Native Council of Port Heiden
PO Box 49007
Port Heiden, AK 99549
907-837-2296 907-837-2297 (fax)

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
comments@bia.gov

Monday, May 18, 2015

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 Native Village of Port Heiden is pleased to submit these comments on the Regulations for State Courts and Agencies in Indian Child Custody Proceedings, published as a Notice of Public Rulemaking in the *Federal Register* on March 20, 2015. We enthusiastically support the long-overdue adoption of the proposed regulations; the following comments highlight some of the most welcome aspects of the regulations as well as some suggested additions.

The 1978 Indian Child Welfare Act was passed to halt the wholesale removal of Native children from their families, communities, and tribes. ICWA was intended to protect the best interests of Native children, and the long-term stability of Native tribes, by creating minimum federal protections applicable in state child custody proceedings. In 1979, the Bureau of Indian Affairs issued Guidelines to assure that state courts deciding child custody matters would respect the rights guaranteed by ICWA. In 2014, the BIA revised the Guidelines; the revisions reflected the ongoing importance of ICWA's provisions and rejected some court-created limitations on ICWA's application.

Unfortunately, despite ICWA's passage, the mass relocation of Native children is ongoing in Alaska today. Native people are a minority in Alaska's overall population, but Native children are the majority of children removed from their families by the State. Native children are frequently adopted out of our communities and into non-Native, non-relative homes. Contributing to this tragedy is the fact that Alaska's courts have repeatedly asserted that the BIA Guidelines, while instructive, are not binding. Thus, the most important feature of the proposed regulations is that they *are* regulations: they will be controlling federal law that Alaska courts cannot disregard.

Our tribe, like many tribes in the Bristol Bay region, consistently struggles to ensure that the state identifies, considers, supports, and ultimately retains, relative placements for Native children in state custody. One example that highlights this concern is the case of *Native Village of Tununak v. State*, 303 P.3d 431, 451 (Alaska 2013). In this case the state ignored a grandmother's request for placement of an infant child, and, after years of litigation, a non-native foster family was allowed to adopt her grandchild. We believe that the proposed ICWA regulations will prevent future situations like this one.[1]

Critically important to the goal of keeping our children in relative or Native homes is section 23.131 of the proposed regulations. This section clarifies that there are *only* four considerations that may support a determination that there is "good cause" to deviate from ICWA's placement preferences. The placement preferences are ICWA's most important substantive protection for Native children, yet Alaska courts regularly authorize the placement of children in non-preferred homes. In justifying these placements, Alaska courts have considered multiple factors, including a generalized analysis of the child's "best interests." All too often, this analysis fails to take into account ICWA's presumption that it *is* in a Native child's best interests to be raised in an ICWA-preferred home. *See, e.g.*, *Tununak*, 303 P.3d at 451 (holding that good cause "depends on many factors, including the child's best interests, the child's symptoms of separation anxiety and attachment disorder, the child's strong bond with the foster family and evidence the child would be harmed if that bond was broken, the child's lack of a bond with a preferred placement, the child's need for permanence, and the ability to meet the child's emotional, physical, medical, cultural, or educational needs. Among these factors, 'the best interests of the child remain paramount.'")

The proposed regulations are necessary to insure that courts do not disregard ICWA's placement preferences based on a non-Native assessment of what is "best" for a child. We applaud the regulations' specific rejection of the idea that a non-preferred placement may be justified by any bonding or attachment that has occurred because of the length of time the child has been in the non-preferred placement. We suggest that the regulations could be improved if, like the 2014 Guidelines, they *explicitly* noted that it is also inappropriate for a court to perform an independent analysis of the best interests of the child.

Section 23.128, which directs that ICWA's placement preferences apply in *all* foster care, preadoptive, and adoptive placements of Native children, is also critical. The Alaska Supreme Court recently held that ICWA's adoptive placement preferences *do not apply* unless an ICWA-preferred family has filed a formal petition to adopt a Native child. These regulations will effectively reverse that erroneous decision. [2]

Other provisions in the proposed regulations that are particularly important in Alaska include:

- Section 23.122, clarifying that qualified expert witnesses must, at the very least, have knowledge of the prevailing social and cultural standards and childrearing practices within the child's tribe, and prioritizing the use of experts who are members of the child's tribe and

[1] *See also Paula E. v. State Department of Health and Social Services,* 276 P.3d. 433 (Alaska 2012)(holding that notice to Grandmother custodian not required).

[2] *Native Village of Tununak v. State*, 303 P.3d 431, 451 (Alaska 2013)

recognized by the tribal community as knowledgeable in tribal customs. This section would be improved if it clarified that although the tribe may be asked to assist in locating qualified expert witnesses, the tribe is under no obligation to do so.

- Sections 23.106 and 23.2, clarifying that the "active efforts" requirement begins the moment the *possibility* arises that a Native child may need to be removed from her parents, and giving examples of active efforts to guide child welfare agencies' practices with Native families. This section could be improved if it was made clear that each item on the list (for example, "Identifying, notifying, and inviting representatives of the Indian child's tribe to participate"), alone, will not satisfy the active efforts requirement.

- Section 23.117, limiting the discretion of state courts to deny the transfer of a case to tribal court, and emphasizing that a state court may *not* consider whether the case is at an advanced stage, whether transfer would result in a change of placement for the child, the tribal court's proposed placement for the child, socio-economic conditions within the tribe, or perceived inadequacy of tribal social or judicial services.

- Section 23.113, preventing the continuation of temporary emergency custody for more than 30 days without a full ICWA-compliant child custody proceeding unless there are "extraordinary circumstances." This clarifies that emergency removal must terminate as soon as it is no longer necessary to prevent imminent physical damage or harm to the child or if the tribe exercises jurisdiction over the case.

We commend the BIA for proposing regulations that will clarify and strengthen ICWA's protections for Native families, and we urge their prompt adoption.

Thank you for your consideration of our comments.

Sincerely,

Gerda Kosbruk, Village Administrator
Native Village of Port Heiden