Courts and Agencies in Indian Child Custody Proceedings. We previously requested that the Guidelines become regulations to ensure they are binding on states. The creation of regulations is long overdue and of great importance. This is illustrated by the recent case of *Oglala Sioux Tribe v. Van Hunnik*, which shows some non-Indian communities have ignored critical aspects of the Indian Child Welfare Act (ICWA) wholesale.

In addition to extreme examples like that of *Hunnik*, some states have created common law known as the "existing Indian family" doctrine that not only ignores the mandates of ICWA and reads into it provisions that are not there, but allows a non-Indian court to essentially determine for itself if a child is "Indian enough" for ICWA to apply. In addition to being implicitly racist, the "existing Indian family" doctrine significantly undermines the rights of tribal nations guaranteed under ICWA. Those rights are designed to give tribal nations the ability to ensure their children are raised in an environment where the tribe's culture and values are passed on, as well as to ensure their citizens' children become citizens of the nation. These rights are critical to the very survival of tribes. While many states that initially adopted this dubious doctrine have since rejected it, there are some states where it continues to exist.[1] It is important that the federal government issue regulations prohibiting this practice.

A recent ICWA case out of Oklahoma highlights the need for the new Guidelines to become regulations.[2] An appellate court in that state recently found "good cause" to deviate from ICWA's placement preferences where a child had been placed in a non-compliant setting for a year before a compliant setting was found. The court deemed ICWA's "good cause" exception to the placement preferences was met because it was not in the best interest of the child to be removed from the existing non-compliant setting.

The new Guidelines, appropriately, explicitly reject an independent "best interest" determination as a basis for finding "good cause" as ICWA's listed placement preferences have already been determined to be in the best interest of Indian

[1] *See* Dan Lewerenz & Padraic McCoy, *The End of "Existing Indian Family" Jurisprudence:* Holyfield *at 20,* In the Matter of A.J.S. *and the Last Gasps of a Dying Doctrine*, 36 Wm. Mitchell L. Rev. 684, 690 (2010)

[2] https://turtletalk.files.wordpress.com/2015/05/okctappicwa.pdf

children.[3] The court in question acknowledged the new Guideline's guidance on this issue and then proceeded to reject them and impose its independent "best interest" determination to avoid placing a child in an ICWA compliant setting.

Disturbingly, the court used an analysis substantially similar to the racist analysis used by courts that continue to follow the "existing Indian family" doctrine. For example, in justifying an independent "good cause" analysis the court noted the child's blood quantum, which it deemed low despite being sufficient for tribal citizenship. It also expressed its belief that the child only had a "distant biological link" to the tribal nation in which the child was eligible for citizenship. All of this, despite the fact that everyone agreed the child was an Indian child under ICWA, thereby requiring its application.

This kind of practice also has the perverse effect of encouraging the initial and continued placement of an Indian child in a non-ICWA compliant setting in order to establish a basis for avoiding the statutory placement scheme altogether. The proposed regulation, however, strikes the right balance in ensuring the statutory placement preferences are followed while allowing for exceptions in very narrow situations. Those situations being where both parents request it, the child requests it, the child has special needs that cannot be met in any other setting, or where active efforts have been made to find a preferential placement but none are available.

These are just some of the examples of how the Indian Child Welfare Act is violated by states, intentionally or otherwise, and why regulations are necessary to ensure compliance. There are many others. Our hope is that by establishing regulations that have a binding effect on states, they will be forced to take a closer look at their existing practices to determine if they are complying with ICWA and make necessary changes where those practices deviate from ICWA's mandates and the government's regulations.

While some states or private adoption agencies may object to the regulations because their current practices are in violation, such action furthers Congress' original intent in enacting ICWA. The statute's guarantees and the proposed regulations not only help ensure against the disastrous effects pre-ICWA removals had on Indian children and their families, but also the disastrous effect those removals had on tribal nations by stripping them of their children.

The Confederated Tribes of the Umatilla Indian Reservation applauds the Bureau of Indian Affairs' significant work on the new Guidelines and the proposed regulations. If adopted, they will prove to be an important tool in ensuring the protection of Indian children and their families, as well as the continued vitality of tribal nations.

Sincerely,

Gary Burke

Gary Burke, Chairman
Board of Trustees

[3] While the Guidelines do not reflect this, such a practice is also important in preventing a court from imposing a race driven analysis to find "good cause" to avoid ICWA's requirements, which occurred in the Oklahoma case.