



## CENTRAL COUNCIL

### *Tlingit and Haida Indian Tribes of Alaska*

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May 19, 2015

Ms. Elizabeth Appel  
Office of Regulatory Affairs & Collaborative Action—Indian Affairs  
U.S. Department of the Interior

Central Council Tlingit and Haida Indian Tribes of Alaska (Central Council) is a federally recognized tribe that represents nearly 30,000 tribal citizens world-wide. Central Council strongly supports the new regulations for State courts and agencies in Indian child custody proceedings. As a tribal government, the safety and well-being of our children is a top priority. Central Council would like to thank the Department of Interior (DOI) and the Bureau of Indian Affairs (BIA) for proposing the new regulation changes to the Indian Child Welfare Act (ICWA).

ICWA was enacted in 1978 with the intention of combatting the systematic removal of Indian children from their homes and communities. However, since then various States have interpreted the ICWA provisions in ways that undermines the purpose of the law. The State of Alaska has been especially difficult in compliance with ICWA provisions. Central Council believes that the proposed changes to the regulations will establish necessary definitions that all State Courts can administer consistent rulings based on federally mandated standards. This will ensure equal application of ICWA throughout the United States, and fulfill recommendations by the Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence.

Central Council would like to explicitly support the major regulation changes that will liberate Alaska Native tribes from the State interpretation and failure of existing regulations. Most imperative is § 23.103(b), the regulations' rejection of the "existing Indian family" doctrine, a state-court created attempt to undermine ICWA.

- § 23.2 Providing a definition of "active efforts," which properly clarifies that Congress has imposed a special duty that agencies owe to Indian children.
- § 23.2 Providing a definition of "continuing custody" to clarify that parents with legal rights to their child who may never have had physical custody are fully covered by ICWA. This is especially important given U.S. Supreme Court's holding in *Adoptive Couple v. Baby Girl*, which held that the birth father never acquired rights under ICWA because he had neither legal nor physical custody of the child. This regulation is consistent with the U.S. Supreme Court's holding.
- § 23.101 Reiterating that Indian Canons of Construction are to be used when complying with ICWA.
- § 23.103(b)(4) Clarifying that private adoption placements made voluntarily by parents are covered by ICWA. This is an important clarification given *Adoptive Couple v. Baby Girl*, with which it is entirely consistent.
- § 23.103(b)(6) Recognition of a tribe's exclusive authority to determine tribal membership. We very much support the affirmation of this key principle of tribal sovereignty, including noting that blood quantum is not a consideration when determining whether ICWA applies.
- § 23.103(d) and § 23.106(b) Providing that if there is any reason to think the child might be Indian, the state court should apply ICWA, even during the investigation.
- § 23.107(b)(2) Requiring that state courts document the agency used active efforts. This will dramatically aid in compliance with ICWA by documenting exactly how this compliance looks.

- § 23.107(d) Providing that a request for anonymity does not relieve the obligations to comply with ICWA, including the obligation to obtain verification from the tribe(s) or to provide notice.
- § 23.113(i) Providing that state courts should allow alternative methods of participation in court proceedings, such as videoconferencing.
- § 23.117(c)-(d) Limiting the discretion of state courts to deny transfer of a case to tribal court. Too often state courts refuse to transfer a case because they think that a tribal court will make a decision with which they disagree. The regulations make clear that this is not an appropriate reason to deny transfer. Additionally, specifying that the state court may not consider whether the case is at an advanced stage, and that socio-economic conditions or any perceived inadequacy of tribal or BIA social services or judicial systems cannot be considered.
- § 23.121 Specifically stating the applicable standards of evidence as they relate to ICWA, including providing specific examples.
- § 23.122 Providing a list of characteristics, in descending order, of who can serve as a qualified expert witness.
- § 23.128 Emphasizing the need to follow the placement preference and limiting the ability of agencies to deviate from the preferences. The failure of state courts and agencies to place Indian children in relative, tribal and Indian homes is one of the biggest problems with the Act's implementation. Keeping children with their families and within their tribal communities and cultures is vitally important to their well-being and a central purpose of the ICWA.
- § 23.131 Providing a definition of "good cause to depart from placement preferences," which explains that the length of time a child is in a placement is irrelevant when courts are deciding what remedy to employ for a non-compliant placement. This rule is consistent with best practices in child welfare.
- Providing that "ordinary bonding or attachment" resulting from a non-compliant placement shall not become the sole basis for a court refusing to return a child to his or her family or otherwise to undo an initial temporary placement. The American Academy of Adoption Attorneys has objected to this proposed rule asserting that it is inconsistent with *Adoptive Couple v. Baby Girl*. This claim is groundless. It is true, as the Adoption Academy states, that *Baby Girl* held that ICWA's preferences set forth in 25 U.S.C. § 1915(2) are inapplicable when no one has sought to adopt the child. But nothing in the proposed regulation conflicts with that proposition. All the proposed regulation addresses is what should happen when the applicable placement preferences are not being met. The Adoption Academy's characterization that this proposed regulation is "perhaps the most glaring example of the proposed regulations being contrary to the language and history of the ICWA" should not be taken seriously.

Thank you for the opportunity to comment on the proposed regulations that aims to combat the ambiguity that ICWA currently creates. Central Council would again like to communicate our appreciation for the issuance of these proposed regulations and urge you to adopt strong ICWA regulations to ensure the protection of the rights of Indian children, families, and tribes across the United States.

Sincerely,



Richard J. Peterson  
President