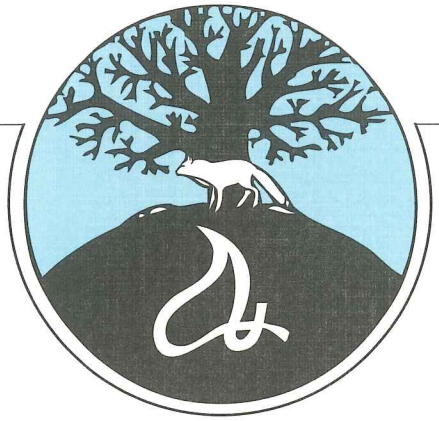
Mashantucket Pequot
Tribal Nation



TRIBAL COUNCIL

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: *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,

The Mashantucket Pequot Tribal Nation is pleased to provide comments on the Notice of Public Rulemaking (NPRM) regarding Regulations for State Courts and Agencies in Indian Child Custody Proceedings. This NPRM was published in the *Federal Register* on March 20, 2015, pages 14880–14894. We commend the Department of the Interior (DOI) and the Bureau of Indian Affairs (BIA) for proposing much needed regulations and guidance in this area.

Families are the center of Native cultures and children are considered gifts from the creator who represent the future of tribal communities. The Indian Child Welfare Act of 1978 (ICWA) "protects the best interest of the Indian Child and promotes the stability and security of Indian tribes and families" (25 U.S.C. § 1902). The substantive ICWA regulations being proposed provide rules for ICWA's implementation in state courts and by state and public agencies. These regulations are needed to address misunderstandings and misapplication of ICWA by state courts and agencies, which has led to the unnecessary break up of Native families and placement instability for Native children.

BIA has the authority to issue regulations. ICWA vests considerable authority in the DOI and the BIA. ICWA states that the Secretary is authorized to "promulgate such rules and regulations as may be necessary to carry out the provisions of the Act" (25 U.S.C. § 1952). ICWA was designed to establish "minimum federal standards" governing state court proceedings. In the last few decades there have been divergent interpretations of a number of ICWA provisions by

state courts and uneven implementation by state agencies. This undermines ICWA's purpose: to create consistent minimum federal standards.

Using this authority, the BIA has proposed federal regulations that will ensure courts and agencies working with ICWA-eligible children and their families understand how the law is to be applied. The previous guidance from the BIA on ICWA, provided by federal guidelines, allowed for variations in practice and thus uncertainty for Native children and families. The proposed regulations specifically address the lessons learned and provide uniform guidance with greater legal force. Provisions in the proposed regulations that are particularly helpful include:

- Early identification of ICWA-eligible children. Children and families are denied the protections of ICWA because a court or agency did not ask whether the child had Native heritage. Not only can this result in Indian children not being identified at all, it can create a risk of insufficient service provision, delay or repetition in court proceedings, and placement instability once a child is identified. The requirements regarding early identification included in the regulations require good practice and promote compliance with the requirements of the law.

- Recognition of tribes' exclusive authority to determine membership. ICWA applies based on a child's political status. Specifically, it applies to children who are members or are children of members and eligible for membership in a federally recognized tribe. With regard to membership, tribes as sovereign governments are the only entity with the legal authority to determine the membership of a tribe. The regulations are clear on this vital point.

- Clarity with regard to ICWA's application. Native children have been denied the protections of ICWA and the opportunity to know their families, communities, and culture because of the Existing Indian Family Exception a judicially created rule that is inconsistent with ICWA's intent. The regulations clarify what the Supreme Court in *Adoptive Couple v. Baby Girl* confirmed: that in general ICWA applies to all cases where an Indian child is involved in an Indian custody proceeding. Thus, the Existing Indian Family Exception is an unlawful interpretation of ICWA. The proposed regulations mirror the overwhelming trend in state legislatures and courtrooms and make this clarification.

- Definition and examples of active efforts. The provision of active efforts is required before an ICWA-eligible child can be removed from her home and before parental rights can be terminated, yet this term has never been defined. Without a clear definition of active efforts, state and private agencies have been required to provide services without a clear understanding of the level and types of services required. The regulations provide not only a clear definition of active efforts but illustrative examples to guide state and private agencies practice with Native children and families. This is very helpful.

- Notice to tribes in voluntary proceedings. Tribes are *parens patriae* for their member children. In ICWA proceedings this includes the right to intervene in state proceedings or transfer the case to tribal court. When tribes do not receive notice of voluntary proceedings they are effectively denied these rights. Further, because tribes have the

exclusive authority to determine which children are members, when tribes are not notified and offered the opportunity to verify that a child is ICWA-eligible, a court cannot ensure compliance with the law. Lastly, tribes are an essential resource for states and agencies seeking placements in line with ICWA's preferences. Without knowledge of a voluntary proceeding, children can be denied possible placements consistent with ICWA's placement preferences. Notice in voluntary ICWA proceedings provides agencies and courts the clarity necessary to protect these interests.

- Limiting the discretion of state courts to deny transfer of a case to tribal court. The Supreme Court has clarified that tribes have "presumptive jurisdiction" in child welfare cases that involve their member children. Some state courts have inappropriately found "good cause" to not transfer a case seemingly because they believe the tribal court will make a decision different from its own. The regulations clarify that this reasoning cannot be used to deny transfer.

- Emphasizing the need to follow the placement preference and limiting the ability of agencies to deviate from the placement preferences. One of ICWA's primary purposes is to keep Native children connected to their families, tribal communities, and cultures. Yet, currently, more than 50% of Native kids adopted are placed in non-Native homes. The regulations provide requirements that will promote placement in accordance with ICWA's language and intent.

We strongly support these regulations. In addition, we believe that the regulations could be strengthened by articulation of the general authority to regulate and that specific regulations be justified with references to supportive cases, state regulations and policies that reflect best practices, and legislative history. Finally, we would like to see the regulations address the *Adoptive Couple v. Baby Girl* case by: (1) clarifying that it should not be applied outside of the private adoption context; and (2) providing guidance on how this interpretation should be implemented in state court and private agency practice. With these additions the proposed regulations will be even stronger.

The Mashantucket Pequot Tribal Nation applauds the BIA for their work on the proposed Regulations for State Courts and Agencies in Indian Child Custody Proceedings. These proposed rules provide the clarity and certainty necessary for all parties involved in child welfare and private adoption proceedings to comply with the law and promote the best interest of Indian children. It is this clarity and certainty that will preserve Native families and promote permanency for Native children.

Thank you in advance for consideration of our comments.

Sincerely,

Rodney A. Butler, Chairman
Mashantucket Pequot Tribal Nation