

To: 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  
via comments@bia.gov

Fr: The National Council of Juvenile and Family Court Judges

Dt: May 14, 2015

Re: Proposed Indian Child Welfare Act Regulations

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## **I. Introduction**

One of the largest and oldest judicial membership organizations in the nation, the National Council of Juvenile and Family Court Judges (NCJFCJ) serves an estimated 30,000 professionals in the juvenile and family justice system including judges, referees, commissioners, court masters and administrators, social and mental health workers, police, and probation officers. We offer these comments on the proposed Indian Child Welfare Act (ICWA) Regulations with the goal of promoting the full implementation of ICWA, and ensuring clarity and certainty for judges and other child welfare professionals.

Congress passed the Indian Child Welfare Act (ICWA) in 1978 to address the widespread practice of State entities removing American Indian children from their homes without an understanding of traditional American Indian child-rearing practices. Throughout the 1960s and 1970s, American Indian / Alaskan Native children were six times more likely to be placed in foster care than other children. *See*, H.R. Rep. No. 95-1386 (1978), at 9. Unfortunately, according to recent research published by NCJFCJ, the percentage of American Indian and Alaska Native children in out of home placement has remained highly disproportionate and is the only category of children whose disproportionality rates are progressively worsening instead of improving. According to 2013 data, across the United States, American Indian and Alaska Native children are overrepresented in foster care at a rate of 2.5 times their rate in the general population.

Congress enacted ICWA to “*protect the best interests 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 will reflect the unique values of Indian culture.*” H. Rep. 95-1386, at 8 (emphasis

added). In 1979, the Department of Interior issued guidelines to assist with ICWA implementation. Since then it has become clear a uniform interpretation of key provisions is necessary to ensure consistent compliance. The ambiguities inherent in many of the terms and requirements in the statute and the non-binding nature of the guidelines have led to a great deal of confusion. Differing interpretations have resulted in inconsistent, and sometimes conflicting, practices by various State courts and agencies and different minimum standards are being applied across the United States, contrary to Congress' intent. *See, e.g., Holyfield*, 490 U.S. at 45–46 (describing the need for uniformity in defining “domicile” under ICWA). The problem with differing interpretations among states is compounded because ICWA is inherently a cross-jurisdictional Act, so each tribe is put in the position of dealing with potentially differing state applications of the law.

## **II. NCJFCJ ICWA Resolution and Best Practice Recommendations**

In 2013 our Board of Trustees passed a resolution in support of full implementation of the Indian Child Welfare Act (ICWA). The resolution recognized and renewed a commitment to support the provisions within ICWA that require inquiry, notice, active efforts, high standards of proof based on the testimony of a qualified expert witness before removal or termination, placement preferences, and provisions for exclusive tribal jurisdiction and intervention. Many provisions within the proposed regulations are in line with both our 2013 ICWA Resolution and best practices as recommended in National Council trainings and resource materials. Below are some examples of proposed regulations that are in line with current NCJFCJ recommendations.

### **a. Inquiry**

The proposed regulations clarify that agencies and courts must ask whether the child is or could be an Indian in every child custody proceeding. § 23.103 NCJFCJ has long recommended this practice to judges. The following quote from Judge Dale R. Koch, former NCJFCJ president, is taken from the National Council's Indian Child Welfare Act Checklists. “It is in the best interests of the child that the required inquiries be made from the time of the initial removal hearing, and that the inquiries continue throughout every stage of the case. Failure to make the necessary inquiries, notify the necessary parties, and follow the standards established within the ICWA can result in the case having to start over from the beginning, to the obvious detriment of the child.”

The proposed regulations also suggest that agencies may be required to include genograms or ancestry charts when certifying on the record whether they have “discovered or know any information that suggests or indicates the child is an Indian child.” §23.107 Also in the NCJFCJ's Indian Child Welfare Act Checklists, the Council recommends that family charts or genograms be created to facilitate

tribal membership determinations. This is not an unusual best practice recommendation.

b. Notice

The proposed regulations clarify that notice is required for each proceeding, not just the first or the last. § 23.111 They also set the standard of sending notice registered mail, return receipt requested as the minimum required method. § 23.111 Both of these practices are also recommended by NCJFCJ. In the Indian Child Welfare Act Checklists, the checklist cards review the importance of sending notice at each proceeding and also specifically state that notice must be sent by registered mail, return receipt requested.

c. Active Efforts

The proposed regulations give a definition of “active efforts” to provide uniformity and consistency throughout the State courts. Under these regulations, “active efforts” means actions “intended primarily to maintain and reunite an Indian child with his or her family or tribal community and constitute more than reasonable efforts as required by Title IV-E of the Social Security Act (42 U.S.C. 671(a)(15)).” §23.2. Further, the regulations clarify that the requirement to engage in “active efforts begins from the moment the possibility arises that an agency case or investigation may result in the need for the Indian child to be placed outside the custody of either parent or Indian custodian in order to prevent removal.” §23.106(a). In addition, active efforts to prevent removal of the child must be conducted while investigating whether the child is a member of the tribe, is eligible for membership in the tribe, or whether a biological parent of the child is or is not a member of a tribe. §23.106(b).

Questions about active efforts constitute numerous technical assistance request received each year by staff at the National Council. The ambiguity of the term has confused many professionals and left them concerned about whether or not they are complying with the statutory requirements. A stronger definition along with numerous examples can only assist judges in determining whether or not agencies have made active efforts instead of only reasonable efforts. The NCJFCJ has encouraged states to work directly with tribes to define active efforts. For example, in 2010 we published a guide titled “Active Efforts Principles and Expectations.” It was created collaboratively between the Oregon Judicial Department Citizen Review Board, the Department of Human Services, and the nine federally recognized Oregon tribes to assist courts and agencies to more fully understand how to implement active efforts. However, additional national guidance will benefit courts and agencies in all states.

In addition, the National Council has recommended that active efforts begin right away and continue until applicability has been determined. In Module III of a National Council supported ICWA training curriculum it states “The National

Council of Juvenile and Family Court Judges recommends that it is best to treat a case as an ICWA proceeding whenever it is suspected that an Indian child as defined by ICWA is involved. This practice avoids revisiting decisions and determinations months down the road if it is determined to be an ICWA proceeding because revisiting placement or jurisdiction decisions may impact the best interests of the Indian child and delay permanency.”

d. Qualified Expert Witness (QEW)

The proposed regulations both define and prioritize the characteristics most likely to meet the requirements for a qualified expert witness. A stronger emphasis has been placed on knowledge of the prevailing social and cultural standards and childrearing practices of the Indian child’s tribe. § 23.122 The National Council has long recommended this approach to qualifying expert witness. From the Indian Child Welfare Act Checklists, “[t]hus, a ‘qualified expert witness’ is not an *expert on the ICWA*, but an *expert on the child’s tribe*.”

e. Good Cause to Deviate from Placement Preferences

Under the Indian Child Welfare Act, “[i]n any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.” 25 U.S.C. § 1915(a) (1978). The good cause to deviate standard has been another ambiguous term that has led to some confusion among state court judges. It has been interpreted so differently between states that it is hard to predict what factors might constitute good cause. The proposed regulations provide additional guidance on the definition of good cause and limit the scope of factors that may be considered. § 23.131 This additional guidance should help bring some uniformity to ICWA implementation. The National Council has always supported vigorous attempts to adhere to placement preferences. In the ICWA Checklists, the Council recommends not only that the agency demonstrate that a diligent effort was made to follow placement preferences but also that if the child must be placed in a non-compliant placement that the agency “make ongoing, diligent search to locate placement that meets the preferences established within the ICWA.”

f. Tribal Jurisdiction and Good Cause to Not Transfer

The proposed regulations state that the right to transfer a case to tribal court is available at any stage of a proceeding, occurs with each distinct proceeding, and limits the good cause factors for denying transfer. The National Council’s publication “Improving Compliance with the Indian Child Welfare Act,” recommends that a judge should “[a]sk why the case is not in tribal court at each hearing.”

In addition, in 2011, the NCJFCJ Board of Trustees passed a resolution in support of tribal courts. In the resolution the Board stated “the National Council, in serving

children and families, recognizes that tribal and state courts are equal and parallel justice systems” and later stated that the Board of Trustees “is, and shall be, committed to engaging the tribal courts as full partners . . . and in meeting the needs of all children and families served by the state and tribal courts, complying with the letter and the spirit of all laws effecting Native children and families including, but not limited to, the Indian Child Welfare Act . . . .” Recognizing tribal courts as equal justice systems includes allowing cases to transfer to tribal court when reasonable instead of overusing the good cause exception to keep cases in state court. The ability to take jurisdiction over children who are members or eligible for membership is a vital part of tribal sovereignty and tribal court judges are generally in a better position to adjudicate matters involving community members than someone from outside of the community. The National Council has committed to supporting tribal courts and complying with both the letter and spirit of ICWA, which includes the right for tribal courts to exercise jurisdiction over tribal members.

g. Emergency Removal

The proposed regulations state that emergency removals must be as short as possible and have shortened the time period for temporary custody without a hearing from 90 days to 30 days. § 23.113 These two standards align with the key underlying principles of child abuse and neglect cases as stated in the National Council’s Resource Guidelines. The Guidelines list “avoiding unnecessary separation of children and families” as one of the most important principles in child abuse and neglect cases. The Guidelines further explain the emotional and fiscal costs involved in placing children away from family and emphasize the need to move forward in a timely manner. Reducing the time in temporary custody without a hearing and make it mandatory that emergency removals in ICWA cases be as short as possible represents a best practice not only in ICWA cases but in all child abuse and neglect cases.

### **III. Conclusion**

We believe that the listed proposed regulations still allow for necessary judicial discretion while supporting more consistent implementation of ICWA. Varied state interpretations have led to uncertainty for children, tribes, and the state, and this uncertainty is not in the best interests of children, their families, and the professionals attempting to make wise decisions in these difficult cases.

### **RESOLUTION IN SUPPORT OF TRIBAL COURTS**

**WHEREAS**, the tribal courts serve the children and families of sovereign nations with their respective authority and with equal responsibility as the state courts serve their constituencies; and

**WHEREAS**, the National Council of Juvenile and Family Court Judges (hereinafter referred to as the “National Council”) acknowledges that the tribal courts have historically not been regarded as equal in status with the state courts and that, as a result, the tribal courts and the children and families served by the tribal courts have been denied many of the resources available to the state courts; and

**WHEREAS**, the National Council, in serving children and families, recognizes that tribal and state courts are equal and parallel justice systems; and

**WHEREAS**, the National Council acknowledges the critical work of the tribal judges and the tribal judicial leadership organizations that support the important work of tribal judges to develop and implement effective practices, and to strive to provide the supports for tribal courts to effectively serve Native children and families; and

**WHEREAS**, the National Council is committed to partnering with tribal courts and judges as allies consistent with the commitment of all courts to meet the needs of all children and families served by the state courts and tribal courts without discrimination or favor; and

**WHEREAS**, the voice of tribal court judges is a necessary component in NCJFCJ’s ability to fulfill its mission; and

**WHEREAS**, the National Council recognizes that children and families are best served within the contexts of their community and honors the relationship that tribal courts have within their tribes.

**BE IT THEREFORE RESOLVED** that the NCJFCJ Board of Trustees is, and shall be, committed to engaging the tribal courts as full partners in fulfilling the mission of the National Council and in meeting the needs of all children and families served by the state and tribal courts, complying with the letter and the spirit of all laws effecting Native children and families including, but not limited to, the Indian Child Welfare Act, the Adoption and Safe Families Act in a context that supports tribal culture, the Tribal Law and Order Act, and the full faith and credit provisions of the Constitution and of federal laws of the United States.

**BE IT FURTHER RESOLVED** that the National Council shall work with the tribal courts, tribal governing bodies, and other tribal authorities to ensure equal treatment of, and resources for, all Native families and children at all levels of government.

*Adopted by the NCJFCJ Board of Trustees, January 21, 2011, St. Petersburg, FL.*

## **RESOLUTION IN SUPPORT OF FULL IMPLEMENTATION OF THE INDIAN CHILD WELFARE ACT**

**WHEREAS**, with the passage of the Indian Child Welfare Act (ICWA) of 1978, Congress declared that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in

protecting Indian children who are members of or are eligible for membership in an Indian tribe;  
and

**WHEREAS**, Congress found that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

**WHEREAS**, Indian children are over represented in the foster care system; and

**WHEREAS**, Congress noted that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families; and

**WHEREAS**, a renewed commitment to full implementation of the Indian Child Welfare Act will result in the preservation of the rights, culture, connections, and traditions of Indian children and their families.

**WHEREAS**, full implementation of the Indian Child Welfare Act requires inquiry into the child's Indian ancestry, notice to tribes, active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, a high standard of proof based on testimony of a qualified expert witness before removal or termination of parental rights, and placement preferences with Indian families or other tribal families, and provisions for exclusive tribal jurisdiction and intervention.

**BE IT THEREFORE RESOLVED AS FOLLOWS:**

That the National Council of Juvenile and Family Court Judges (NCJFCJ) believes that full implementation of the Indian Child Welfare Act should be a priority for all state courts;

That NCJFCJ encourages states to adopt ICWA in its entirety in state law;

That NCJFCJ encourages all judges to receive training on the ICWA, including the effects of historical trauma, and the effects of separation from family, culture and tradition;

That NCJFCJ encourages state Court Improvement Programs to work in meaningful collaboration with tribes to develop strategic plans to effect full implementation of the Act, including data collection to track progress;

That NCJFCJ encourages courts to develop statutes and court rules to enable and welcome tribal attorneys and qualified expert witnesses in other states to appear in court on behalf of the tribe, allowing and providing for telephonic appearance when needed;

That NCJFCJ commits to working closely with state courts, Indian tribes, and tribal organizations to achieve full implementation of the Act and track progress of that implementation.

*Adopted by the NCJFCJ Board of Trustees during their Annual Meeting, July 13, 2013, Seattle, Washington.*