United South and Eastern Tribes, Inc.

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Office of Regulatory Affairs and Collaborative Action
Attention: Elizabeth Appel
Department of the Interior
1849 C Street, NW MS 3642—MIB
Washington, D.C. 20240

Re: Comments of the United South and Eastern Tribes, Inc. on Notice of Proposed Rulemaking—Regulations for State Courts and Agencies in Indian Child Custody Proceedings—RIN 1076-AF25, Docket ID: BIA-2015-0001-0001

Dear Ms. Appel,

The United South and Eastern Tribes, Inc. (USET) is pleased to provide the Bureau of Indian Affairs (BIA or "the Bureau") with the following comments on the Notice of Public Rulemaking (NPRM) regarding Regulations for State Courts and Agencies in Indian Child Custody Proceedings.

USET is a non-profit, inter-Tribal organization representing 26 federally recognized Indian Tribes from Texas across to Florida and up to Maine.[1] USET is dedicated to enhancing the development of Tribal nations, to improving the capabilities of Tribal governments, and assisting USET Member Tribes in dealing effectively with public policy issues and in serving the broad needs of Indian people.

USET commends the BIA for hearing the voices of Tribes and Native families across the country and issuing these long overdue regulations. Indian Country has survived many attempts of removal and assimilation, but our greatest resource is our children. Removing a Native child from its safe and loving biological family and culture destroys the foundation of our Tribes and Tribal communities. The Indian Child Welfare Act (ICWA) was signed into law in 1978 specifically to remedy decades of abuse and neglect by public and private agencies that were removing large numbers of American Indian and Alaska Native children from their families and placing them in non-Indian homes outside their communities. And while there are countless stories of the success of ICWA over the last decades, more work remains to ensure its purpose is fully realized.

[1] USET member Tribes include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

USET member Tribes continue to encounter cases in which state courts, and state and public agencies misinterpret and are otherwise non-compliant with the law. At the root of much of this misinterpretation and misapplication is a lack of comprehensive regulations on the proper implementation of ICWA. This has caused the avoidable break up of Native families and placement instability for Native children, the very problems that ICWA was intended to remedy. All parties involved, including families, and the agencies, and courts that implement ICWA, need and deserve the clarity and certainty that the proposed regulations provide.

ICWA provides the BIA with significant authority to issue these necessary regulations, stating that the Secretary 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 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. Collectively, this provides the BIA with a strong legal justification to act now to address these issues.

Under this authority, the BIA has proposed federal regulations that will ensure courts and agencies working with ICWA-eligible children and their families are provided with a roadmap to the consistent and predictable application of ICWA. The previous guidance from the BIA on ICWA, provided by federal guidelines, allowed for wide variations in practice and thus uncertainty for Native children and families. The proposed regulations specifically address the lessons learned and provide uniform guidance with greater legal force. Provisions in the proposed regulations that USET finds particularly important are:

Early identification of ICWA-eligible children

It is a sad reality that children and families are frequently denied the protections of ICWA because a court or agency fails to determine a child's Tribal citizenship. Not only can this result in Indian 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.

Recognition of Tribes' exclusive authority to determine citizenship

ICWA applies based on a child's political status as a citizen or as eligible for citizenship in a Tribe as a biological member of that Tribe. As sovereign nations, only Tribes themselves may set criteria and make determinations regarding citizenship. The proposed regulations reflect and uphold this inherent sovereign authority.

Clarity in ICWA's application

Too many Native 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 state-created doctrine that is inconsistent with ICWA's intent. The Exception challenges Tribal sovereignty and attempts to apply outside and inappropriate scrutiny to Native culture and identity. While a majority of states have rightly recognized the Exception as unlawful, we are aware of a small number of states continuing to apply this doctrine, including states in the USET area. We are incredibly pleased, then, that the regulations clarify what the Supreme Court in *Adoptive Couple v. Baby Girl* confirmed: that in general ICWA applies to all cases where an Indian child is involved in an Indian custody proceeding.

Definition and examples of active efforts

Under the law, states are required to provide "active efforts" to a family before an ICWA-eligible child may be removed from home and before parental rights can be terminated. However, the term has gone undefined since the passage of ICWA. Without a clear definition of active efforts, state and private agencies are left to their own interpretations of the term, and must provide assistance 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 in their assistance to Native children and families.

Notice to Tribes in voluntary proceedings

Tribes are *parens patriae* for their minor citizens. During ICWA proceedings, this includes the right to intervene in state proceedings or transfer cases to Tribal court. In order to assure Tribes this opportunity, they must receive notice of voluntary proceedings. Further, because Tribes have the exclusive authority to determine citizenship, a court cannot ensure compliance with the law without proper Tribal notification. Finally, Tribes are an essential resource for states and agencies seeking placements in line with ICWA's preferences. Without knowledge of a voluntary proceeding, children can be denied possible placements consistent with ICWA's placement preferences. Notice in voluntary ICWA proceedings, provides agencies and courts the clarity necessary to protect these interests.

Limiting the denial of case transfers to Tribal court

The Supreme Court has clarified that Tribes have "presumptive jurisdiction" in child welfare cases that involve their minor citizens. Often, however, state courts inappropriately find "good cause" to not transfer a case because they believe the Tribal court will make a decision different from their own. The regulations clarify that this reasoning cannot be used to deny transfer.

Emphasizing and Strengthening Placement Preference Compliance

ICWA's primary purpose is to keep Native children connected to their families, Tribal communities, and cultures. Yet, currently, more than 50% of adopted Native children are placed in non-Native homes. The regulations provide requirements that will promote placement in accordance with ICWA's language and intent.

For the reasons outlined above, USET expresses its strong support for these crucial clarifying regulations. In addition to the necessary provisions and processes within the proposed rule, we would like to offer some additional recommendations as the rulemaking process moves forward. First, we urge the Bureau to thoroughly articulate its general regulatory authority under ICWA and to undergird individual regulations with cites to supportive case law, existing best practices, and legislative history. Additionally, 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 this interpretation should be implemented in state court and private agency practice. These additions will provide further strength and clarity as states and others seek to implement the new regulations.

USET applauds the BIA for its dedication to improved outcomes for Native children under ICWA. We appreciate the opportunity to provide comments in support of the proposed regulations and welcome the opportunity to

provide additional input, should it arise. USET member Tribes recognize that we must preserve and safeguard the legacy of each Indian Tribe through the protection and care of our most precious resource; our children. Should you have questions or require additional information please do not hesitate to contact Ms. Liz Malerba, USET Director of Policy and Legislative Affairs, at (202)-624-3550 or by e-mail at Lmalerba@usetinc.org.

Sincerely,

Brian Patterson
President

Kitcki A. Carroll
Executive Director

CC: USET member Tribes
Wanda Janes, USET Deputy Director
Liz Malerba, USET Director of Policy and Legislative Affairs
file

"Because there is strength in Unity"