

May 17, 2015



OICWA

2014-2016
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Promoting the Well-Being of American Indian Children, Their Families, & Their Tribes

OICWA

"Remember that your children are not your own, but are lent to you by the Creator"
~ Mohawk

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 Oklahoma Indian Child Welfare Association (OICWA) strongly supports the issuance of proposed ICWA regulations by the Bureau of Indian Affairs. We believe that regulations are critically important if states are to fully comply with the Indian Child Welfare Act (ICWA), 25 U.S.C. 1901 *et seq.* and to attain consistency of its application.

Multiple tribes in Oklahoma came together to draft these comments. The representative tribes included tribes with both large and small populations. Input was provided by Self-Governance tribes and tribes who operate under the Indian Self-Determination and Education Assistance Act (P.L. 93-683). There were also voices concerning tribes whose tribal programs are administered by the BIA. This input considered cases in Oklahoma and cases out-side of our home state. Consideration included both private and deprived situations.

The ICWA was enacted in 1978 in response to a crisis affecting Indian children, families and tribes. Studies revealed that large numbers of Indian children were being separated from their parents, extended families, and communities and placed in non-Indian homes. Congressional testimony documented the devastating impact this was having upon Indian children, families and tribes. As a result, Congress enacted mandatory legal requirements to be followed by state courts who are adjudicating the rights of Indian children and their families who live outside of an Indian reservation.

Although progress has been made as a result of ICWA, out-of-home placement of Indian children is still much greater for Indian youth than it is for the general population and Indian children continue to be regularly placed in non-Indian homes. The Oklahoma Department of Human Services currently has approximately 11,000 children in care, 4,300 of which are reported to be Indian. This number (approx. 39%) is over representative of the current Indian population, which was reported in the most current U.S. Census as approximately 11% of the population in Oklahoma. Compliance with the ICWA by states is erratic and state court decisions inconsistent. There is a great need for the federal government to provide binding regulations to ensure that the ICWA is enforced and applied properly in all states so that our children and families are fully protected.

We particularly support the following provisions in the proposed regulations:

- Requiring that agencies and courts ask in every proceeding whether a child is Indian. This will help ensure that all of our children are identified and accorded ICWA protections.
- Recognition of a tribe's exclusive authority to determine tribal membership. We very much support the affirmation of this key principle of tribal sovereignty.
- Rejection of the Existing Indian Family Exception. This section ensures that the ICWA will be applied to all Indian children in any child custody proceeding and that no Indian children will be left behind.
- Notice to tribes in voluntary cases. We are *parens patriae* for our children. By providing notice, this ensures that we will be able to assert our jurisdiction (which may be exclusive) and/or intervene in the case if necessary. Notice to the tribe is also critical if the state court is to confirm (as it is required to do) whether the child is an Indian child and covered by the ICWA.
- Defining active efforts to prevent the breakup of Indian families and requiring that such efforts begin immediately. This provision is vitally important to keeping Indian families together, a central and critical purpose of the ICWA.
- 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, particularly on the overused and improperly determined bonding issue.
- 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.
- Recognizing that ICWA was created to represent the "best interest" determination for Indian children.

Please note that we believe that the legal basis for regulatory action is strong. The statute provides that "the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this Act" which is a broad grant of authority. The Act was designed to establish "minimum federal standards" governing state court proceedings. In the last 35 years, however, there have been divergent interpretations of a number of ICWA provisions by various state courts and uneven implementation by state agencies. This undermines ICWA's purpose to create consistent minimum federal standards. In addition, case law decided since 1979 supports the exercise of regulatory authority by the BIA.

Although we strongly support these regulations in general, we have a few recommendations that we advance for consideration. We believe that it is important that the rationale for the authority to regulate be carefully explained and that individual provisions should be justified with references to supportive cases, state regulations and policies that reflect best practices, and legislative history. We also believe that the regulations should explicitly address the *Adoptive Couple v. Baby Girl* case: 1) clarifying that it should not be applied outside of the private adoption context; and 2) providing guidance on how the Supreme Court interpretation of

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the law should be effectuated in state court and agency practice. Finally, we urge you to carefully consider technical recommendations that will be provided by national organizations and attorneys who have expertise in the ICWA from the tribal perspective.

We feel further clarification can be made by adding additional key definitions, including:

- **Tribal Representative** to Regulations defined as *“A representative or representatives designated by the tribe to intervene and participate in hearings, provide expert witness testimony, and provide recommendations of the tribe, who will be allowed to participate in all aspects of the court proceeding.”* and
- **“Tribal Designee:** *any individual or individuals, designated by the tribe as their tribal representative in court proceedings involving ICWA. Those individuals include the tribe’s attorney, ICW Social Worker, or other designated representative designated by the tribe.”* This is imperative as state courts have failed to recognize the tribe’s designated representative. This addition of a tribal designee definition is vital as not all tribes have attorneys, or their attorney’s may not be licensed to practice out of state. The Indian tribe’s right in the interest of their children and the preservation of their tribe, outweigh the court’s rules of participation.
- We recommend the wording utilized in the Feb. 2015 OICWA guidelines be restored to the proposed Regulation for approval as 23.117 (d) as number (4). The wording *“The good cause determination does not include an independent consideration of the best interest of the Indian child because the preference reflect the best interests of an Indian child light of the purposes of the Act.”* The very passage of ICWA was set a minimal standard for Indian children. ICWA was passed to overcome the existence of bias and determinations based on lack of knowledge of Indian tribes and Indian children. Leaving findings of best interest to be argued by the very individuals opposing this standard evades the very purpose of the act

We further pray that the BIA, in weighing all comments received through this comment period, strongly consider the spirit and intent with which ICWA was originally created. Further consideration must also be made into limiting the impact on the effect to the spirit and intent of ICWA by those comments submitted by those seeking to enure to themselves pecuniary gain by limiting the authority of ICWA and the proposed regulations.

Thank you for the opportunity to comment on these regulations. Once again, we very much appreciate the issuance of these proposed regulations and urge you to adopt strong ICWA regulations to ensure that the ICWA fulfills its essential purposes of protecting the rights of Indian children, families, and tribes. Please accept the attached comments in behalf of the Oklahoma Indian Child Welfare Association,

Respectfully Submitted,

Lou Stretch
President
Oklahoma Indian Child Welfare

