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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:

I am responding on behalf of our law firm comprised of three Native women partners to the Proposed Regulations for State Courts. Our firm has close to 40 years combined litigation experience representing and defending Indian families in the state child protection courts whose rights are affected by the Indian Child Welfare Act. Prior to private practice I was the Executive Director for the ICWA Law Center for 7 years. My law partner, Tammy Swanson, was the Litigation Director for 10 years and my other partner Phyllis Tousey was a Staff Attorney at the ICWA Law Center. Over the course of the past 20 years we have represented literally 100's of Indian families and tribes in ICWA matters in state and tribal courts. Our experience is first hand battling against the absolute non-compliance with ICWA requirements that occur routinely in state courts. Our Indian family's rights are disregarded by the system using excuses such as it is too difficult, the child is stabilized, lack of appropriate services nearby, lack of relative placements or some other excuse. This is all due to a lack of the ability to enforce the ICWA in the state court system. There are NO real consequences for counties for non-compliance and therefore there is little incentive to change. Additionally, it is difficult to change systems litigating individual cases especially if there are no consequences. A good example is the failure to notify the tribe until the children have been placed outside the placement preferences for an extended period of time. The system has no incentive to correct this violation if the child has stabilized in the non-compliant home even if there is appropriate family to take the child. The counties simply contact their "bonding" experts and create a "good cause" to deviate from the placement preferences. The result is that counties ultimately are rewarded for ICWA violations.

These proposed rules are long overdue. We commend the Bureau of Indian Affairs for proposing regulations. They are needed. Our children and families can't wait any longer. We applaud the

BIA for their work on the proposed regulations. One just needs to look at the statistics in Minnesota to show how desperately the regulations are needed. Since the passage of ICWA the disparities of Indian children in placement have NOT improved. These rules provide the clarity and certainty necessary for practitioners to ensure compliance with the law. ICWA promotes the best interest of Indian children. Clarity and certainty help preserve our families and promote permanency for our children. It is our opinion that they do not go far enough. Without this clarity counties will ignore the law. It has to stop. Nothing else has made non-compliance stop or slow down. Practitioner's need these regulations to effectively advocate for Indian children and families in the system.

Placement preferences must be follow the placement preference and it is critical to limit the ability of agencies to deviate from the placement preferences. One of ICWA's primary purposes is to keep Native children connected to their families, tribal communities, and cultures. Yet, currently, more than 50% of Native kids adopted are placed in non-Native homes. The regulations provide requirements that will promote placement in accordance with ICWA's language and intent

We have heard that adoption attorneys are voicing the largest complaint to the regulations. It is our experience that these stakeholders especially the adoption industry have little or no regard for the ICWA and the rights of Indian families. This group is well funded. In Minnesota this group has used these funds to implement big firm litigation tactics against the poorest community, the Indian Community, to take away Indian children in violation of the ICWA. The litigation history in Minnesota is a good example. The stakeholder group which has litigated against the application of ICWA in most cases is by members of this group. Also this group has been very active in attempts to have "created" exceptions to ICWA such as the existing Indian family exception adopted by courts in Minnesota. Further, the Baby Veronica case is also a good example of the effort by this stakeholder group. The huge number of responses is not surprising. It in fact illustrates the how well funded and organized this small stakeholder group is. The huge response is similar to the manner in which this group litigates. This stakeholder group, its litigation tactics and the history of litigation against ICWA compliance illustrates the need that attorneys who represent Indian families, tribes and Indian children have for the proposed regulations. Without explicit guidance through regulation, Indian families will continue to have to battle for ICWA compliance through expensive and heart wrenching litigation in the state court system. These regulations are vital to Indian families and Indian children.

Another big concern is the latitude that State Courts have in denying transfer to tribal court. It is our experience that State courts first judge whether the tribal court will change the decision before they transfer the case. The current guidelines say this is not a valid consideration. But is happens. Indeed, I was involved in a Minnesota Supreme Court argument where this question was actually asked and part of the conversation. State courts often block cases from transfer into tribal court because they believe the tribal court will make a decision different from its own. This is an end run around the jurisdiction provisions in ICWA and supports unfounded bias against our tribal agencies and courts. The regulations clarify that this reasoning cannot be used to deny transfer to tribal court. However, the regulations give too much discretion to the state court to deny. We would request that more clarity be provided that prevents a State court from transferring absent a good reason not just in the Court's discretion.

Notice to tribes in voluntary proceedings. Tribes are parens patriae for their member children. In ICWA proceedings this includes the right to intervene in state proceedings or transfer the case to tribal court. When tribes do not receive notice of voluntary proceedings they are effectively denied these rights. Further, because tribes have the exclusive authority to determine which children are members, when tribes are not notified and offered the opportunity to verify that a child is ICWA-eligible, a court cannot ensure compliance with the law. Lastly, 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. Further, there are practices which have developed where a county removes an Indian child and labels it a voluntary placement and thereby skirting the ICWA requirement.

We strongly support these regulations, but we also believe that it is important that the authority of BIA to regulate be included in the final published rule. We also think that individual regulations should be justified with references to cases, state regulations, and legislative history. Also we also believe that the regulations should explicitly address the Baby Veronica case. They should clarify that it should not be applied outside of the private adoption context; and provide guidance on how it should be implemented in practice.

Very truly yours,

SWANSON, DROBNICK & TOUSEY, P.C.

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