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FOR IMMEDIATE RELEASE
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TRIBAL COURT ACCESS TO PROTECTION ORDER REGISTRIES COULD HAVE PREVENTED GUN TRAGEDY

Boulder, Colorado, April 6, 2015– **Tribal Courts Call for Immediate Direct Access to Federal and State Protection Order Registries.**

As Raymond Lee Fryberg, the father of 15-year-old Jaylen Fryberg awaits arraignment on federal charges relating to his son's use of a gun Fryberg purchased illegally, tribal courts across the country are calling for immediate access to state and federal protection order registries to prevent further tragedy. Jaylen Fryberg killed four students and himself and injured one other student on October 24, 2014 at Marysville-Pilchuck High School in Marysville, Washington.

Fryberg was prohibited from possessing firearms as a result of a permanent protection order issued by the Tulalip Tribal Court in 2002. The Tulalip Tribes are an American Indian nation that neighbors Marysville, the small Washington town where the shooting tragedy occurred. A federal investigation revealed that Fryberg lied on forms when he purchased the gun stating that he was not subject to a protection order. The instant background check of state and national protection order registries did not reveal the existence of the Tulalip order. Currently, there is no national tribal registry for protection orders. Additionally, many, if not most, tribal protection orders are not entered into the National Crime Information Center (NCIC) Protection Order File (POF), a federal registry for protection orders. The Tulalip Tribes are a sovereign Indian nation and the Tribal Court exercises civil and criminal jurisdiction pursuant to the Tribes' powers of self-government. It is because of this separate sovereignty that state protection order registries are closed to tribal courts. This results in the failure of state-wide registration of

Department of the Interior,
Bureau of Indian Affairs

Comment Form

To: Ms. Elizabeth Appel, Office of Regulatory Affairs & Collaborative Action – Indian Affairs, U.S. Department of the Interior, 1849 C. Street N.W., MS 3642 Washington, DC 20240

From: Judge Richard C. Blake and Justice Dennis M. Perluss, Cochairs, California Tribal Court–State Court Forum (forum)

Tribal Affiliation: A consortium of tribal and state court judges in California

Date:

Comment:

The summary of the proposed rule *Regulations for State Courts and Agencies in Indian Child Custody Proceedings* (as published in the Federal Register on March 20, 2015 (Vol. 80 FR No. 54 14880) states that the proposed rules will improve ICWA implementation by state courts and child welfare agencies. The forum supports these goals and agrees with the need for more specific federal regulations to provide guidance and clarity on issues that have been the subject of conflict and difference in interpretation. The forum supports full ICWA compliance.

We are writing this comment to describe the impact the proposed regulations and newly issued guidelines would have on California state courts. Our comments are grouped into several areas that reflect the following general concerns: (1) the proposed regulations are at times unclear or confusing; (2) the proposed regulations are in a number of instances inconsistent with the statute (25 U.S.C.§§ 1901 – 1963); (3) the regulations do not resolve inconsistencies between ICWA and other relevant federal statutes, which interfere with ICWA compliance; (4) the regulations transfer current Bureau of Indian Affairs (BIA) responsibility to State courts and agencies which is not most conducive to ICWA implementation; (5) the regulations fail to take advantage of technological advances that could facilitate ICWA implementation and compliance; and (6) the regulations unduly fetter the discretion of State judicial officers.

1) **Certain proposed regulations are unclear and confusing**

   a) **Proposed regulation §23.103, When does ICWA apply? (page 14886)**
   There is a need to clarify the application of ICWA in delinquency proceedings given that proposed regulations §23.103(a) and §23.103(e)(2) seem to conflict.

   ICWA (25 U.S.C. 1903 (1)) excludes "a placement based upon an act which, if committed by an adult, would be deemed a crime.…." This general exclusion is expressed in proposed regulation §23.103(e)(2).

   However, proposed regulation §23.103(a) states that ICWA applies to

   > "juvenile delinquency proceedings if any part of those proceedings **results in the need for placement of the child in foster care**, preadoptive or adoptive placement, or termination of parental rights." (Emphasis added.)

   Does this mean ICWA applies even when the delinquency proceedings are based on a criminal act. If so, what definition of "foster care" is intended in this regulation?

   There are different definitions of foster care in different federal statutes. In addition to the definition in ICWA, 42 U.S.C. § 672(c) defines foster care to include a family home or child care institution accommodating 25 children or less, but explicitly exclude

   > "detention facilities, forestry camps, training schools, or any other facility operated primarily for the detention of children who are determined to be delinquent." (42 U.S.C. § 672 (c))

   Is there any relationship between this definition and §23.103(a)?

   b) **The investigation requirements at the start of a proceeding**
   The scope of required ICWA inquiry has been the subject of a great deal of litigation in California. In proposed regulations §23.103(c) and §23.107(b), it would be helpful to clarify **who** state courts are required to ask whether the child is an Indian child and what exactly must be asked. Is it sufficient to ask the parents and child (if old enough)? What specifically must be asked? It would be helpful to clarify what the "investigation" required under §23.103(c) consists of beyond asking and whether an "investigation" must be conducted if all of the individuals asked about Indian status say that there is no Indian ancestry?

   c) **The definition of "Indian child" being used in the regulations.**
   The Act (25 U.S.C. § 1903(4)) defines an Indian child as

> "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."

Various sections of the proposed regulations, however, refer only to the Indian child being "a member or eligible for membership" in a tribe. (See proposed regulation §23.2(1); §23.107(a) and (b)(2); §23.108(a); §23.109 Title, (a), (b) and (c); §23.111(a)(1) and (d)) Is it the intent of the regulations to expand the practical definition of an Indian child?

d) The notice requirements

i) How do the new requirements concerning notice, found in proposed section 23.111, relate to the existing notice requirements in 25 CFR §23.11(a)? This section permits notice to be sent "by certified mail, return receipt requested." Section 23.111(a) of the proposed regulations states that notice must be sent "by registered mail with return receipt requested." This appears to create a conflict.

We urge you to continue to allow certified mail to be used for ICWA notice. In 1994, the BIA considered amending the regulations to require registered mail rather than certified mail[1]. This was ultimately rejected because it was determined that it undermined the purpose of ICWA notice:

> Comment. One commenter recommended that revised regulations require ICWA notices be sent to tribes via registered mail…
>
> Response. No change is made in the manner in which ICWA notices are served due to considerations given for proof of delivery of said notices in a timely manner. Registered mail is delivered only to the addressee. This means ICWA notices may not be delivered should the addressee not be present at the time of mail delivery. Unclaimed registered mail is held by the mail service for a limited number of days and then returned to the sender. On the other hand, mail delivered via certified mail with return receipt requested may be delivered to the office in the address rather than only to a specific person. **Because the intent of providing ICWA notices is timely tribal notification of child custody proceedings and proof that such notice was given, certified mail with return receipt requested is the preferred method of serving ICWA notices to assure its timely delivery**. (emphasis added at page 2254)

Registered mail is generally much slower than certified mail. Whereas certified mail within the United States is generally delivered within two to three business days, registered mail generally takes fourteen business days.[2] In addition there is a substantial cost differential between registered and certified mail. Registered mail

[1] See final rule adopted at 59 FR 2248-01

[2] http://smallbusiness.chron.com/difference-between-certified-amp-registered-mail-40089.html

costs $11.95 per item. Certified mail costs $3.30 in addition to the first class mail cost.

e) The requirements of §23.107(d)

This section requires the court to keep identifying documents as confidential and under seal when a parent requests anonymity, but says that it does not relieve the court from the obligation of verifying a child's Indian status. Please clarify how a court can simultaneously comply with these seemingly conflicting requirements.

f) Proposed regulation §23.107: what actions must an agency and state court undertake in order to determine whether a child is an Indian child?

Our state courts need clarity and specificity as to what will satisfy the investigation requirements of ICWA. Specifically who must the agency ask whether there is reason to believe a child is an Indian child and what specific questions must be asked.

This proposed regulation should also be revised to require only that an agency and state court seek verification in writing rather than obtain verification in writing from all tribes in which a child may be a member. Proposed subsection 23.107 (a) requires that if an agency has "reason to believe" that a child is an Indian child the agency:

> must obtain verification, in writing, from all tribes in which it is believed that the child is a member or eligible for membership, as to whether the child is an Indian child. (Emphasis added.)

Agencies and state courts have no authority to require tribes to provide written verification. All agencies and state courts can do is **seek** or request a tribe to provide written verification of a child's status.

g) The level of information that provides a court with "reason to believe" the child is an Indian child.

Proposed regulation 23.107(c) is confusing. Specifically subsection 23.107(c)(1)-(5) uses differing and inconsistent language in discussing what gives a court 'reason to believe":

(1) Any party to the proceeding, Indian tribe, Indian organization or public or private agency informs the agency or court that the child is an Indian child;
(2) Any agency involved in child protection services or family support has discovered information suggesting that the child is an Indian child;
(3) The child who is the subject of the proceeding gives the agency or court reason to believe he or she is an Indian child;
(4) The domicile or residence of the child, parents, or the Indian custodian is known by the agency or court to be, or is shown to be, on an Indian reservation or in a predominantly Indian community; or
(5) An employee of the agency or officer of the court involved in the proceeding has knowledge that the child may be an Indian child.

What is the difference between these? Is knowledge that the child may be an Indian child different from information suggesting that the child is an Indian child?

h) Who designates child's tribe under §23.109?
Proposed §23.109 requires an agency to notify all potential tribes when a child is eligible for membership in multiple tribes. If the tribes do not agree on which should be designated as the child's tribe, is it the agency that makes a decision on which tribe should be designated. Currently, in California in the event of a conflict the court would decide which tribe should be designated after a noticed evidentiary hearing at which all parties and tribes would have an opportunity to be heard. Section 23.108 seems to contemplate that the agency would decide rather than the court.

i) Conflicting provisions on appointment of counsel
Proposed subsection §23.111(c)(4)(iv) says the court must advise parents or Indian custodians of the right to appointed counsel "where authorized by State law." This is inconsistent with §23.111(f) that says the court must inform of the "right to appointed counsel…." It does not contain the limiting language "where authorized by State law." Further the statute 25 U.S.C. §1912(b) does not limit appointment of counsel to "where authorized by State law."

j) The waiting periods in §23.111 and §23.112
How many times can a party ask for an additional 20 days to prepare? Is this something that happens once? With each hearing? With each "proceeding" (see question re "proceeding" below)?

k) What is meant by "each distinct Indian child custody proceeding" in §23.115?
This proposed subsection says that the right to request a transfer to tribal court "occurs with each proceeding" and "each distinct Indian child custody proceeding." These terms are unclear. If there is one initiating petition or document and many hearings within that action, when is there a distinct or separate proceeding for the purpose of §23.115?

l) Clarify proposed regulation §23.110: when must a state court dismiss an action?
It is not clear how a state court determines whether a tribe exercises exclusive jurisdiction over a particular reservation.

Agencies and courts in California may come into contact with families and children affiliated with tribes throughout the country. State agencies and courts do not have ready access to information about the governmental status of reservation lands and whether any particular tribe has successfully petitioned to resume exclusive jurisdiction. This information is within the knowledge of the tribe and/or the BIA. To facilitate state court compliance, improve accuracy and efficiency and reduce the burden on state courts, the BIA should compile information on which reservations are subject to the exclusive child welfare jurisdiction of a tribe and make this information readily available to state agencies and courts as part of the assistance to state courts mandated by subpart H of these regulations.

Subsection 23.110(c) requires the state court to contact the tribal court to determine whether the child is a ward of the tribal court. Because there is no comprehensive list of tribal courts operating in the United States and only individual tribes and/or the BIA would have this information, we recommend that the BIA maintain a comprehensive list of tribal courts and tribal court contact information as part of the assistance to state courts mandated by subpart H of these regulations.

m) Proposed regulation §23.111: what are the notice requirements for a child custody proceeding involving an Indian child.

State courts need clarity on when formal notice by registered/certified mail return receipt requested is required and when some less formal contact with the tribe is acceptable. The relationship between the notice requirements of §23.111 and other contacts with tribes such as the "investigation" and "verification" discussed in proposed regulation §23.107 is not clear.

Proposed regulation 23.107 requires an agency to ask in all proceedings whether there is reason to believe that the child is an Indian child. If there is reason to believe then the agency

> must obtain verification, in writing, from all tribes in which it is believed the child is a member of eligible for membership…

Proposed regulation 23.107 does not specify how that verification must be sought, but presumably the notice provisions of 23.111 need not be followed because this request for verification appears to be separate from the notice requirement of 23.111. Subsection 23.107(b)(2) further states that if there is "reason to believe" then

> the court must confirm that the agency used active efforts to work with all tribes of which the child may be a member to verify whether the child is in fact a member or eligible for membership in any tribe…

The regulation does not specify what these "active efforts" consist of, but again, presumably they do not require compliance with the notice requirements of 23.111.

The provisions of 23.107 suggest that there is intended to be an investigation stage that is separate and distinct from the requirements of notice under section 23.111. Presumably, notice under section 23.111 is intended to be required in a smaller subset of cases than the investigation under section 23.107. However, both the investigation mandated by section 23.107 and the notice required by section 23.111 are triggered by a "reason to believe."

This is confusing particularly in light of the recently released guidelines (F.R. 80 No. 37 10146) in which investigation under guideline B.2 (a) is triggered by a "reason to believe" and notice under guideline B.6 is triggered by "reason to know."

The trigger for notice set out in proposed section 23.111 is also inconsistent with the statute itself. 25 U.S.C. §1912(a) mandates notice "…where the court knows or has reason to know that an Indian child is involved…"

Proposed regulation 23.109 provides that when a child may be affiliated with more than one tribe:

> (a) Agencies must notify all tribes, of which the child may be a member or eligible for membership, that the child is involved in a child custody proceeding…

Again it is not clear what this notification must look like. Must the notification sent under section 23.109 comply with all of the requirements of section 23.111 and be sent by registered mail return receipt requested?

There are a number of issues if the notification required under section 23.107 and 23.109 must comply with all of the requirements of section 23.111. As a result of the federal relocation programs of the 1950s and 60s, over half of the individuals in California who identify as American Indian/Alaska Native are affiliated with tribes outside of California. Often these individuals believe they have American Indian/Alaska Native ancestry, but do not know the specific tribe they are affiliated with and do not know whether or not they are a member or entitled to membership in a specific tribe. California courts and agencies in Los Angeles and other urban areas report that they may have to be in contact with 30 to 60 tribes in which a child "may be a member or eligible for membership." Registered mail return receipt requested is slow and expensive. Finally, section 23.111 requires that a copy of the petition or complaint accompany the notice. The petition contains detailed confidential information concerning the parents and children involved. While it is appropriate the child's tribe has access to this confidential information, it is problematic that this information be sent to multiple tribes most of which the family will have no affiliation with. Tribes have reported that the receipt of numerous notices under the formal ICWA requirements is burdensome for them as well.[3]

Please revise 23.111 to clarify how many times notice by registered/certified mail, return receipt requested must be sent to each tribe, or provide a definition of the term "proceeding" as used in this subsection.

Proposed subsection 23.111(a) states that courts and agencies must send notice

> of each such proceeding (including but not limited to a temporary custody proceeding, any removal or foster care placement, any adoptive placement, or any termination of parental or custodial rights) by registered mail with return receipt requested….

[3] See attached Exhibit A

In California, there is generally one initiating petition and one action for a child welfare matter from initial removal to reunification or other permanent plan such as adoption or tribal customary adoption. California does not have separate "proceedings" or legal actions for temporary custody, removal, foster care placement, adoptive placement and termination of parental rights. All of those are different hearings within the same proceeding. In addition to those hearings, there are also a wide variety of other hearings types that can take place within a child welfare proceeding.

It is not clear whether subsection 23.111(a) requires ICWA notice by registered/certified mail, return receipt requested only one time at the initiation of a proceeding, or whether it is required for each hearing within a proceeding or only for certain kinds of hearings within a proceeding.

n) Section 23.111(i) – Interstate Placements

This section states:

> If the child is transferred interstate, regardless of whether the Interstate Compact on the Placement of Children (ICPC) applies, both the originating State court and receiving State court must provide notice to the tribe(s) and seek to verify whether the child is an Indian child.

In a child welfare case in California, the California court would have no way of implementing this requirement. As the receiving state, there would be no California state court case or file. The court would not be aware of the placement and would have no opportunity to provide notice.

o) Section 23.132: what is the procedure for petitioning to vacate an adoption?

It is not clear whether an adoption can be vacated for failure to comply with ICWA. Per subsection (a), a person can petition to vacate an adoption based upon the consent to adoption having been obtained by fraud or duress, or that the proceeding failed to comply with ICWA. However, per subsection (d), the court can only invalidate a proceeding based on a finding that consent was obtained by fraud or duress. There is no mention of vacating for otherwise failing to comply with ICWA.

2) Inconsistency with the ICWA Statute

a) **§23.111 - t**he trigger for notice set out in proposed 23.111 is also inconsistent with the statute itself. 25 U.S.C. §1912(a) mandates notice "…where the court knows or has reason to know that an Indian child is involved…"

b) **§23.121**(a) and (b) should be revised to include reference to emotional harm to the child. Currently these subsections say that in order to make a foster care placement or termination of parental rights order, the court must have clear and convincing evidence including the testimony of qualified expert witnesses demonstrate that continued custody

> "is likely to result in serious physical damage or harm to the child." This is inconsistent with the statute. 25 U.S.C. § 1912(e) and (f) state that the evidence must demonstrate that continued custody "is likely to result in serious emotional or physical damage to the child." (emphasis added)

3) Inconsistency with other federal statutes

One of the greatest challenges that state courts face is reconciling the provisions of ICWA with other federal statutes governing child welfare matters, particularly title IV-E of the Social Security Act (title IV-E). Under title IV-E, the federal government makes substantial sums available for certain child welfare proceedings, placements and related costs. However, these payments are contingent upon the states complying with various federal standards. Many of these standards are incorporated into California statutory law in compliance with title IV-E. As such, these standards and restrictions are binding upon California courts in child welfare matters. BIA and the Department of Health and Human Services need to work together to ensure that there is no conflict between the requirements of the ICWA and title IV-E. States and state courts cannot be expected to comply with contradictory and conflicting federal requirements on the subject of child welfare matters.

Per §23.131 (c)(4) a

> placement may not be considered unavailable if the placement conforms to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

It is not clear how this relates to section 471 [42 U.S.C. 671](a)(10) of title IV-E, which requires the state to maintain certain standards for foster care placements including various criminal background standards for licensing of foster care placements. The standards of title IV-E have been incorporated into California law, which prohibits courts from making foster care placements that violate these standards.

4) Problematic shift of BIA responsibility to state courts

Consistent with the role of the BIA as the primary agency through which the federal government discharges its fiduciary obligations to individual Indians and tribes, BIA is charged with a variety of obligations to assist with ICWA implementation and compliance. The forum believes that it is vital that BIA fulfill its responsibilities. Unfortunately, BIA is not complying with its obligations under the statute and existing regulations. The proposed regulations impermissibly attempt to shift federal responsibility to the state courts and agencies. This does a disservice to Indian children, Indian parents, tribes, and State courts and agencies as we all strive for full ICWA compliance.

a) Revise the format of the *Designated Tribal Agents for Service of Notice*

Proposed regulation 23.104 provides that state agencies and courts should rely on the list of ICWA agents for service published by the BIA in the Federal Register in order to provide notice or obtain information or verification from a tribe under the regulations. For the reasons discussed in more detail below, the list of agents for service of ICWA notice published by the BIA in the federal register provides inadequate information to permit agencies and courts to identify and notify tribes.

In California, many individuals of American Indian descent identify their American Indian affiliation in relationship to their historical tribal affiliation such as "Pomo" or "Tlingit." This is often inconsistent with the way in which tribes are identified on the list of agents for service published in the federal register. The list of agents for service of ICWA notice published in the federal register (found at http://www.bia.gov/cs/groups/public/documents/text/idc012540.pdf) contains an alphabetical list of tribes by their federally recognized names by region. It does not link the information in the federal register to the historical tribal affiliation. Thus, a state or county social worker who obtains information that a family identifies as Pomo or Tlingit cannot readily identify which tribes must receive notice or be contacted simply by consulting the list of agents for service. Previously published lists of *Designated Tribal Agents for Service of Notice* contained the historical tribal affiliation information.[4] Without warning or consultation, this information was removed when the BIA published its list on January 17, 2014 and subsequent lists.[5] Understanding tribal affiliations is something that is in the particular purview and expertise of the BIA and failure to provide historical tribal affiliation information shifts what is properly a BIA responsibility to the state courts and agencies and undermines the goal of timely notice to all of a child's potential tribes.

Another problem with the Federal Register list is that it is often incorrect or out of date. The California Department of Social Services was specifically informed by local BIA staff that the published

> lists are current only when published and tribal addresses and phone numbers can and do change without public notice. Therefore please be advised that these lists cannot be relied upon to provide up to date addresses or phone numbers for Federally Recognized Tribes in all instances.

We recommend using an electronic database that can be continuously updated. Most states (including California) have a system for registering and updating information concerning agents for service of corporations doing business within the state. This information is contained in a searchable data base maintained by the state (in California it is maintained by the Secretary of State and can be found at http://kepler.sos.ca.gov/list.html), which is

[4] See for instance the lists published August 1, 2012 http://www.gpo.gov/fdsys/pkg/FR-2012-08-01/pdf/2012-18594.pdf, May 12, 2011 http://www.gpo.gov/fdsys/pkg/FR-2011-05-25/pdf/2011-12536.pdf and May 19, 2010 http://www.gpo.gov/fdsys/pkg/FR-2010-05-19/pdf/2010-11696.pdf

[5] See http://www.gpo.gov/fdsys/pkg/FR-2014-01-17/pdf/2014-00779.pdf

continuously updated. Further, the data base could be configured so that, when only limited information on tribal affiliation is available (for instance that a grand-parent had Cherokee heritage,) an agency would be able to find up to date contact information for all of the tribes of a particular group. We suggest that it would greatly improve the efficiency and effectiveness of ICWA noticing if such a database were maintained with respect to agents for service of notice under ICWA. It seems appropriate that the new centralized Indian Child Welfare Act Response Center would be responsible for maintaining such a database.

BIA should redesign the list of agents for service of ICWA notice and provide greater assistance to state courts in determining which tribes need to be provided with ICWA notice.

b) Provide funding for appointment of counsel as mandated by 25 U.S.C. §1912(b) and 25 CFR §23.13

ICWA requires that counsel be appointed for an Indian parent or Indian custodian in all cases where the court determines indigency. It further requires that where state law makes no provision for payment of such counsel, the fees and expenses shall be paid out of federal funds.[6] Existing regulations at 25 CFR §23.13 further elaborate on these requirements. However, in California BIA does not pay these appointed counsel fees even when all requirements of the Act and regulations are followed.

c) Fulfill the recordkeeping and information availability requirements of 25 CFR §23.71

The proposed regulations improperly attempt to shift federal responsibility to state agencies and courts.[7] Existing regulation 25 CFR Subpart G §23.71, which is not revoked or amended by the proposed regulations, requires the BIA to maintain information on state court proceedings and finalized adoptions, and provide information to adult adoptees upon request under ICWA.

Proposed subsection §23.134 should be removed. It is inconsistent with and duplicative of Subpart G of the existing regulations.

The forum supports the goal of ensuring that all adult adoptees are reconnected with their tribes. However, the proposed regulation attempts to achieve this goal in an inefficient and ineffective manner. There are more than 560 federally recognized tribes across the country, each with its own enrollment requirements. Suggesting that "agencies should communicate directly with tribe's enrollment offices" does a disservice to adult Indian adoptees seeking to establish their tribal identities and places an unfair burden on state courts and agencies.

Part G, §23.71 requires that states entering a final decree of adoption for an Indian child provide this information to the Secretary of the Interior and for the Division of Social

[6] 25 U.S.C. §1912(b).
[7] See in particular §§23.134 and 23.137

Services. BIA is required to receive this information and maintain a central file on all state Indian adoptions. Existing §23.71(b) places the responsibility for maintaining this information and disclosing it to adoptees upon request upon the Division of Social Services, BIA. This makes sense and is consistent with the fiduciary responsibility the BIA has to individual Indians and tribes. It is inappropriate and an unfair burden on state courts and agencies for the BIA to shift this obligation to the states. It also does a disservice to Indian individuals and tribes who work closely with the BIA. It makes no sense to suggest that state agencies should work with each tribe across the country to identify a tribal designee to assist with adult adoptees. It would make much more sense and be much more economical and efficient for the BIA to identify and work with representatives of the tribes and actively facilitate enrollment of adult adoptees.

Proposed regulation §23.137 requires that the State establish a single location where all records of every voluntary or involuntary foster care, preadoptive placement and adoptive placement of Indian children by courts of that State be maintained. It also requires that the State furnish these records within seven days of a request by an Indian child's tribe or the secretary. Maintaining this information and making it available to tribes and individuals should be a BIA responsibility under Subpart G of the regulations. The attempt to shift this responsibility from BIA to the states imposes a burden and unfunded mandate on the states.

d) Provide technical assistance and resources as mandated by 25 CFR Subpart H. §§23.81 – 23.83

Subpart H. of 25 C.F.R. Part 23 contemplates that the BIA will provide assistance to the state courts in complying with ICWA requirements. Subsection 23.81 requires the BIA to provide assistance in identifying qualified expert witnesses. Subsection 23.82 requires the BIA to provide assistance identifying language interpreters. Subsection 23.83 requires the BIA to provide assistance locating biological parents when an adoption of an Indian child is terminated.

In practice and in fact, BIA provides no such assistance to state courts and agencies in California. Subpart H should be revised to require that BIA provide assistance to state courts in matters arising under the new proposed regulations including: (1) determining whether particular reservation lands are ones over which a tribe exercises exclusive child welfare jurisdiction; (2) determining whether a tribe has a tribal court exercising child welfare jurisdiction; and (3) obtaining contact information for a tribal court. It is impractical and inefficient to expect individual state courts and agencies to obtain this information especially when BIA already has the expertise and existing relationships with tribes and tribal courts.

Section 23.122(a) of the proposed regulations state that "[a] qualified expert witness should have specific knowledge of the Indian tribe's culture and customs." The forum supports the requirement that a qualified expert witness be able to provide the court with meaningful insight into the child rearing practices of the child's tribe. However, finding such experts can be a challenge in California. Largely as a result of historical federal relocation policies of the

1950s and 1960s, many areas of California such as Los Angeles and the San Francisco Bay areas are home to individuals who trace their ancestry to American Indian tribes from throughout the United States. BIA should maintain a list of available experts from each tribe as part of their assistance to State courts mandated by §23.81.

5) Failure to take advantage of technology

While the proposed regulations acknowledge and encourage the use of electronic notice and technology such as telephone and videoconferencing for remote participation in court proceeding, they do not go far enough. The proposed regulations fail to take advantage of technological advances to improve notice compliance, specifically in terms of the contact information for tribal agents for service and electronic notice to tribes.

a) Contact information: agents for service

Although a list of agents for service is to be published in the Federal Register each year, in practice, this information is often incorrect or out of date. The California Department of Social Services was specifically informed by local BIA staff that the published

> lists are current only when published and tribal addresses and phone numbers can and do change without public notice. Therefore please be advised that these lists cannot be relied upon to provide up to date addresses or phone numbers for Federally Recognized Tribes in all instances."

See our comments above on the format of the list of agents for service

b) Electronic service

A related issue is the means of providing notice to tribes. Currently, registered mail with return receipt requested is the only method explicitly authorized by the Act. The forum is pleased that the proposed regulations mention electronic service. However, the forum recommends that you consider allowing electronic service in lieu of registered mail when a tribe and a state enter into an agreement to allow such alternative service. Service by registered mail return receipt requested can be as much of a burden on the tribes receiving the notices as it is on the agencies sending the notices. Parties are generally entitled to waive service in a specified manner. However, unless this is specifically recognized in the federal regulations, agencies will fear being overturned on appeal; and there will be little incentive to invest in methods of electronic service, which could be of benefit to both agencies and tribes. While we understand the importance of ensuring that notice is actually received by the authorized tribal representative, this could be done electronically just as efficiently as by registered mail if the tribes choose to receive notice in this way. At a minimum, tribes and state and local agencies should be entitled to enter into agreements dealing with the method of notice (and other issues) and thereby opt out of the requirement of effecting notice by registered mail. Electronic service, when chosen by the tribe, could offer a number of efficiencies. Tribes and agencies would be able to communicate, in real time, to expedite

determinations about tribal membership eligibility and the exchange of information relating to active efforts and placement.

[Question for the forum – the subsection below discusses areas where the proposed regulations limit judicial discretion. Are these limits appropriate?]

6) **Unduly restricts judicial discretion**

Under federal and state child welfare laws, a judge must make decisions in the best interests of the child.. The proposed regulations contradict federal and state laws by unduly restricting a judge in making an individualized, case-by-case determination of what is in the best interests of a child. The proposed regulations should not prohibit a judge from considering various factors in deciding whether to transfer a case or place a child. It is sufficient that the proposed regulations state that there is a presumption of what is in the best interest of the Indian child.

a) Considerations re good cause not to transfer to tribal court

Proposed subsection 23.117, "How is a determination of "good cause" not to transfer made?", unduly restricts the discretion of a judge to make a determination on an individualized basis based on the best interests of the child by restricting a judge from considering the factors set out in subsection (c) - whether the case is at an advanced stage and transfer would result in a change in the child's placement and (d) – the existing relationship between the child and the tribe and the child's prospective placement upon transfer.

b) Considerations on placements

Proposed subsection 23.131(c)(3), (4) and subsection (d) unduly restricts judicial discretion in purporting to prevent a court from considering bonding and attachment that might have occurred between a child and a foster family in determining whether or not there is good cause to deviate from the placement preferences in ICWA and otherwise limit the discretion of a judge to consider various factors when determining whether there is good cause to deviate from the ICWA placement preferences.

tribal court protection orders, including the 2002 order issued against Fryberg by the Tulalip Tribal Court.

In the State of Washington, the Washington State Police controls access to the protection order registry. In 2004, pursuant to a state audit, tribal police departments were restricted from accessing the system because the language of state law does not include tribes as approved agencies. Following the decision to bar tribes from entering tribal protection orders in the state database, some tribes in Washington developed a protocol with local county superior courts by which the county court clerk enters the tribal orders into the state system. This system is not flawless and can result in misses and delays in the registration of tribal protection orders. Elsewhere in the country, some tribes have entered into memoranda of understanding or other cooperative agreements with neighboring state jurisdictions so that the tribal protection orders are entered into the state and federal registries.

"This problem is not a local problem or unique to the Tulalip Tribes. The issue of lack of entry of tribal protection orders in state and federal databases is a national crisis," said Judge Richard Blake, President of the Board of Directors of the National American Indian Court Judges Association (NAICJA). Tribal courts and tribal court judges have been working for decades to gain direct access to state and federal protection order registries in order to enter their orders. "We had hoped that with the passage of the Tribal Law and Order Act of 2010 which mandated the federal government to provide access to federal databases that this critical gap in public safety would be closed. But here we are five years later and the U.S. Department of Justice and the FBI are still in violation of the statutory requirement that tribes be given direct access to the NCIC system. Our hearts go out to the victims and their families of the Marysville Pilchuck High School shooting at this very difficult time. Our sincere hope is that immediate direct access is granted to tribal courts to enter protection orders to prevent further harm and loss of life," said Blake.

NAICJA, established in 1969 and headquartered in Boulder, Colorado, is a non-profit 501(c)(3) organization which provides a national voice for the more than 332 American Indian and Alaska Native tribal justice systems in the United States and supports those systems by providing resource materials, information, technical assistance, and training.

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If you would like more information about this topic, please contact Judge Richard Blake, President, NAICJA Board of Directors at (530) 515-6245 or email at president@naicja.org.