



NATIONAL CONGRESS OF AMERICAN INDIANS

May 19, 2015

Ms. Elizabeth Appel
Office of Regulatory Affairs & Collaborative Action
Indian Affairs, U.S. Department of Interior
1849 C Street NW, MS 3642
Washington, DC 20240

Submitted via Email

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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 National Congress of American Indians (“NCAI”) applauds the efforts of the Department of Interior in drafting these proposed regulations, and is pleased to provide comments on the Notice of Public Rulemaking regarding Regulations for State Courts and Agencies in Indian Child Custody Proceedings (“Proposed Rule”). 80 Fed. Reg. 14,880-94 (Mar. 20, 2015).

NCAI writes to you as the oldest and largest representative congress of American Indian and Alaska Native tribes. We have waited far too long for the promulgation of detailed, mandatory guidance to direct state child welfare courts and agencies in their application and interpretation of the Indian Child Welfare Act (“ICWA”) as Congress originally intended. NCAI is committed to strengthening the integrity of ICWA, as exemplified by NCAI Resolution SAC-12-068, which states that NCAI “will continue to provide leadership and assist tribes as they address these threats to their sovereignty and well-being of their children and families.” In that vein, NCAI is pleased to offer our strong support of the Proposed Rule.

NCAI endorses and incorporates by reference the comments submitted by the National Indian Child Welfare Association, our partner in this effort, and by the Association on American Indian Affairs.

NCAI would like to offer two additional contributions to support effective implementation of the Proposed Rule. First, we urge that the provisions of the Proposed Rule be implemented at the outset of state child welfare proceedings to encourage front loading ICWA-compliant placement permanency for our children. Second, we have provided a number of forms that could be used as templates for state courts and tribes when applying ICWA, to foster uniform conformity with ICWA’s mandates.

I. Front Loading ICWA-Compliant Placement Permanency is in the Best Interest of Indian Children

In order to understand why early ICWA compliance, as mandated by the Proposed Rule, is in the best interest of Indian children, it is necessary to understand the historical context that led up to the passage of ICWA. In 1959, as part of the termination policy of the time, the Child Welfare League of America, a national child welfare organization, began promulgating national adoption standards for Indian children. These standards outlined that Indian children of at least one-quarter Indian blood quantum were to be adopted out to primarily non-Indian families.¹ By the

¹ Palmiste, Claire, *From the Indian Adoption Project to the Indian Child Welfare Act: the Resistance of Native American Communities*, *Indigenous Policy Journal*, Vol XXII, No. 1, at 3 (Summer 2011).

time ICWA was passed in 1978, 25-35% of all Indian children had been taken from their families and placed in adoptive, foster, or institutional care in furtherance of these standards.² Of those removals, 99% were cited for vague reasons of “neglect” or “social deprivation” and the emotional damage that children would be subject to by continuing to live with their Indian parents. Upon hearing these reasons, tribal communities were often shocked to hear that community members they had judged to be excellent parents were judged “unfit” by non-Indian social workers. Congress found that in making these determinations, many social workers, ignorant of tribal custom and culture, would make decisions inappropriate in the context of Indian family life and find neglect or abandonment where none existed.

Discrepancies between non-Indian and Indian child placements highlighted the states’ abuse of child welfare mechanisms at the expense of tribes and their children. For example, Congress found that in areas where parental substance abuse was the same in both Indian and non-Indian households, non-Indian parents with substance abuse issues rarely had their children taken away, while substance abuse was the most frequently cited reason for removal of children from Indian parents. In passing ICWA, Congress intended to combat these abuses of the child welfare system and to restore tribal authority in determining the best interest of their children.

These abuses persist today, largely through misapplication or ignorance of ICWA as well as patronizing determinations of the best interests of our children. Many Native parents suffer from poverty, while some parents live with the scars of being forcibly ripped from their families and communities by the harmful adoptive practices of the 1950’s and 60’s.³ ICWA seeks to restore these parents to a position in which they are able to effectively parent their children, either themselves or through extended family and the tribal community. However, the cycle of displacement and cultural isolation continues; Indian children continue to be taken from their homes at *three times* the rate of non-Indian children.

Pulling our children out of their homes and severing all connection to their families and cultures cannot be in their best interest. This is the very practice that created the psychological and economic isolation we see in parents ICWA seeks to make whole. “Best interests of the child” cannot mean the wholesale removal of children from low income Indian families, with the only reason being that those families have the symptoms of being low income.

The “best interests of the child” is early and effective implementation of “active efforts” by state courts and agencies to prevent removal and keep these families together. If properly implemented, ICWA does this—through early notice to parents, extended family, and tribes, ICWA ensures that Indian children are *always* placed within the family or in the best placement possible to prevent the cultural isolation Indian children experience when displaced from their communities. If properly implemented, as mandated by the Proposed Rule, ICWA completely avoids the heartbreaking scenario in which non-Indian foster and adoptive parents must sever bonds with Indian children in their care after years of delay in ICWA implementation.

Early application of Proposed Rule is necessary to ensure effective implementation of ICWA in furtherance of the wellbeing of our children. Specifically, Section 23.103(c), which mandates that agencies and state courts must ask if a child is Indian in *every* child custody proceeding; Section 23.103(d), which mandates that agencies and state courts must treat a child as an Indian child if there is any reason to believe that the child is an Indian child; Section 23.106(a), which mandates that “active efforts” begin the moment there is even a possibility that the Indian child may be taken from the custody of their parent or Indian custodian; Section 23.111(1), which mandates that agencies and courts provide notice as soon as they know or have reason to believe that there is an Indian child subject to a child custody proceeding; Section 23.110(a), which mandates that courts dismiss a child custody proceeding the moment the court determines it lacks jurisdiction; Section 23.128(a), which mandates ICWA’s placement preference for all changes of custody of an Indian child; and Section 23.113(a), which mandates that emergency removal and placement of Indian children be as short as possible and end *immediately*

² 25 U.S.C. § 1901(4); H.R. Rep. No. 95-1386, at 10 (1978).

³ Krakoff, Sarah and Carpenter, Kristen, *Repairing Reparations in the American Indian Nation Context*, in Lenzerini, Federico, REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES, Oxford University Press, Jan 24 2008.

once the emergency has ended—if implemented at the outset of *all* child custody proceedings, ensure that ICWA-compliant placements are determined long before an Indian child has been taken from his or her home. Early ICWA-compliant placements front load the work of finding permanent placements for our children, with as little disruption to their sense of family, community, and permanency as possible, and with a view toward facilitating long term visitation or reunification efforts.

II. Model ICWA Forms for State Courts

Several states with strong ICWA compliance records have developed standardized legal forms, such as a tribal notice or a motion to transfer jurisdiction. However, there are many more state courts that have little familiarity with ICWA and child placement cases regularly cross state lines. The proposed regulations or the ICWA guidelines could be amended to include suggested forms for the major ICWA procedures. Suggested forms would not displace the excellent forms found in some states, but would help to fill a gap in states where ICWA is less frequently used.

Due to the exacting nature of legal practice and the effort required to prepare legal documents, legal forms are a significant aid in the drafting process. Forms conserve time and serve as a reference to attorneys, social work professionals, tribal workers and others dealing with adoptions or placements involving American Indian children. The importance of forms should not be underestimated, as a filing lacking proper language or information may jeopardize court proceedings.

Forms contain standard language to be used in court proceedings, and also resemble a template which is to be filled in based on case specifics. Most legal forms must be tailored specifically to the court and situation in which it will be presented. Forms online may be offered with drafting tools and other resources.

The concept of nationwide ICWA forms arose at the NICWA Annual Meeting where two points were discussed. (1) Many state courts are completely unfamiliar with ICWA and it is a huge task to continually educate. Standardized forms may help to familiarize those courts with the basics of ICWA. (2) Many tribes also run into problems because of non-standardized motions and requests that are not a part of ICWA. Suggested legal forms may be useful to tribal governments as well.

Some aspects of child placement law are unique to each state. However, the major features of ICWA are the same nationwide, and could easily be fitted to a legal form. The following is a suggested list of basic ICWA forms. These forms and many others are found on the North Dakota Department of Human Services website at <https://www.nd.gov/dhs/triballiaison/forms/>

Notice Pursuant to ICWA - The form gives notice to a tribe of any hearing being held on behalf of an Indian Child under 25 USC 1912(a).

Request for Confirmation of Child's Status as Indian - This form is for a social worker's use. The purpose is to record information related to the child and the child's extended family, and to request from the tribe a confirmation of the child's status as Indian.

Notice to Secretary of U.S. Dept. of Interior Regarding an Indian Child - This form is for the use when an Indian Child's status cannot be confirmed under 25 USC 1912.

Notice of Intervention - This is the Notice of Intervention under 25 USC 1911(c).

Request for Transfer. This form requests transfer of a case to Tribal Court under 25 USC 1911(b).

Tribal Placement Preferences - The form indicates the Tribe's placement preferences, if different than what is established in ICWA under 25 USC 1915(c).

Transfer Order - This form is for granting a Tribe's or parent's request for transfer of jurisdiction to Tribal Court. 25 USC 1911(b).

Notice to the Secretary of the Interior or His/Her Designee of Final Decree or Order of Adoption of an Indian Child Pursuant to 25 U.S.C. § 1951

III. Conclusion

NCAI wholeheartedly supports the Proposed Rule, and we are happy to offer our support to Interior in its implementation efforts. For further information on any of the topics discussed herein, please contact John Dossett, general counsel at jdossett@ncai.org or Christina Snider, staff attorney at csnider@ncai.org, or by calling (202) 466-7767.

Sincerely,

A handwritten signature in cursive script that reads "Jacqueline Johnson Pata".

Jacqueline Pata, Executive Director