Puyallup Tribe of Indians

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Re: Puyallup Indian Tribe Comments Supporting B.I.A. Proposed ICWA Rule: Regulations For State Courts And Agencies In Indian Child Custody Proceeding, Docket ID: BIA 2015-0001

Dear Bureau of Indian Affairs:

The Puyallup Indian Tribe hereby expresses its support for the new binding regulations proposed by the Bureau of Indian Affairs, which will better protect its Tribal member children and their parents who are involved in state court proceedings, Regulations For State Courts And Agencies In Indian Child Custody Proceeding (published on March 20, 2015 on pages 14880–14894 of the Federal Register). The Puyallup Indian Tribe is a federally recognized under the Treaty of Medicine Creek, 10 Stat. 661-664 (1854)[1], and the Tribe provides its own resources while the Tribe's Indian Child Welfare staff actively seek to transfer cases to Tribal Court located on the Puyallup Indian Reservation in Tacoma, Washington.

The Tribe employs two full time Indian Child Welfare Liaisons and a full time Indian Child Welfare Attorney. The Tribe participates in ICWA cases spread across Washington, California, Minnesota, Montana, New Mexico, and other States. The Tribe has a large caseload and dedicates three people full time to monitoring those cases, and transferring as many as possible to Tribal Court. After the Tribal Court accepts jurisdiction, the cases are handled by Tribal Presenting Officer and the Tribe's Children's Services who help the parents and children access numerous other Tribal Services with a greater understanding of available resources and relatives.

[1] *See also* 25 United States Code Section 479a-1, and Indian Entities [Tribes] Recognized and Eligible to Receive Services From the Bureau of Indian Affairs, Federal Register Volume 80, 1942 at page 1945 (Wed. Jan. 14, 2015).

1. The Puyallup Indian Tribe has experienced ineffective or inconsistent implementation of the Indian Child Welfare Court by state courts, state and county attorneys, and state and county social workers, showing the need for these proposed Federal Regulations.

The proposed B.I.A. binding ICWA Regulations are needed because the Tribe has encountered all kinds of difficulties in various state court cases when it tries to transfer them back to its own Tribal Court. The proposed binding Regulations are also needed to deal with notice deficiencies by county and state officials that the Tribe continuously experiences, despite the clear intent of Congress in passing the Indian Child Welfare Act (25 U.S.C. Sections 1901-1952), and despite some state laws implementing the Indian Child Welfare Act. For example, in Washington State courts, some children's court "dependency" dockets are so busy that state/county attorneys and staff have difficulty getting notice to the Tribes at all for some hearings (in the last 6 months failing to give notice in at least 3 cases). Ironically, this has happened most frequently in Pierce County where the Tribal Headquarters is also located. Additional problems have been caused by late or after the fact receipt of social worker reports and other court filings. This still occurs in some cases where the Tribe's Indian Child Welfare Liaisons have appeared and participated in the hearings. It also has occurred in cases where the ICWA Attorney has filed a formal Notice of Appearance and Notice of the Tribe's Intervention. These problems are exacerbated in Washington State where Children's court clerks do not give out information about the children's cases over the phone, and the court filings are not accessible on line to the Tribe or its attorneys. Practical problems implementing ICWA occur in other states as well. For example, the federal court recently held that violations of ICWA and due process violations were committed by state court judges, state's attorney, and state social services in Rapid City, South Dakota when Indian children were taken away from their parents in numerous emergency removal cases where the parents had not provided with the petitions or supporting affidavits. Oglala Sioux Tribe et al. v. Hunnik et al., 5:13-cv-05020-JLV, Slip Opinion at page 34 (D.S.D., March 30, 2015). That U.S. District Court aptly commented that "**Indian children, parents and tribes deserve better.**"

2. There should be no time limit on when a tribe moves to transfer cases, as proposed in 25 CFR Section 23.117(c).

The Puyallup Indian Tribe monitors and actively participates in numerous Indian Child Welfare cases across many States. The Tribe communicates with county and state officials on all cases as soon as it is informed of them. The Tribe may reserve a decision on transferring for a variety of good reasons such as case status (e.g., whether a parent objects to transfer at that point in the proceedings, whether suitable placements are available, whether resources are available, whether transfer would burden the parents if it is impractical for them to travel to the Reservation for

court and/or Tribal services). Regardless, the Puyallup Indian Tribe intervenes, participates, and remains involved in all state court ICWA cases affecting its children. ICWA cases are monitored carefully. Some cases may resolve over time, so it sensible and practical to work on them and monitor them for a while in order to determine whether they are suitable to transfer. That process and the time involved varies for every individual case.

There is no time limit under the federal Indian Child Welfare Act, but many state courts have added their own interpretation and arbitrarily put time deadlines on the time to transfer that do not exist under federal law. The old, former, 1979 BIA non-binding ICWA regulations contributed to the problem by allowing the advanced stage of the proceedings to be considered as a factor for the court to deny a transfer to tribal court. Many State Courts denied transfer using that as a reason, and got around ICWA. For example, the Washington State Court of Appeals (Division I) held that 2 months and 15 days was too long for a Tribe to file its motion to transfer after getting notice of the petition for the termination of parental rights case. In re Dependency of E.S., 92 Wash. App. 762, at 770-771, 964 P.2d 404, at 409 (1998) (citing "advanced stage of proceedings" and holding "Because the Tribe had actual notice of the termination proceedings by no later than March 20, 1996, when its motion to intervene in the termination proceedings was granted, and did not move to transfer jurisdiction until June 4, 1996—13 days before the termination hearing was scheduled to begin—the trial court properly denied the motion as untimely.") There is no time limit or language "advanced stage of the proceedings" in the Indian Child Welfare Act. Rather, the ICWA allows Tribes to intervene at any point in the proceeding. The "… Indian child's Tribe shall have a right to intervene at any point in the proceeding." 25 U.S. Code Section 1911(c). This proposed Regulation eliminating the time requirement is in better keeping with the ICWA.

The Puyallup Tribe has experienced deficient treatment of ICWA in a California Court case involving four Puyallup Tribal members (three children and their mother), and their father who is enrolled with another Tribe. The Tribe intervened and sent its ICWA liaison to state court hearings in Riverside County, participating fully. The case came to a point where the state sought to terminate the parent's rights, and the Tribe wanted to transfer, but the Judge indicated that it was too late and there was no way a transfer would be granted to either Indian parent's Tribe. The Judge should have allowed a transfer under ICWA's Section 1911(c) as no parent was objecting to transfer, only the State. The Tribe would have accepted the case and provided more services to the reunify the family or proceed to guardianship or termination under Tribal law in Tribal Court, which makes sense because all parties are "Indian" (mother and her 3 children are Puyallup Tribal members).

3. The Tribe supports requirements for experts in ICWA cases to have knowledge of Tribal childrearing practice and customs, as proposed in Section 23.122.

State Courts too frequently proceed without experts who have knowledge of Tribal childrearing practice and customs, which in essence violates the intent and spirit of the ICWA. For example, in the ongoing Riverside County, California case mentioned above, the Judge relied on a social worker the county attorney proffered as an ICWA expert by the state had no knowledge or experience with Puyallup Tribal culture or childrearing processes, her only practical experience appeared to be looking at the Tribe's website. The new regulations would eliminate the problem of having such a person used and an ICWA expert in state courts to terminate parental rights, when such expert has no knowledge of the child's Tribe's cultural standards or childrearing practices.

Like California, Washington State case law is bad on the requirements for who can testify as an expert in ICWA cases. *See* In re Mahaney, 146 Wash. 2d 878, 897, 851 P.3d 776, 786 (2002) ("In the instant case, the court was entitled to rely on the expert witnesses with specialized training for the medical, psychological, and special needs of the children, **even though such experts lack special knowledge of and sensitivity to Indian culture**. Determining the admissibility of expert opinion is within the discretion of the trial court. Roberts v. Atl. Richfield Co., 88 Wash.2d 887, 898, 568 P.2d 764 (1977)."). [Emphasis added].

The proposed regulations suggest that a qualified expert witness should have specific knowledge of the Indian tribe's culture and customs. That will help address such poor decisions that fail to require experts to "demonstrate knowledge of the prevailing cultural standard and childrearing practices within the Indian child's tribe." That makes sense because ICWA requires expert witnesses before removing an "Indian child" from their parent or Indian custodian. The ICWA, at 25 U.S.C. sections 1912(e) and (f) requires proof shown by testimony of qualified expert witnesses that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child for continued foster care (by clear and convincing evidence), or termination of parental rights (by evidence beyond a reasonable doubt). That also makes sense because ICWA's placement considerations requires that the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with the parent or extended family members maintain social and cultural ties. 25 U.S. C. Section 1915(d). In other words, it is in perfect keeping with ICWA to require that experts have knowledge of the child's Tribe's social and cultural childrearing standards.

4. Additional Specific Comments on the proposed Regulations.

A. New Active Efforts Definition Proposed in Section 23.2.

The ICWA requires proof that "active efforts" have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, and that these

efforts have proved unsuccessful. 25 U.S.C. Section 1912(d). These proposed ICWA Regulations address the definition of "active efforts" in Section 23.2, providing fifteen factors. Since the term "active efforts" is not defined in the ICWA, these factors will provided guidance and ensure better ICWA compliance and protection of rights under the proposed binding regulations. The Tribe has comments to five subsections of these proposed Binding Regulations. The Tribe recommends adding the phrase "which are reasonably accessible" when identifying appropriate services of children's parents/guardians to Subparagraph (3), so it would read as follows: "(3) Identifying appropriate services which are reasonably accessible and helping parents to overcome the barriers." This would help in those situations where state social services require parents or guardians to travel off-reservation through state territory to obtain services when they may not have reliable transportation, may not have insurance, may not be able to afford to travel far distances, and may live in an area where there is little or no mass transit. Transportation difficulties and/or lack of financial means for transportation should not be held against the parents/guardians who are trying to obtain needed services for return of the children. Actual experience at this Tribe in state ICWA has often shown that Indian parents/guardians are more comfortable working with Tribal representatives and Tribal services than state officials. That makes since given that state officials may proceed to terminate their parental rights. That is also reasonable given the justifiable historic distrust of outside governments.

Also, at Subsection (4), the phrase "and providing timely sharing of reports and information to the child's tribe and to the parties" should be added. Reports often are not timely shared with Tribes or parties, putting them in the position of having insufficient time to review the information before the court hearing. Further, at Subsection (5), the phrase "and timely" should be added so it reads: "Conducting or causing to be conducted a diligent and timely search for the Indian child's extended family members for assistance and possible placement." A ***timely*** relative search is needed in every case in order to have suitable placements ready, and to avoid delays and other difficulties. In addition, at Subsection (13), the phrase "or inaccessible" should be added at the end, in order to ensure that the services must actually be "accessible" to the parents/guardians. At Subsection (15), similarly, the term "accessible" should be added to the phrase "Providing **accessible** post-reunification services and monitoring."

The Tribe notes that new definitions are proposed for the following terms: "Continued custody"; "custody"; "Domicile"; "Imminent physical damage or harm"; "status offenses"; "upon demand" and "voluntary placement." Also, there is a new sentence added to the definition of "Indian Custodian" which is: "An Indian person may demonstrate he or she is an Indian custodian by looking to tribal law or tribal custom or State law." The extra sentence recognizes the reality that

there are informal Indian caretakers who may raise Indian children without having a court order. The definition of "Secretary" also adds a phrase clarifying that the term also includes the "Secretary's authorized representative acting under delegated power."

The Tribe also notes that the proposed regulations expand ICWA coverage to juvenile proceedings in state court "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." Proposed Section 23.103(a).

B. Elimination of the "Existing Indian family Doctrine" which is not in ICWA.

It is very significant that the proposed regulations at Section 23.103(b) will eliminate the "existing Indian family doctrine" which was created by state courts as a way to get around the ICWA. The ICWA does not contain that exception, but state courts have often abused this to avoid compliance with ICWA. Section 23.103(b) also would prevent state courts from considering a non-exhaustive list of six factors used by state courts to avoid the ICWA. That same section would make agencies and state courts ask whether the child is or could be an Indian child and to conduct an investigation about that, and goes a step further making the agency and the State court treat the child as an Indian child unless and until the Tribe determines the child is not eligible or a member.

Section 23.103(e) states that the ICWA does not apply to tribal Court proceedings. The Puyallup Indian Tribe intervenes in other Tribal courts in many cases involving removal of Puyallup children from their families by other Tribes, and questions inclusion of this provision.

The Tribe also notes that there are local BIA offices, and suggests that the term "local" be added to **Section 23.105(c)** so it reads "...you may seek assistance in contacting the Indian tribe(s) from the BIA ***local***, Regional Office and/or Central Office in Washington, DC..."

Section 23.108 clarifies that state courts cannot substitute their judgment for a Tribe's determination as to whether a child is a member eligible to be a member of the Tribe. **Section 23.109** concerns the definition of an Indian child's tribe where a child may be enrolled in one Tribe, and eligible to be enrolled in another. There is a concern over limiting the second Tribe's participation in subsections (c)(2)(ii) and (c)(3) that notice may be limited to the designated Tribe, and the Tribe where the child is actually enrolled might not be designated. Instead, the best practice would be to send notices to all Tribes where the child is eligible for enrollment. That is in better keeping with the ICWA's definition of an Indian child, and affords greater

protection for the Indian child and extended family members from the other tribe who may be potential placements.

The Tribe recommends changing one part of the notice requirements proposed under Section 23.111(c)(4)(v). This sub provision would be bad because it adds a burden of stating a specific number of days, when ICWA just states up to twenty days. ICWA's current 20 day continuance provision states "the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding." 25 U.S.C. Section 1912(a) This is very important because it is difficult to obtain continuances. This provision must be fixed, and should simply restate the ICWA provision above.

The Tribe supports the provisions for transfer of jurisdiction at Section 23.115, which would specifically allow transfer motions to be made on paper or by oral motion. Oral motions are allowed by court rules, so this makes sense. It is sometimes difficult and impractical for motions to be made on paper. This section would also allow appearances by phone, videoconferencing or by other methods, which recognizes current practice and technological advances. This would also help parents and guardians participate when they are unable to travel or appear.

The provisions of Section 23.117 describe good cause not to transfer of jurisdiction and clarifying that courts may not consider advanced stage of the proceedings, the child's contact with the tribe or reservation, socioeconomic conditions or any perceived inadequacy of tribal social services or judicial systems, or the tribal court's prospective placement. The Tribe supports these provisions, but recommends using the word "shall" instead of may to strengthen these points, so it reads "In determining whether good cause exists, the court shall not consider…".

The Tribe supports the provisions for access to reports in Section 23.119, but recommends the use of the word "must" instead of "may" to strengthen the evidence requirements in subsection (b), and avoid due process violations in emergency removals of Indian children.

Further, in light of the different laws and different treatment by state courts toward Tribes and their ICWA representatives, there should be a provision to make it clear to all state courts that Tribes can participate in IWCA state court proceedings. For example, some states make it difficult or impractical for the Tribe's attorneys to appear in a case if it is in a different state. Some do not allow reciprocity, or they require local counsel in order to appear *pro hac vice* in

ICWA cases. That is costly and time consuming. The delays caused by having to hire a local lawyer are often unworkable because at the Puyallup Indian Tribe, existing legal requirements require every lawyer for the Tribe to be approved by a vote of the Tribe's full membership, a process which may take up four months, or possibly longer. Therefore, a proposed rule clarifying that the Tribes have a federal right to have their counsel or party representatives to appear in state ICWA proceedings should also be considered in the proposed regulations.

5. Uniformity by adopting the proposed ICWA Regulations will aid state courts in properly implementing ICWA, and will greatly assist Tribes and Indian families in ensuring that the best interests of Indian Children are met.

It is important to note that many state courts have relied on the former non-binding 1979 BIA non-Binding ICWA Guidelines, and have reached varying results. Although the new non-binding BIA ICWA Guidelines address some of those concerns, approving of the proposed Binding regulations will aid state courts with the BIA agency interpretation of ICWA, and will produce more certainty and uniformity for state courts to use. That in turn, will also help Tribes, parents, guardians and Indian children to protect their families and relatives from unwarranted removals of children from their homes, and from unnecessary delays in return of their children.

CONCLUSION

The Tribe supports the BIA's proposed new approach to eliminating exceptions used by many state courts to avoid complying with ICWA, especially eliminating the "existing Indian family" exception that has so often been abused by state courts to avoid ICWA compliance; and eliminating state courts' use of the passage of time ("advanced stage of the proceedings") to avoid transferring cases to tribal courts as required by ICWA. The Puyallup Indian Tribe thanks the B.I.A. for its efforts, and requests the B.I.A. to adopt the proposed Indian Child Welfare Act Rule: Regulations For State Courts And Agencies In Indian Child Custody Proceeding, to be codified at 25 Code of Federal Regulations Part 23, with the exceptions of the designated tribe provisions in Section 23.109, and using the ICWA's 20 day continuance language instead of the proposed language in Section 23.111(c)(4)(v) for specifying the number of days. Thank you.

Respectfully,

Bill Sterud
Tribal Council Chairman
Lawrence LaPointe, Vice-Chair