



## ICWA LAW CENTER

May 18, 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: ICWA, Notice of Proposed Rulemaking – Regulations for State Court and Agencies in  
Indian Child Custody Proceedings – RIN 1076-AF25-Federal Register (March 20, 0215)

Dear Ms. Appel:

The ICWA Law Center strongly supports the BIA's issuance of ICWA regulations. The ICWA Law Center is a non-profit legal services organization that provides direct legal representation to Indian families impacted by child custody proceedings implicating the Indian Child Welfare Act. The ICWA Law Center works to strengthen, preserve and reunite Indian families consistent with the mandates and spirit of ICWA. The ICWA Law Center is grateful for the opportunity to provide comments on the Notice of Public Rulemaking regarding Regulations for State Courts and Agencies in Indian Child Custody Proceedings (hereinafter "the Proposed Rule").

Despite the protections of the ICWA, a disproportionate number of Indian children continue to be placed outside their homes. In Minnesota, an Indian child is 15.5 times more likely than a White child to be placed in care (Minnesota's Child Welfare Report, August 2014). These tragic disparities require a sustained legal response to prevent unnecessary out of home placements. In 1993 American Indian leaders active in the Minnesota legal community formed the ICWA Law Center. The creation of the ICWA Law Center was a concerted response to end violations of ICWA and to strengthen Indian families and communities. Since 1993, the ICWA law Center has advocated in more than 5,000 cases involving more than 7,500 children. Through this experience, the ICWA Law Center knows that non-compliance with ICWA threatens the ability of families to stay together. When families are torn apart, all involved experience trauma having

a lasting impact for generations. The ICWA Law Center supports the clarity and consistency of the Proposed Rule as a means to increase ICWA compliance. Through this clarity and consistency, the mandates of ICWA will best be adhered to ensuring the connection of Indian children to their families and their tribes are honored.

The Proposed Rule is critically important to ensure consistent compliance with ICWA and to further the best interest of Indian children. The ICWA Law Center overwhelmingly supports the Proposed Rule, in the comments that follow we highlight our position and offer a more detailed analysis on a few key provisions. Although we do not offer specific comments on all provisions of the Proposed Rule we have reviewed the comments of NICWA and AAIA and fully support their comprehensive analysis of the Proposed Rule has a framework for the Final Rule.

### *Active Efforts*

The definition of active efforts is a critical component of the Proposed Rule. For Indian families who are involved in child custody proceedings, the provision of active efforts enables families to solidify their strengths and appropriately address their needs. State court findings of active efforts are often made without detailed consideration of what efforts have actually been made. The lack of a definition in ICWA has led to inconsistent application of this key provision. The proposed definition will provide clarity and consistency.

The ICWA Law Center also strongly supports the Proposed Rule section 23.120 regarding the provision of active efforts. In light of *Adoptive Couple v. Baby Girl*, language should be included to reflect the limited scope of the holding in the Supreme Court's decision. The provision of active efforts is critical in preserving and strengthening Indian families. This limitation will ensure that the Supreme Court's decision is not interrupted by state court judges to apply in proceedings other than in a private adoption where the father abandoned the child and without ever having any legal or physical custody.

Consistent with ICWA, the statement that active efforts should be provided in all cases from the earliest possible time until a case is concluded is significant. The Proposed Rule would be further strengthened by a clear statement that there is no exception to this requirement. Further, the ICWA Law Center suggests that the rules specifically address the intersection of the Adoption and Safe Families Act (ASFA) 1997 (Pub. Law 105-89) and ICWA, with the following language, "The provisions of ICWA apply to all Indian children and the provisions of ASFA in no way infringe upon the protections of ICWA. Active efforts are distinct from the reasonable efforts required in ASFA."

The Proposed Rule provides a much need definition of active efforts and through the examples provides the framework to ensure Indian families are protected and if intervention occurs in their lives that their needs are appropriately assessed and best met.

### **Child custody proceedings**

The definition of child custody proceedings is important to include; however, the definition should clearly indicate that third-party custody or guardianship proceedings and adoptions are included in child custody proceedings and must comply with ICWA.

### **Parent**

The definition of parent should include a provision where “tribal law or custom” constitute a basis for establishing paternity for purposes of ICWA.

### **Best Interests of Indian Child**

A definition of best interests of Indian child should be added to the Proposed Rule. The following language is suggested: “The ICWA sets forth minimal federal standards, compliance with these standards is in the best interests of Indian children. Best interests of an Indian child means compliance with ICWA to preserve and maintain an Indian child’s family and supports an Indian child’s sense of belonging to family, extended family and tribe.”

Including the term best interests in these rules is important as states courts often are persuaded that application of ICWA and best interest conflict when in reality ICWA provides the framework to ensure the long-term best interests of Indian children.

### **Excluding the “Existing Indian family doctrine”**

The language in Section 23.103(b), “There is no exception to the application of ICWA based on the so-called “existing Indian family doctrine” has great importance and we strongly support its inclusion in the rule. This is important as attempts to apply the “existing Indian family doctrine” lead to absurd and offensive considerations. The ICWA Law Center has represented families in child custody proceedings where despite the child being recognized as a member of a federal recognized tribe, the parents were asked questions such as follows. 1. Do you speak your tribal language; 2. Do you attend Powwows; 3. Did you vote in tribal elections? The underlying assertion was that the answers to these questions would empower the state court judge to make a determination as to whether the family was an “Indian family”. Minnesota currently has a specific exclusion of the “existing Indian family doctrine” in state law; however, the specific exclusion of the “existing Indian family doctrine” in the Proposed Rule is significant to ensure consistent application of ICWA.

The ICWA Law Center strongly supports the Proposed Rule’s recognition that tribes have exclusive authority to determine membership. This affirms ICWA’s applicability based on a

political status. Tribes as sovereign governments are the only entity with the legal authority to determine membership of a tribe.

### **Federal Minimum Standard**

We support section 23.105(a) of the Proposed Rule and believe this section can be strengthened with specific language that the application of ICWA is the best interests of Indian Children. Proposed language: “The ICWA and this Rule provide minimum federal standards for compliance with ICWA and this Rules will protect the best interests of Indian children. In any child custody proceeding where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires that the State court must apply the higher standard.” This provision should also include protections for tribes.

These rules should also clearly state that “States through statute or tribal-state agreements may provide greater protections to protect the rights of Indian children, their families and tribes.”

### **Notice**

The ICWA Law Center supports the notice requirements in section 23.111. ICWA compliance in both voluntary and involuntary proceedings is critical to the best interests of Indian children. Inclusion of the notice provision in voluntary proceedings is significant in order to effectuate compliance with ICWA section 1913. Determining a child’s status as an Indian child and notice to tribes is interwoven. This language will help to ensure the voluntary provisions of ICWA will be enforced and applicable to all Indian children.

This provision of the Proposed Rule should specifically address the interstate placement of children through the requirements of the interstate compact on the placement of children. Placements across state line too often lead to inconsistent or non-compliance with the application of ICWA. Notice to tribes of these proceedings will help to ensure consistent application of ICWA in all placements of Indian children.

### **Transfer to Tribal Court**

The ICWA Law Center supports the language in the Proposed Rule section 23.116 and suggests that this language specifically include a statement that “A transfer to tribal court is presumed to be in the best interests of an Indian child.”

## **Qualified Expert Witness**

The ICWA supports the Proposed Rule section 23.1222 and listing the qualifications of Qualified Expert Witnesses in descending order. However, the proposed language may be confusing. We suggest the following language "The QEW shall be determined in the following order of preference"

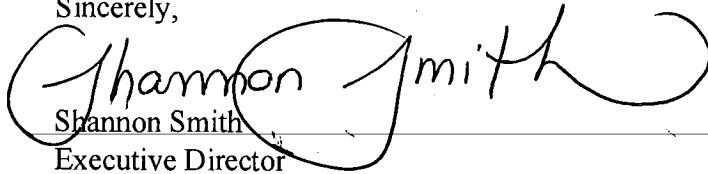
## **Placement Preferences**

The sections regarding placement preferences are critically important. The limitation on the consideration of "ordinary bonding and attachment" is necessary. Despite the Supreme Court reasoning in *Mississippi Band of Choctaw Indians v. Holyfield* state courts repeatedly forego placement preferences for their ideals about bonding even when the amount of time the child has been in the placement is predicated on clear and often blatant violations of ICWA.

## **Conclusion**

On behalf of the ICWA Law Center, thank you for the opportunity to comment on the Proposed Rule. We strongly support the issuance of the Rule to ensure that the mandates of ICWA are consistent and enforceable. Through ICWA and this Rule, the best interests of Indian children and their families will be protected and in turn our communities will be strengthened. The ICWA Law Center strongly urges the promulgation of a Final Rule to promote consistent compliance with ICWA and to protect Indian families, Indian children and tribes.

Sincerely,

A handwritten signature in black ink that reads "Shannon Smith". The signature is written in a cursive style with a large, looping flourish at the end of the name.

Shannon Smith  
Executive Director

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