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The Tulalip Tribes are the successors in interest to the Snohomish, Snoqualmie, and Skykomish tribes and other tribes and band signatory to the Treaty of Point Elliott

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 Custody Proceedings – RIN 1076-AF25 – Federal Register (March 20, 2015)

Dear Ms. Appel:

This letter is written to express Tulalip Tribes' support for the proposed regulations by the Bureau of Indian Affairs to more consistently and effectively apply the Indian Child Welfare Act (ICWA). The ICWA is fundamental in protecting our children by setting forth high standards for child welfare policies and practices for all States to achieve. These standards, if practiced in every State would advance the interests of Indian children, Indian families and Indian communities. Currently child welfare and ICWA compliance varies state to state and county to county, uniformity is lacking,[1] by promulgating regulations ICWA may be better understood and supported.

Background on the Tulalip Tribes

The Tulalip Tribes are the successors in interest to the Snohomish, Snoqualmie, Skykomish, and other allied bands signatory to the 1855 Treaty of Point Elliott. The United States Constitution recognizes three distinct sovereigns in addition to the Federal government- the several states, foreign nations, and Indian Tribes. As a sovereign government, Tulalip Tribes' governing responsibilities mirror that of other sovereign governments. The Tulalip Tribes, as it has been for thousands of years, is a government exercising its powers to determine the best needs of its traditional territory and tribal citizens.

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[1] See Government Accountability Office (2005). GAO report 05-290: Indian child welfare act: Existing information on implementation issues could be used to target guidance and assistance to states. Washington, DC: Author. Retrieved on May 13, 2015 from http://www.nicwa.org/policy/law/icwa/GAO_report.pdf (pointing to inconsistencies in training, lack of standard reporting, and examples of how select states use or misuse the law). See also Casey Family Programs (2015). *A Research and Practice Brief: Measuring Compliance with the Indian Child Welfare Act.* Seattle, WA: Author. Retrievable from: http://www.casey.org/media/measuring-compliance-icwa.pdf.

Decades of failed United States policy has resulted in a great need for many services in our tribal community. Tulalip culture, language, values, and spiritual beliefs were nearly eradicated under U.S. government superintendence. Furthermore, disruption of traditional ways of life has contributed to a variety of ills among our community, including a diabetes epidemic, chemical dependency problems, and disproportionate poverty. The needs of the Tulalip Tribal community remain great.

Our tribal government has developed many programs to provide benefits to our citizens to address these problems. Tribal programs teach our youth the traditions and language of the Tulalip people, provide for the healthcare and physical needs of our people, and seek to abate the numerous issues that have come about from a historical lack of tribal self-determination. The Tulalip Tribes has always believed in maintaining children in the home of their natural parents and when not possible, in the home of their relatives or fellow community members. Tulalip has operated our own child welfare department for over 25 years. We receive notices regarding our youth residing outside of the Tulalip Reservation and have worked closely with the State of Washington, both on and off the Reservation. In recent times we have experienced difficulty in receiving ICWA Notices despite updating our contact information with the Bureau of Indian Affairs. Currently notices are still being sent to the old address or to our Tribal Court or, at times, to our current address. We have intervened in a number of cases and whenever a Tulalip child lands in state court, we work diligently in transferring the case to the Tulalip Tribal Court. We exercise our tribal jurisdiction over Indian children consistent with federal and tribal law.

ICWA was enacted to prevent the unwarranted removal of Indian children from their homes. Although there are many misconceptions regarding ICWA and how it is or should be applied, the law is a crucial element in furthering the rights and needs of Indian children and their communities. While the ICWA utilizes child welfare principles and laws applicable for all children, it has also created exceptional rules and laws applicable only to Indian children and their families. While there are various views on the exceptional rules, whether they are seen as unfair or racially biased, we as Indian people view them as necessary. In practice, especially under the proposed BIA guidelines, best practices in child welfare will be utilized for Indian Children.

We applaud the Bureau of Indian Affairs for updating its ICWA regulations. These proposed regulations are long overdue and will hopefully generate uniform compliance with ICWA by state courts and child welfare agencies. Many examples exist of states applying ICWA in ways that conflict with another state's application of the same provisions. These conflicting applications are in direct conflict with Congress' intent when passing ICWA, which was created to be applied uniformly in all states.

It is evident that the proposed regulations are the product of a careful review of the many ways states have interpreted ICWA and are well-designed to eliminate these ambiguities that have come about as a result of having outdated regulations. One of the most long overdue regulation is the rejection of the so-called "existing Indian family" doctrine, which has been created and rejected by case law and in the process has harmed many Indian children with its legal fiction. The Department's conclusion that this exception is contrary to the plain language of ICWA is proof of the need for the binding interpretations and application of ICWA because of a residual

hostility in some states to a robust implementation of Congress' will. It was, of course, this same hostility to the values of ICWA (primarily that Indian tribes should have deference to determine how their children are raised) that caused Congress in 1978 to enact the law in the first place.

We praise the BIA for submitting these proposals for comment and look forward to the final version that will provide more clarity and support to ICWA's principles and purpose. We are providing comments to only those regulations that would have or could directly impact Tulalip Tribal cases. Our reasons for supporting certain proposals and recommendations for editing certain proposals follow.

§ 23.2 Definitions

"Active efforts" means actions intended primarily to maintain and reunite an Indian child with his or her family or tribal community and constitute more than reasonable efforts as required by Title IV–E of the Social Security Act (42 U.S.C. 671(a)(15)).

All child welfare agencies should strive to safely maintain children with their parents or family, to remove them only to protect them from imminent harm and to reunify them as quickly as possible so long as the imminent risk is no longer present. Congress has recognized the importance of this principle both in ICWA and in child welfare interventions involving non-Indian children. (42 U.S.C. § 671(a)(15)). This proposed definition properly clarifies that Congress has imposed a special duty that agencies owe to Indian children, as indicated by the particular history of treatment Indian children and families have endured, to undertake these efforts.

One suggestion that should be included is active efforts regarding alleged fathers, especially if the alleged father is the Indian Parent. Many tribes may not become actively involved if the Indian parent is only alleged, for example, Tulalip Tribes requires paternal DNA to enroll a child through their father. Recently one Tulalip youth had an alleged Tulalip father whose parental rights were terminated after little efforts from the State to locate the father. The Tulalip Tribes intervened and assisted with DNA testing and the child was ultimately enrolled after the termination petition was granted. This is a situation that could easily repeat itself in the future if the States are not required to actively seek out the alleged father(s) when they are the Indian parent. While we understand alleged fathers have no rights – by not seeking out the alleged fathers, children are robbed of having an identified father and possibly knowing their Indian heritage.

"Continued Custody" means physical and/or legal custody that a parent already has or had at any point in the past. The biological mother of a child has had custody of a child. Custody means physical and/or legal custody under any applicable tribal law or tribal custom or State law. A party may demonstrate the existence of custody by looking to tribal law or tribal custom or State law.

This is an important definition because it clarifies that parents with legal rights to their child who may never have had physical custody are fully covered by ICWA. Consistent with the Supreme

Court's holding in *Adoptive Couple v. Baby Girl*, 133. S.Ct. 2552 (2013). In *Adoptive Couple*, the Court held that the birth father never acquired rights under ICWA and, for that reason; he was not entitled to benefit from any of its provisions. He had neither legal nor physical custody of the child.

State courts commonly speak in terms of "returning" children to a parent's custody or "removing" them from parents regardless of whether the parent has or ever had physical custody. Thus, courts and agencies "remove" children from hospitals when they are born and courts speak in terms of having "removed" them from their parents' custody, even though they had had not exercised custody of them. Similarly, courts speak in terms of "returning" children to parents (including birth fathers) who never had physical custody. (See, e.g., *In re Michael B.*, 604 N.E.2d 122, 131 (N.Y. 1992) (agency had duty to employ "reasonable efforts" for a child to "return to the natural home" as applied to a birth father whose identity was unknown when the child was placed in foster care and the child had never lived with him.)

> **"Extended family member" is defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, is a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.**

This definition is a great start, but we feel that great-grandparents, great-aunts, great-uncles, etc., are left out of the extended family. In Indian Country our elders are our leaders and knowledge keepers, as such great-grandparents should be included as they may bring knowledge to the table for identifying Indian ancestry and locating relative placements, if they themselves cannot be a placement resource for the child(ren).

> **"Imminent physical damage" or harm means present or impending risk of serious bodily injury or death.**

In several places throughout the proposed regulations, the phrase "imminent physical harm" is used, which is not the language in ICWA. Rather, ICWA uses the phrase "serious emotional or physical damage," which we believe should be utilized in the regulations to conform to the law § 1912(e). This substitution will also require the definition to be modified to include emotional damage.

In practice, serious emotional damage means specific symptoms such as severe anxiety, depression or withdrawal, which have a fairly well defined meaning to mental health professional – and the parent is unwilling to provide treatment for him or her. We recommend that the definitional section for "serious emotional damage" be clarified to state that, "to find that a child is suffering from serious emotional harm, the child must display specific symptoms such as severe anxiety, depression or withdrawal and there must be a finding that the parent is unwilling to provide treatment for the child."

> **"Parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal**

law or custom. It does not include an unwed father where paternity has not been acknowledged or established.

Leaving out unwed father's whose paternity has not been acknowledged or established may be leaving out the Indian parent or allowing States to not make efforts to locate the alleged Indian parent. As explained above without paternity some tribes may not deem the child eligible for membership, hence ICWA would not apply. An unwed father should be recognized as a "parent" and at the bare minimum, the tribal definition of who a "parent" is, should be followed.

§ 23.103 When does ICWA apply

There is no exception to application of ICWA based on the so-called "existing Indian family" doctrine.

We agree with the analysis put forth by the Association on American Indian Affairs (AAIA) that the so-called "existing Indian family" doctrine (EIF), a court-created method to bypass ICWA that has been followed in just seven states and affirmatively opposed in 19 others, was not adopted by the United States Supreme Court in *Adoptive Couple v. Baby Girl*. Rather, the Court held that ICWA is triggered any time an Indian child is involved in a child custody proceeding – the antithesis of the EIF.

Finally, we wish to comment on one substantive component of the proposed rules, involving "good cause" to depart from placement preferences set forth in proposed rule § 23.131.

§ 23.104 How do I contact a tribe under the regulations in this subpart?

(a) Many tribes designate an agent for receipt of ICWA notices. The BIA publishes a list of tribes' designated tribal agents for service of ICWA notice in the Federal Register each year and makes the list available on its Web site at www.bia.gov.

We appreciate the work that is done to maintain a list of ICWA contacts for tribes, however, Tulalip Tribes experienced difficulty in updating our contact information, and it took two years to update our contact information. Since our information has been updated we have continued to receive some notices addressed to the old address. More information should be added to the Registrar publications regarding when updates are due to the BIA and when the updated list should be out so that Tribes know when to get their updated information submitted. States should also be required to check the Federal Registrar for updated contact information.

§ 23.111 What are the notice requirements for a child custody proceeding involving an Indian child?

The required information for notice does not include the parents' dates of birth and possible tribal ancestry, unless that information is included in the State's petition. It would also be helpful if the maternal and paternal grandparents' names, dates of birth and tribal affiliation if known are included. The more information provided to the tribes the more easily the responding tribes can verify enrollment or determine enrollment eligibility.

§ 23.115 How are petitions for transfer of proceeding made?

(a) Either parent, the Indian custodian, or the Indian child's tribe may request, orally on the record or in writing, that the State court transfer each distinct Indian child custody proceeding to the tribal court of the child's tribe.

(b) The right to request a transfer occurs with each proceeding.

Tulalip Tribes strongly supports this regulation. Recently transferring cases has taken two weeks – one month or more depending on the time it takes the Tribes to note a motion in the State Court and to provide notice to parents. Due to the delay some youth's cases have lingered in State Court longer than necessary, and in some cases this has kept them out of family placements during these delays. The ability to make the motion to transfer on the record will allow tribes to bring children home much more quickly.

§ 23.122 Who may serve as a qualified expert witness?

(a) A qualified expert witness should have specific knowledge of the Indian tribe's culture and customs.

(b) Persons with the following characteristics, in descending order, are presumed to meet the requirements for a qualified expert witness:

(1) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.

(2) A member of another tribe who is recognized to be a qualified expert witness by the Indian child's tribe based on their knowledge of the delivery of child and family services to Indians and the Indian child's tribe.

(3) A layperson who is recognized by the Indian child's tribe as having substantial experience in the delivery of child and family services to Indians, and knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

(4) A professional person having substantial education and experience in the area of his or her specialty who can demonstrate knowledge of the prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

Tulalip Tribes supports the preference list of appointed Expert Witnesses. Expert Witness testimony is not only required but could be of utmost importance in a case, important enough that it should not be provided by just anyone who has ever met an Indian or who has been a social worker but has no real knowledge of Indian family customs. We applaud the BIA for

generating a list such as this. This issue has recently come up for us in cases we have intervened in State Court in and have been in discussion of designating such an expert witness or two.

> **§ 23.131(c)(3) Good cause to depart from placement preferences.**
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> **The extraordinary physical or emotional needs of the child, such as specialized treatment services that may be unavailable in the community where families who meet the criteria live, as established by testimony of a qualified expert witness; provided that extraordinary physical or emotional needs of the child does not include ordinary bonding or attachment that may have occurred as a result of a placement or the fact that the child has, for an extended amount of time, been in another placement that does not comply with ICWA.**

The Department's decision to define "good cause" is within its authority. It is also a vital clarification for courts. The proposed rule explains that the length of time a child is in a placement is irrelevant when courts are deciding what remedy to employ for a non-compliant placement. This rule is consistent with best practices in child welfare.[2]

We strongly support the regulation that "ordinary bonding or attachment" resulting from a non-compliant placement shall not become the sole basis for a court refusing to return a child to his or her family or otherwise to undo an initial temporary placement. Some have criticized this proposed rule on the grounds that placement determinations should be made in a child's best interests, arguing that best interests are heavily determined by ordinary (or expected) bonding and attachment. This is an alluring, but false, criticism.[3] The scenario addressed by this rule contemplates a narrow set of circumstances: cases in which ICWA has been circumvented – intentionally or not – and which are out of compliance with placement preferences. Keeping in mind that "active efforts" require continual attempts to seek ICWA-compliant placement, the rule proposed in §23.131(c)(3) is an important safeguard against the incentive to cut corners when placing children and depend on a court forgiving noncompliance by the time the matter is reviewed because, by then, the cost of disrupting a child's placement may be said to be greater than allowing them to remain in a placement that was out of compliance in the first place.

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[2] See, e.g., Center on the Developing Child at Harvard University (2007). *A Science-Based Framework for Early Childhood Policy: Using Evidence to Improve Outcomes in Learning, Behavior, and Health for Vulnerable Children.* Boston, MA: Author. Retrieved September 26, 2007 from: http://www.developingchild.harvard.edu and the Annie E. Casey Program. (2015). *EVERY KID NEEDS A FAMILY: giving children in the child welfare system the best chance for success.* A KIDSCOUNT policy report. Baltimore: Author; Weinfield, N. S., Ogawa, J. R., & Sroufe, L. A. (1997). Early attachment as a pathway to adolescent peer competence. *Journal of Research on Adolescence, 7*(3), 241-265; Doyle, J. (2007) Child Protection and Child Outcomes: Measuring the Effects of Foster Care. The American Economic Review. 1583-1610 retrieved from: http://www.mit.edu/~jjdoyle/fostercare_aer.pdf; Hayduk, I. (2014) The Effect of Kinship Placement on Foster Children's Well-Being. Retrieved here: https://research.stlouisfed.org/conferences/moconf/2014/Hayduk_paper.pdf.

[3] A variety of research exists both discussing the significance of attachment theory, and also revealing some serious flaws in the use of bonding and attachment as practical tools in real-life child placement determinations by state courts, as well as supporting the notion that children can and do form multiple attachments and that having at least one secure attachment "buffers" a child from further developmental issues. See, e.g., David E. Arrendondo & Leonard P. Edwards, *Attachment, Bonding, and Reciprocal Connectedness*, J. CENTER FOR FAM., CHILD. & CTS. 109 (2000); Robert E. Emery et al., *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 PSYCHOLOGICAL SCIENCE IN THE PUBLIC INTEREST 1 (2005).

The American Academy of Adoption Attorneys has objected to this proposed rule asserting that it is inconsistent with *Adoptive Couple v. Baby Girl*. This claim is groundless. It is true, as the Adoption Academy states, that *Baby Girl* held that ICWA's preferences set forth in 25 U.S.C. § 1915(2) are inapplicable when no one has sought to adopt the child. But nothing in the proposed regulation conflicts with that proposition. All the proposed regulation addresses is what should happen when the applicable placement preferences are not being met. The Adoption Academy's characterization that this proposed regulation is "perhaps the most glaring example of the proposed regulations being contrary to the language and history of the ICWA" should not be taken seriously.

The Adoption Academy's claim that such a rule violates a child's constitutional rights and violates *Palmore v. Sidoti*, 466 U.S. 429 (1984) also should not be taken seriously. To the contrary, the proposed rule is necessary to ensure fidelity to the rule of law. Without it, lawyers and agencies who participate in placing Indian children for adoption have an incentive to cut corners and place children with adoptive families without full ICWA compliance. The rule is an important tool to ensure that each Indian child's best interests, as defined by Congress, are advanced. The rule is grounded in reasoning articulated by the Supreme Court in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 53-54 (1989). As the Court explained in that case:

> We are not unaware that over three years have passed since the twin babies were born and placed in the [adoptive] home, and that a court deciding their fate today is not writing on a blank slate in the same way it would have [three years ago]. Three years' development of family ties cannot be undone, and a separation at this point would doubtless cause considerable pain.... Had the mandate of the ICWA been followed [three years ago], of course, much potential anguish might have been avoided, and in any case the law cannot be applied so as automatically to 'reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.' (Citation omitted). Thus, the bonding that occurred during litigation, without more, cannot form the basis for terminating Father's parental rights.

In addition, the regulation is consistent with best practices in all child welfare proceedings. The purpose of the regulations is to ensure that courts apply the well-considered ICWA law as it was intended, without introducing personal or emotional bias, or most critically, cultural bias. The regulation will require that when ICWA-compliant placement is made available, such placement shall be ordered absent good cause. Agencies and courts will therefore be encouraged to actively seek and identify appropriate placement from the outset, and not encouraged to continue prevailing practices of simply placing a child without legitimate active efforts to satisfy the intent of the ICWA.

As the Utah Supreme Court explained, "[t]he adoptive parents argue that we should consider the bonding that has taken place between themselves and Jeremiah in reaching a decision in this matter. . . . [This] would reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation." *Matter of Halloway*, 732 P.2d 962, 971-72 (Utah 1986). New York's highest court has similarly written "[t]o use the period during which a child lives with a foster family, and emotional ties that naturally eventuate, as a ground for comparing the biological parent with the foster parent undermines the very objective of voluntary foster care as a resource for parents in temporary crisis, who are then at risk of losing

their children once a bond arises with the foster families." *Matter of Michael B.*, 604 N.E.2d 122, 130 (N.Y. 1992).

By applying the rule of law in each case, we advance the rights of children when the law itself was promulgated with their rights in mind. Congress enacted ICWA "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902. It is a key best practice to require courts to follow pre-established, objective rules that operate above the charged emotions of individual cases and presume that preservation of a child's ties to her biological parents is in her best interests. This proposed regulation is properly designed to ensure that the law accomplishes this goal.

Calls to allow courts to ignore violations of ICWA that resulted in an unlawful placement of a child are little more than a disguised disagreement with the substantive law thoughtfully enacted by Congress. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 44-45 (1989) ("Congress perceived the States and their courts as partly responsible for the problem [ICWA] intended to correct."); *see also In re C.H.*, 299 Mont. 62, 997 P.2d 776, 784 (2000) ("[T]he best interests of the child ... is an improper test to use in ICWA cases because the ICWA expresses the presumption that it is in an Indian child's best interests to be placed in accordance with statutory preferences. To allow emotional bonding – a normal and desirable outcome when, as here, a child lives with a foster family for several years – to constitute an 'extraordinary' emotional need [comprising good cause to deviate from the preferences] would essentially negate the ICWA presumption.").

Thank you for the opportunity to comment on these regulations. Tulalip Tribes whole heartedly endorses the proposed ICWA regulations promulgated by the BIA with the consideration of the above comments.

Please direct any questions or further requests for input to Khia Grinnell at kgrinnell@tulaliptribes-nsn.gov.

Sincerely,

THE TULALIP TRIBES OF WASHINGTON

Melvin R Sheldon Sr

Melvin R. Sheldon, Jr., Chairman

cc: Tulalip Board of Directors
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Office of Reservation Attorney