



May 19, 2015

Sent Via Electronic Mail

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

comments@bia.gov

Re: Docket ID: BIA–2015–0001; Notice of Proposed Rulemaking: *Regulations for State Courts and Agencies in Indian Child Custody Proceedings* (RIN 1076-AF25)

Dear Ms. Appel:

The Alaska Federation of Natives (AFN) is pleased to submit these comments on the “Regulations for State Courts and Agencies in Indian Child Custody Proceedings” published as a Notice of Proposed Rulemaking in the *Federal Register* on March 20, 2015.¹ AFN is the largest statewide Native organization in Alaska and our membership includes 165 federally-recognized tribes, 146 village corporations, 12 regional corporations, and 12 regional nonprofit and tribal consortiums that contract and compact to run federal and state programs. AFN’s mission is to enhance and promote the cultural, economic, and political voice of the entire Alaska Native community. Our membership, which spans every region of the state, is intimately familiar with the complex and emotional nature of protecting our most precious resources: our Alaska Native children. As such, we enthusiastically support the long-overdue adoption of the proposed regulations. The following comments highlight some of the most welcome aspects of the regulations as well as some suggested additions.

The 1978 Indian Child Welfare Act (ICWA) was passed to halt the wholesale removal of Native children from their families, communities, and tribes by nontribal private and public agencies. ICWA was intended to protect the best interests of Native children and the long-term stability of Native tribes by creating minimum federal protections applicable in state child custody proceedings to allow for Native children to be raised in homes that emulate the unique values of Native cultures. In 1979, the Bureau of Indian Affairs (BIA) issued Guidelines to ensure that state courts deciding Native child custody matters would respect the rights guaranteed by ICWA. In 2014, the BIA revised the Guidelines to assert the

¹ Regulations for State Courts and Agencies in Indian Child Custody Proceedings (Proposed Rule), 80 Fed. Reg. 14880 (Mar. 20, 2015) (amending 25 CFR Part 23).

ongoing importance of ICWA's provisions and reject some court-created limitations on ICWA's application.

Unfortunately, despite the passage of ICWA, and efforts by many tribal leaders and people of good will, the mass relocation of Native children continues in Alaska today. Native people are a minority in Alaska's overall population, but Native children make up the majority of children removed from their families by the Alaska Office of Children's Services (OCS). A recent emergency regulation adopted by OCS at the urging of AFN acknowledges that Native children are frequently adopted out of our communities and into non-Native, non-relative homes at disturbingly high rates.² Contributing to this tragedy is the fact that Alaska's courts have repeatedly asserted that the BIA Guidelines, while instructive, are not binding. Thus, the most important feature of the proposed regulations is that they *are* regulations: they will be controlling federal rules that Alaska courts cannot disregard.

Also critically important is Section 23.131 of the proposed regulations, which clarifies that there are *only* four considerations that may support a determination that there is "good cause" to deviate from ICWA's placement preferences, including the "request of the parents." AFN is particularly pleased with the BIA's commitment to requiring *both* parents attest to the deviation, because it will lessen the instances where the rights of the child's mother are deemed more important than the rights of the child's father. The placement preferences are ICWA's most important substantive protection for Native children, yet Alaska courts regularly authorize the placement of children in non-preferred homes. In justifying these placements, Alaska courts have considered multiple factors, including a generalized analysis of the child's "best interests." All too often, this analysis fails to take into account ICWA's presumption that it *is* in a Native child's best interest to be raised in an ICWA-preferred home.

The proposed regulations are necessary to ensure that courts do not disregard ICWA's placement preferences based on a non-Native assessment of what is "best" for a child. We applaud the regulations' specific rejection of the idea that a non-preferred placement may be justified by any bonding or attachment that has occurred because of the length of time the child has been in the non-preferred placement. We suggest that the regulations could be improved if, like the 2014 Guidelines, they *explicitly* noted that it is also inappropriate for a court to perform an independent analysis of the best interests of the child.

² See ALASKA DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Emergency Regulations Proposed Changes to Regulations: 7 AAC 54.600 Adoption of Children Subject to the Indian Child Welfare Act, Public Review Draft (Apr. 15, 2015), available at <https://aws.state.ak.us/OnlinePublicNotices/Notices/View.aspx?id=176448> (last visited May 19, 2015); see also Memorandum to Triptaa Surve, AAC Contact, Department of Health and Social Services from Scott Meriweather, Special Assistant, Office of the Lieutenant Governor of Alaska (Apr. 15, 2015), <https://aws.state.ak.us/OnlinePublicNotices/Notices/View.aspx?id=176448> (last visited May 19, 2015) ("Today, the majority of children in the custody of DHSS are Alaska Native and American Indian children, to whom ICWA applies. However, the majority of Native children in the custody of DHSS are placed in non-Native homes.").

Section 23.128, which directs that ICWA's placement preferences apply in *all* foster care, preadoptive, and adoptive placements of Native children, is also critical. The Alaska Supreme Court recently held that ICWA's adoptive placement preferences *do not apply* unless an ICWA-preferred family has filed a formal petition to adopt a Native child.³ These regulations will effectively reverse that erroneous decision.

Other provisions in the proposed regulations that are particularly important in Alaska include:

- Section 23.107, outlining 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 Native heritage. 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.
- Section 23.111, clarifying requirement of 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.
- Section 23.122, clarifying that qualified expert witnesses must, at the very least, have knowledge of the prevailing social and cultural standards and childrearing practices within the child's tribe, and prioritizing the use of experts who are members of the child's tribe and recognized by the tribal community as knowledgeable in tribal customs. This section would be improved if it clarified that although the tribe may be asked to assist in locating qualified expert witnesses, the tribe is under no obligation to do so.
- Sections 23.106 and 23.2, clarifying that the "active efforts" requirement begins the moment the *possibility* arises that a Native child may need to be removed from her parents, and giving examples of active efforts to guide child welfare agencies'

³ *Native Village of Tununak v. State, Dep't of Health & Social Servs., Office of Children's Servs.*, 334 P.3d 165 (Alaska 2014).

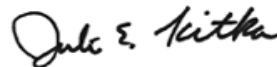
practices with Native families. This section could be improved if it was made clear that each item on the list (for example, "Identifying, notifying, and inviting representatives of the Indian child's tribe to participate"), alone, will not satisfy the active efforts requirement.

- Section 23.117, limiting the discretion of state courts to deny the transfer of a case to tribal court, and emphasizing that a state court may *not* consider whether the case is at an advanced stage, whether transfer would result in a change of placement for the child, the tribal court's proposed placement for the child, socio-economic conditions within the tribe, or perceived inadequacy of tribal social or judicial services. One of ICWA's primary purposes is to keep Native children connected to their families, tribal communities, and cultures. Yet, currently, more than 60% of Alaska 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 commend the BIA for proposing regulations that will clarify and strengthen ICWA's protections for Native families, and we strongly urge their prompt adoption. The proposed rule provides the clarity and certainty necessary for all parties involved in child welfare and private adoption proceedings to comply with the law and to promote the best interest of Indian children.

Thank you in advance for your consideration of our comments.

Sincerely,
ALASKA FEDERATION OF NATIVES



Julie Kitka
President

Cc: AFN Board of Directors