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 writing to comment and offer support for the issuance of the proposed Indian Child Welfare Act, 25 U.S.C. 1901 *et. seq*. (ICWA), regulations by the Bureau of Indian Affairs. Strong regulations are critically important to a uniform enforcement of the ICWA to meet the highest aspirations of the law to protect the rights Indian children, families and Tribal governments.

Congress enacted ICWA to "protect the *best interest of Indian children* and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes or institutions which reflect the unique values of Indian culture." (italics mine).

In addition to the ICWA, the United Nations Declaration of Rights of the Indigenous Peoples (UNDRIP), Article 7 section 2 affirms Tribal peoples "right to live in freedom, peace and security [and]…shall not be subjected to… removing children of the group to another group."

I am mindful of the ICWA and UNDRIP as I write on my own behalf, as a former Guardian ad Litem (GAL) for the Ute Indian Tribe of the Uintah and Ouray Indian Reservation (Utah). My representation of children involved in the child welfare system included an "*in the best interest of the child*" calculus. And because inherently child welfare cases are extremely difficult with many diverse facts that complicate representation and the recommendations that are made in the "best interest" of children it becomes easy to substitute our [attorneys', social workers,' and judges'] own view of the best interest for that of the child and those diverse facts that surround each of these cases.

As a reasonable parent it is very easy for either my wife or I to come to two different conclusions to what is in our two children's best interest too. Further it was equally as easy to supplant my views on best interest as a GAL, however I would add that my view as a Native American man that grew up in Indian country may have closer proximity to the best interest of Indian children than some of my colleagues.

Further I propose that any one individual making best interest recommendations or decision on behalf of a child is counter to tribalism, where many people have connections and investment in children. Attachment and bonding between child and caregiver are based upon Anglo, middle class values and where reasonable minds/cultures can come to differing conclusions about best interests of children. Recent studies have questioned the relevance of attachment and bonding theories across culture where communities, like American Indians, rely upon a "dense network of relationships."[1]

I am aware of the tension between the ICWA and "*in the best interest*" advocates because of the perceived lack of an additional best interest considerations when addressing the "good cause" to NOT comply with the placement preferences [§ 23.131] in the ICWA.

This specific point of contention has been clarified for uniform interpretation across jurisdictions in the proposed ICWA regulations that "ordinary bonding and attachment" between an Indian child and a non-ICWA placement care giver is precluded from "extraordinary needs" that would justify a finding of good cause to NOT comply with the placement preferences.

Already this issue has been considered by the Oklahoma state appellate court[2] evaluating the BIA ICWA Guidelines specific to "good cause" to deviate from the ICWA placement preferences. The Court went to good measures to identify the minor child's blood quantum, similar Baby Girl v. Adoptive Couple, and that "creating a Tribal connection where none had existed before…is often done at the expense of the child's best interest."

The Court made a finding that "good cause" existed to deviate from the placement preferences citing primarily bonding with the foster mother. Even though the BIA Guidelines [and proposed ICWA Regulations] provide the "request of [natural] parents" as a consideration to find "good cause" to deviate from the ICWA preferences, the Court still cited bonding and only disingenuously mentions the natural parents preferred the foster mother as the placement in a footnote.

This case stands the latest interpretation in "good cause" throughout all the state jurisdiction that is often times at the detriment to Indian children.

While there could possibly be value in having a separate consideration for each individual child when considering placement preference. I can NOT trust the legal process to assess an Indian child's best interest on a consistent basis, as evidenced by the case law on this issue. I would hope that these regulations, as stated would be adopted to provide uniformity.

Even more, there has been a movement in literature to eliminate the "best interest" consideration altogether and instead have decision makers reflect upon the "least detrimental among available alternative for the child." Scholars suggest this shift would instead focus on causing no harm to the child rather than having a moral "best" implication on the proceeding. "It should reduce the likelihood of their [decision makers] becoming enmeshed in the hope and

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[1] Raymond Neckoway et al., Is Attachment Theory Consistent with Aboriginal Parenting Realities?, 3 FIRST PEOPLES CHILD & FAM. REV. 65 (2007).

[2] In the Matter of M.K.T., C.D.T., and S.A.W., ____ (2015).

magic associated with "best," which often mistakenly leads them into believing that they have greater power for doing "good" than "bad.""[3] I am NOT proposing replacing best interest, but merely suggesting a paradigm shift around children's legal issues.

I strongly recommend that the proposed ICWA regulations assist in providing opportunities for Tribes and States to come together to achieve the aspiration of the best interest of Indian children. When ICWA is complied with and Indian children, families and tribes are engaged with active efforts, Indian children win.

I was a member of a team that assisted in many children winning. One such instance involved baby O.J., an eighteen (18) month old. OJ had spent a minority of his young life living with his aunt on the reservation voluntarily while his parents were addressing mental health concerns. However at a time when O.J.'s was living with his parents they were arrested and charged with serious felonies in a border town next to the reservation, he was immediately taken into state custody. Because of the relationship developed between the state Attorney General's office and the Tribe and because of "full, faith and credit"[4] between Tribes and the state recognizing licensed foster homes, O.J. was able to be immediately placed with his tribally licensed aunt without objection by any parties. O.J. did NOT have to be placed in a stranger's home for 72 hours while we worked quickly to transfer the case to Tribal Courts. O.J.'s best interests were met by complying with ICWA's placement preferences and state law that provided recognition for the ICWA and Tribal sovereignty.

The ICWA represents the best practices in child welfare since its inception in 1978. The strong language regarding active efforts to maintain families and kinship placement preferences are considered the best practices in child welfare. I support the proposed ICWA Regulations in their current form.

Sincerely,

/s/_____ _
Sheldon Spotted Elk

[3] Joseph Goldstein, et. al., Beyond the Best Interests of the Child, 62-63 (1979).
[4] See, Utah Code § 62A-2-117(2)