Ms. Eliabeth Appel

Office of Regulatory Affairs & Collaborative Action

Indian Affairs

U.S. Department of the Interior

1849 C Street NW

MS 3642

Washington D.S. 20240

Dear Ms. Appel,

Native American Bar Association of Arizona (NABA-AZ) is a non-profit organization consisting of Native American practitioners and lawyers who practice Indian law. NABA-AZ supports the proposed regulations for the Indian Child Welfare Act. The ICWA guidelines previously published in 1978 were clearly in need of updating as the case law of the various states interpretations of the ICWA over the decades has eroded the intent and spirit of this Congressional act to preserve Indian families and tribal communities.

As of May 1, 2015, the majority of opposing comments filed regarding the proposed regulations address the regulation §23.131, as to the good cause to deviate from preferences of placement. NABA-AZ offers the following comments in support for this critical section.

In its entirety, ICWA and the proposed regulations do not **prohibit** all best interest considerations, as is often suggested by those who offer non-supportive comments. Rather, the proposed regulations narrow the application of "good cause" to deviate from ICWA placement compliance, by the prohibition of a judicial best interest analysis when a court is placing a child in a non-ICWA compliant placement. The ordinary bonding and attachment is the "catch-all" that currently justifies good cause to deny a child an opportunity to be in a home with a family member or tribal home. (Simply being comfortable or familiar does not warrant any opportunity to adjust to another).

Whenever the analysis is given to "best interest", many litigants and parties actually default to personal bias as to what constitutes a "better" life for a child, and in such analysis, the dominant western culture often does not fairly or adequately understand the Native American cultures and communities. In addition, the bias against poverty-stricken homes and communities contributes to those homes being deemed to not being the best for a child, but discounting the importance and value of cultural connectedness, of being a home and family where the ancestral history, the shared stories of survival, and traditions are the root of a child's understanding of self.

According to a recent study, Native American attorneys continue to be in short supply. Native Americans are 1.6% of the U.S. population but only .3% of U.S. attorneys in spite of the fact that 65,356 Native Americans 25 and older had a graduate or professional degree in 2011 according to the U.S. Census Bureau. (See "The Pursuit of Inclusion, an In-Depth exploration of Native American attorney in the Legal Profession, available at nativeamericanbar.org) Most Native American children and families who end up in State courts will rarely encounter a Native

American attorney for parents, for children, as the guardian ad litem, or as the judge. NABA-AZ encourages Native American interests to be represented by Native American attorneys when possible, but when that is not possible, the more education and guidance regarding the protective statute of ICWA that can be offered the better, to the critical goal of keeping Native American families safe and whole. Since every Native American child and family cannot have Native American representation or judges familiar with the long history of termination and racial bias, and lacking the basic education of the Indian law tenets, NABA-AZ strongly supports the ICWA regulations to bolster the compliance of ICWA.

The Minnesota Supreme Court stated strong rationale for the rejection of a "best interest" analysis "state courts are a part of the problem the ICWA was intended to remedy…the best interests of the child standard, by its very nature, requires a subjective evaluation of a multitude of factors, many, if not all of which are imbued with the values of majority culture." *In re Custody of S.E.F.*, 521 N.W. 2d at 262-363. Similar interpretation was articulated in the United States Supreme Court in Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, (1983). In rejecting the best interest standard would ensure that "Indian child welfare determinations are not based on white, middle class standard which in many cases forecloses placement with the Indian family." Id. at 37.

Unjustified emotional alarm on behalf of primarily non-Indian commenters is distressing to NABA-AZ . NABA-AZ acknowledges that many of the commenters have good intentions to advocate for children, however the comments are yet another example of non-Indian interest misunderstanding Native American history, culture, values, and modern day tribal capacities. The tone of the comments is overwhelmingly hostile to the idea that Native American children should presumptively be cared for by Native American families.

The panicked impression of those opposing the narrowing of "good cause" exception paints a picture of children who are loved and welcomed by a foster family who is not ICWA compliant, will suddenly be ripped from the home and placed with a home that is merely "sufficient" but since the home is "merely" compliant with placement, and therefore the child will suffer. The implication is that bonding and attachment with tribal homes is not as likely and clearly will not be "as good". The scare tactics are intended to persuade some that tribal children will suffer and be mistreated by complying with preference of placement, tactics that are based on a premise that tribal homes will always be lesser.

The commenters also reveal themselves to be terribly uneducated and uninformed as to the unique status of Native American tribal governments and people, based on the trust relationship and the sovereign status of tribes. When comparisons are made to not treating any child differently than any other race, the commenter is missing the point of the goal of preserving tribal entities and cultures, of which every Native American child should be entitled to, as expressly authorized by Congress.

Many tribal codes apply the best interest of a child in when making determinations for the child in custody of the tribal court. However, a tribal court analysis of what is the best interest of a child is not an application the ICWA. Tribal courts, within their own jurisdiction, make decisions for the children within the tribal courts based upon tribal law and cultural values and custom.

In conclusion, NABA-AZ respectfully submits these comments in support of the proposed regulations for State Courts and agencies in Indian Child Custody Proceedings.

Sincerely,

Sheri Freemont

President
NABA-AZ
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