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May 15, 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: Kawerak, Inc. Comments to Notice of Proposed Rulemaking—Regulations for State Courts and Agencies in Indian Child Custody Proceedings—RIN 1076-AF—Federal Register (March 20, 2015) 25 CFR 23.

Dear Ms. Appel:

Located in Nome, Alaska, Kawerak, Inc. (Kawerak) is the regional Native non-profit consortium consisting of the twenty federally recognized tribes located in the Bering Strait region of Northwest Alaska. Kawerak is pleased to provide comments as requested within the Notice of Public Rulemaking (NPRM) regarding Regulations for State Courts and Agencies in Indian Child Custody Proceedings. This NPRM was published in the *Federal Register* on March 20, 2015, pages 14880-14894. The issuance of these proposed rules is long overdue and we commend the Department of the Interior (DOI) and the Bureau of Indian Affairs (BIA) for proposing much needed regulations in this area.

The Indian Child Welfare Act of 1978 (ICWA) "protects the best interests of Indian children to promote the stability and security of Indian tribes and families… ." (25 U.S.C. § 1902). In 1979, the Bureau of Indian Affairs (BIA) issued Guidelines to assure that state courts deciding child custody matters would respect the rights guaranteed by ICWA. In 2014, the BIA revised the Guidelines; the revisions reflected the ongoing importance of ICWA's provisions and rejected some court-created limitations on ICWA's application.

Though these previous efforts to establish Guidelines have been helpful, unfortunately, significant relocation of Native children away from their communities and to non-Native homes continues in Alaska today. Native people are a minority in Alaska's overall population, but Native children are the majority (62%) of children removed from their families by the state. All too frequently, Native children are placed in non-Native, non-relative homes outside their communities, never to return.

Our hope is that the new regulations will put an end to this practice. We fully support the establishment of these federal regulations that set forth law for state courts and agencies to follow in implementing ICWA. The previous Guidelines while helpful, did not have the force of law that these regulations will have, and it is hoped that state courts and agencies will now have a mandate to adjust their processes to be in compliance with federal regulations and ultimately with the provisions and intent of ICWA itself. Following are Kawerak's comments to provisions in the proposed regulations that are of particular importance to Kawerak and to Alaska:

- Section 23.2: New substantial details defining "active efforts" are necessary and will help all parties in these cases. There was previously no such detail, and courts struggled to understand differences between active efforts and a lesser standard of reasonable efforts when ICWA is not involved. The fifteen examples of what constitutes active efforts will be extremely helpful for all parties in determining whether services being provided are in compliance with this higher standard. Defining active efforts and providing examples that are best practice for social work is useful. Native children and families do not always receive the services they need when they are in state care.
- Section 23.103(b): We strongly support the clarification that there is no "Existing Indian Family Doctrine," a doctrine created by a handful of state courts and rejected by most others. Such court-created precedent, where used, was simply a way around compliance with ICWA. We also strongly support the specific rejection of factors courts used in applying this doctrine, such as the extent to which the parent or child participates in tribal customs, votes in elections, contributes to tribal charities and activities, participates in tribal religion, and other such factors listed in section 23.103 (b)(1)-(6). It should be clear now that courts cannot make up their own tests, not supported by any provisions of ICWA, for determining whether it applies.
- Section 23.103(c) and (d) and 23.107: These provisions require that agencies and state courts must ask if a child is an "Indian Child" at every proceeding, and must treat the child as such until it is determined that the child is not. Early identification of ICWA-eligible children is critical. Asking whether or not the child is Native at each court proceeding will help insure that Native children are receiving appropriate services. We recommend in this section or wherever appropriate insertion of language making it mandatory to also ask if the placement is ICWA compliant at each court proceeding.
- Section 23.107: Provides that in voluntary proceedings, the state court/agency must provide notice to the tribe of the proceedings. Tribes have had a right under ICWA to be involved in voluntary proceedings, but there has always been a gap in which no notice to the tribe was required. This provision fills that gap.
- Section 23.108: ICWA applies based on a child's political status—their membership in a tribe. As sovereign governments, we are the only entity with the legal authority to determine whether a child is a member of our tribe. We are pleased that the regulations are clear on that point.
- Section 23.115-117: These provisions clarify the process and standards for transferring cases to tribal courts. We support the clarification that a case may be transferred at any point in the proceedings, and the court may not consider whether the case is at an advanced stage of the proceedings. We also support the additional detail providing other factors that a court may not consider, including the tribal court's prospective placement of the child. Both of these have been improperly used as reasons why the State of Alaska opposes a transfer.
- Section 23.122: Clarifies that the qualified expert witness should have specific knowledge of the tribe's culture and custom, and prioritizes the type of expert and the nature of their expertise. We support the addition of this section. We do feel this section would be improved by a clarification that although the tribe may be asked to assist in locating qualified expert witnesses as contemplated by paragraph (c), the

tribe may not be required to do so and that the tribe's failure to do so does not absolve the state agency of its obligation to comply with Section 23.122. Section 23.122 (c) should state that the court or a party may request assistance from the tribe in locating persons to serve as expert witnesses, "but a request for assistance to a tribe and the failure of the tribe to provide a qualified expert witness, does not satisfy the obligation to utilize a qualified expert witness with specific knowledge of the Indian tribe's culture and customs as provided herein" or similar language. The act of asking a tribe to provide a qualified expert witness and the inability or unwillingness of the tribe to be able to do so, should not be a box the agency can check that it has now satisfied the obligations required by this section.

- Section 23.131 (c)(3): Clarification that bonding/attachment to placement does not constitute good cause to depart from ICWA placement preferences. This is important and has routinely been used by agencies to assert that moving a child to an ICWA compliant placement would so traumatize the child that there is good cause to deviate from the placement preferences. This will force agencies to get it right from the beginning and place children in ICWA compliant homes if they are truly concerned about the child's welfare and the trauma involved in being relocated. In rural Alaska we sometimes lack services (therapeutic foster homes, treatment facilities) that families require so children must sometimes travel to larger cities for these services. We understand that at times there is a legitimate need for a child to be in a home or treatment facility that takes them out of ICWA placement compliance. However, this section will ensure that as a general matter, johagencies cannot assert that bonding has occurred to deviate from placement preferences, and that includes where a child has been placed in a larger city to receive therapeutic foster care or services from a treatment facility, and no longer needs such services.

We respectfully request that Kawerak's comments be made part of the record moving forward with this NPRM process. We very much appreciate DOI's efforts to establish regulatory provisions which clarify ICWA provisions, and which we believe will assist tribes and the State of Alaska moving forward with ICWA proceedings by having a much clearer understanding of the rules that apply. We believe Native children, and the purposes and intent in enacting ICWA, will be better served now.

Sincerely,
KAWERAK, INC.

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Melanie Bahnke
President