

May 19, 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 under-signed national and statewide organizations are writing to express our support for the proposed ICWA regulations. As organizations committed to the well-being of all children and families we are pleased that the Bureau of Indian Affairs has chosen to issue a 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. The issuance of these proposed rules is long overdue and we commend the Department of the Interior (DOI) and the Bureau of Indian Affairs (BIA) for proposing much needed regulations in this area. As has been previously stated by many leading child and family organizations, ICWA is a high standard for how all children and families in our nation's child welfare system should be treated, not just American Indian/Alaska Native (AI/AN) children and families.

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). Substantive ICWA regulations that provide rules for its implementation in state courts and by state and public agencies have never been issued. Without regulations, ICWA has been misunderstood and misapplied for decades. This has, in turn, led to the unnecessary break up of AI/AN families and placement instability for AI/AN children. AI/AN children and families and the agencies and courts that implement ICWA need and deserve the clarity that the proposed regulations provide.

ICWA states that the Secretary of DOI 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 and private agencies. This undermines ICWA's purpose: to create consistent minimum federal standards that ensure the best interests of AI/AN children.

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 ICWA guidelines issued by the BIA in 1979 allowed for wide variations in practice and thus uncertainty for AI/AN children and families in state child welfare systems. The proposed regulations specifically address the lessons learned and provide stronger and clearer guidance. Provisions in the proposed regulations that we find particularly helpful include:

- Early identification of ICWA-eligible children. All too often children and families are denied the protections of ICWA because a court or agency did not ask whether the child had AI/AN heritage. Not only can this result in AI/AN 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.
- Clarity with regard to ICWA's application. Too many AI/AN 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 ICWA applies to all cases where an AI/AN child is involved in a child custody proceeding. The proposed regulations mirror the overwhelming trend in state legislatures and courtrooms and make this clarification.
- Clarifying ICWA's notice requirements that parents, Indian custodians, and the child's tribe must be notified of emergency placements to facilitate their participation and make available tribal resources in the process.

- Definition and examples of active efforts. ICWA requires active efforts to help prevent the removal of an AI/AN child from their home and support efforts to rehabilitate parents so the child can be safely returned home, similar to reasonable efforts under other federal law. The provision of active efforts is required before an ICWA-eligible child can be removed from his/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 AI/AN children and families.
- Require a diligent search for placements within ICWA's placement preferences (relatives, tribal families, and other Indian families) and provide notification to these prospective placement resource families similar to those required under the Fostering Connections to Success and Increasing Adoptions Act of 2008 (Pub. L. 110-351).
- Emphasizing the need to follow the placement preferences under ICWA and clarifying the circumstances when deviation from the placement preferences can occur. One of ICWA's primary purposes is to keep AI/AN children connected to their families, tribal communities, and cultures. Yet, currently, more than 50% of Native kids adopted are placed in non-Indian homes. The regulations provide requirements that will promote placement in accordance with ICWA's language and intent.
- Assisting adult adoptees who were adopted out secure information from their birth records to help them connect to their culture and be able to establish their rights as tribal citizens.

For too long AI/AN children have been disproportionately represented in the nation's foster care system and have not had the full benefit of federal protections under ICWA that were designed to reduce their numbers in care. Improving ICWA implementation can only help address this long standing concern and support the full implementation of the law that has been limited by uncertainty and inconsistent practice. AI/AN children and families, like all children and families, deserve better than the status quo and we appreciate the opportunity to support improvements in their care and overall well-being.

Thank you in advance for consideration of our comments. If you would like to discuss our comments further, please contact Director of Government Affairs and Advocacy at the National Indian Child Welfare Association, David Simmons, at desimmons@nicwa.org and he will put you in contact with our organizations.

Sincerely,

Advocates for Children and Youth
 Children's Defense Fund
 Children and Family Futures
 Child Welfare League of America
 Foster Family-Based Treatment Association
 Generations United
 National Children's Alliance
 National Crittenton Foundation
 National Foster Parent Association
 Nebraska Appleseed
 Nebraska Families Collaborative
 New Mexico Child Advocacy Networks
 North American Council on Adoptable Children