IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

NATIONAL COUNCIL FOR ADOPTION, BUILDING ARIZONA FAMILIES on behalf of itself and its birth-parent clients, birth parents D.V. and N.L., and baby boy T.W. by and through his guardian ad litem PHILIP (JAY) MCCARTHY, JR.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:15-cv-00675
SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior, KEVIN WASHBURN, in his official capacity as Assistant Secretary of Indian Affairs, BUREAU OF INDIAN AFFAIRS, and the UNITED STATES DEPARTMENT OF THE INTERIOR,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFF NATIONAL COUNCIL FOR ADOPTION'S MOTION FOR SUMMARY JUDGMENT ON APA CLAIM

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PRELIMINARY STATEMENT

Plaintiff National Council For Adoption ("NCFA") moves for summary judgment on a straightforward question of law: Whether the Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146 (Feb. 25, 2015) ("2015 Guidelines") are invalid because they were issued in derogation of the notice-and-comment requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553. The APA's notice-and-comment requirements apply to the agency's "guidelines" on the implementation of the Indian Child Welfare Act ("ICWA"), notwithstanding their disingenuous label, because they dictate to state courts and other affected parties a set of unequivocal commands. The 2015 Guidelines are an abrupt departure from decades of policy dating back to ICWA's enactment—including the agency's own longstanding recognition that it lacks authority to issue commands to state courts—accomplished with the unchecked stroke of the agency's pen. And they fundamentally alter, for the worse, how state courts conduct child custody proceedings involving Indian children, not least because they command state courts to violate the constitutional rights of the children and parents who fall within ICWA's purview. Because the 2015 Guidelines are invalid as a matter of law, this Court should grant NCFA's motion, vacate the 2015 Guidelines, and grant such further relief as it deems proper.

STATEMENT OF UNDISPUTED MATERIAL FACTS

A. The Indian Child Welfare Act

1. In the mid-1970s, there was rising concern over "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). "Congress found that 'an alarmingly high percentage of Indian families [were being] broken up by the removal, often unwarranted, of their

children from them by nontribal public and private agencies.'" *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2557 (2013) (quoting 25 U.S.C. § 1901(4)). "This wholesale removal of Indian children from their homes prompted Congress" to enact the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963. 133 S. Ct. at 2557.

2. ICWA establishes "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." 25 U.S.C. § 1902.

3. An "Indian child" is defined 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." *Id.* at § 1903(4).

4. In the event that an Indian child is removed from a parent or Indian custodian, or voluntarily placed for adoption by a birth parent, ICWA establishes a hierarchy of preferences for the placement of the Indian child, which apply "in the absence of good cause to the contrary." *Id.* at § 1915(a), (b).

5. "In 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." *Id.* § 1915(a) (emphasis added).

6. For foster care or pre-adoptive placements, "a preference shall be given, *in the absence of good cause to the contrary*, to a placement with—(i) a member of the Indian child's extended family; (ii) a foster home licensed, approved, or specified by the Indian child's tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian

organization which has a program suitable to meet the Indian child's needs." *Id.* at § 1915(b) (emphasis added).

B. 1979 Guidelines

7. In 1979, in the immediate wake of ICWA's enactment, the BIA promulgated "Guidelines for State Courts; Indian Child Custody Proceedings" (the "1979 Guidelines") that were, on their face, "not intended to have binding legislative effect." 44 Fed. Reg. 67,584, 67,584 (Nov. 26, 1979).

8. The 1979 Guidelines recognized that "[p]rimary responsibility" for interpreting the bulk of ICWA "rests with the courts that decide Indian child custody cases." *Id.*

9. The 1979 Guidelines emphasized that "the legislative history of the Act states explicitly that the use of the term 'good cause' was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child." *Id.* "Nothing in the legislative history indicates that Congress intended this Department to exercise supervisory control over state or tribal courts or to legislate for them with respect to Indian child custody matters. For Congress to assign to an administrative agency such supervisory control over courts would be an extraordinary step." *Id.* "Assignment of supervisory authority over the courts to an administrative agency is a measure so at odds with concepts of both federalism and separation of powers that it should not be imputed to Congress in the absence of an express declaration of Congressional intent to that effect." *Id.*

10. As state courts applied ICWA in the ensuing decades, many held that the "good cause" exception to ICWA's placement preferences should include consideration of the child's best interests, including any bond or attachment the child had formed with her current caregivers. *See, e.g.*, *In re Adoption of F.H.*, 851 P.2d 1361, 1363–64 (Alaska 1993); *In re Appeal in Maricopa Cnty. Juvenile Action No. A-25525*, 667 P.2d 228, 234 (Ariz. Ct. App. 1983); *People*

ex. rel. A.N.W., 976 P.2d 365, 369 (Colo. App. 1999); *In re Adoption of T.R.M.*, 525 N.E.2d 298, 307–08 (Ind. 1988); *In re Interest of A.E., J.E., S.E., and X.E.*, 572 N.W.2d 579, 583–85 (Iowa 1997); *In re Interest of C.G.L.*, 63 S.W.3d 693, 697–700 (Mo. Ct. App. 2002); *In re Adoption of Baby Girl B.*, 67 P.3d 359, 370–75 (Okla. Civ. App. 2003); *In re Interest of Bird Head*, 331 N.W.2d 785, 791 (Neb. 1983); *In re Adoption of M.*, 832 P.2d 518, 522 (Wash. Ct. App. 1992).

11. In *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013), the Supreme Court held that ICWA's parental termination provisions were inapplicable where a non-Indian, Latina birth mother had voluntarily placed her Indian child for adoption with an adoptive couple that she chose, and the objecting biological father had never had custody of the child under applicable state law. *See* 133 S. Ct. at 2562. The Supreme Court noted that construing ICWA as applicable to such cases would raise "equal protection concerns." *Id.* at 2565. The Supreme Court further held that ICWA's hierarchy of placement preferences did not apply, because only Adoptive Couple had formally sought to adopt Baby Girl, and there was therefore "no preference to apply." *Id.* at 2564 (quoting 25 U.S.C. § 1915(a)).

C. 2015 Guidelines

12. On February 21, 2014, eight months after the Supreme Court issued its decision in *Adoptive Couple*, Defendant Washburn sent a letter to certain tribal leaders stating that, "[i]n response to the recent critical issues regarding ICWA, I have directed my staff to re-examine the *Guidelines* and respectfully request your input." Letter from Kevin Washburn, Asst. Sec'y, Indian Affairs, to Tribal Leaders (Feb. 21, 2014), at 1 (attached as Exhibit 1 to Declaration of Charles Johnson (July 29, 2015) ("Johnson Decl.")).

13. On February 25, 2015, the BIA, through the Department of the Interior, published the new Guidelines, which became "effective immediately" upon release. 80 Fed. Reg. at 10,147.

14. There was no published notice of proposed rulemaking or formal notice-and-comment period prior to the 2015 Guidelines' publication.

15. But the 2015 Guidelines open with a declaration that they were written "in light of written and oral comments received." *Id*. at 10,146. The 2015 Guidelines further state that "[t]he updated guidelines are issued in response to comments received during several listening sessions[and] written comments submitted throughout 2014," and that "[t]he Department reviewed and considered each comment in developing these revised Guidelines." *Id.* at 10,147.

16. In stark contrast to the 1979 Guidelines, the 2015 Guidelines are written as binding, mandatory rules.

17. First, the BIA removed the language contained in the 1979 Guidelines stating that they are not binding on state courts and, further, that they *could not* be binding on state courts because the BIA lacks the authority to dictate to state courts how to implement ICWA. *See, e.g.*, 44 Fed. Reg. at 67,584.

18. Second, the 2015 Guidelines instruct state courts in mandatory language.

19. The 2015 Guidelines prohibit state courts from considering the child's "best interests" in determining whether, as ICWA requires, there is "good cause" to deviate from ICWA's statutory placement preferences. According to the BIA, "[t]he good cause determination does not include an independent consideration of the best interest of the Indian child because the preferences reflect the best interests" of all "Indian child[ren]." *Id.* at 10,158. Specifically, when considering "good cause," a state court is now categorically prohibited from considering "ordinary bonding or attachment that may have occurred as a result of a placement or the fact that the child has, for an extended amount of time, been in another placement that does not comply with the Act." *Id.*

20. The 2015 Guidelines also prescribe, for example, "[w]hat actions *must* . . . State court[s] undertake to determine whether a child is an Indian child," and "[w]hen *must* a State court dismiss an action." 80 Fed. Reg. at 10,150 (emphases added). The 2015 Guidelines mandate that reasons for not following placement preferences "*must* be stated on the record or in writing," and that a determination not to follow placement preferences "*must be based*" on several enumerated considerations that appear nowhere in the text of the statute. *Id.* at 10,158 (emphases added).

21. The 2015 Guidelines also require state social service agencies and other state-licensed child placement agencies to perform certain actions. The 2015 Guidelines declare that "[a]gencies *must* ask whether there is reason to believe a child that is subject to a child custody proceeding is an Indian child. If there is reason to believe that the 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." *Id.* at 10,152 (emphases added). "Agencies *are required* to 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." *Id.* at 10,153 (emphasis added).

22. Further, the 2015 Guidelines purport to preempt state courts' rules of evidence and procedure in any child custody proceeding in which the child involved might be an "Indian child." The 2015 Guidelines instruct, for example, that a State "court *may not* issue an order effecting a foster care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody with the child's parents or Indian custodian is likely to result in serious harm to the child." *Id.* at 10,156 (emphasis added). The 2015 Guidelines then instruct

state courts as to "[w]ho may serve as a qualified expert witness," declaring a presumption that a "member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices" meets the "requirements for a qualified expert witness." *Id.* at 10,157.

23. The 2015 Guidelines also purport to repudiate state-court decisions limiting ICWA's application to circumstances where the child was at some point domiciled on Indian lands or otherwise had significant connections to the tribe. A number of state courts have recognized that application of ICWA to a child that has no political or cultural connection to a tribe would violate the Equal Protection Clause by irrationally discriminating among children based on their ancestry. *See, e.g.*, *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 520–22 (Cal. Ct. App. 1996); *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 715–23 (Cal. Ct. App. 2001); *cf. Adoptive Couple*, 133 S. Ct. at 2565 (noting that interpreting ICWA's parental termination provisions as applicable in any case where a child has an Indian ancestor, "even a remote one, . . . would raise equal protection concerns"). These cases form a variant of what has become known as the "Existing Indian Family Doctrine."

24. The 2015 Guidelines declare that "[t]here is no exception to application of ICWA based on the so-called 'existing Indian family doctrine.' Thus, the following non-exhaustive list of factors should not be considered in determining whether ICWA is applicable: the extent to which the parent or Indian child participates in or observes tribal customs, votes in tribal elections or otherwise participates in tribal community affairs, contributes to tribal or Indian charities, subscribes to tribal newsletters or other periodicals of special interest to Indians, participates in Indian religious, social, cultural, or political events, or maintains social contacts with other members of the tribe; the relationship between the Indian child and his/her Indian

parents; the extent of current ties either parent has to the tribe; whether the Indian parent ever had custody of the child; and the level of involvement of the tribe in the State court proceedings." 80 Fed. Reg. at 10,151–52. Thus, the 2015 Guidelines require that state courts apply ICWA to an "Indian" child even if the child has never been domiciled on Indian lands, is not an enrolled member, and has no connection to any Indian tribe other than blood.

D. National Council For Adoption And Its Members

25. NCFA has over 105 member adoption agencies with over 300 offices across the United States. Compl. ¶ 36; Johnson Decl. ¶ 5.[1] To become a member of NCFA, an agency must be a non-profit adoption agency and meet other ethical standards and licensing requirements. Compl. ¶ 36; Johnson Decl. ¶ 5. The member agencies of NCFA provide approximately 10% of NCFA's funding and are involved in helping NCFA carry out its initiatives at the grassroots level. Compl. ¶ 36; Johnson Decl. ¶ 5.

26. As a result of the 2015 Guidelines, NCFA has been forced to divert a significant portion of its limited resources (including both money and time) to educate its members about the new requirements imposed by the 2015 Guidelines. Compl. ¶ 37; Johnson Decl. ¶¶ 7–8.

27. For example, NCFA has spent more than $10,000 to educate its member agencies regarding compliance with the new requirements imposed by the 2015 Guidelines. These costs were incurred discussing the requirements of the 2015 Guidelines with member agencies, organizing a conference to train member agencies on how to comply with the 2015 Guidelines, producing numerous webinars to explain the requirements of the 2015 Guidelines, and speaking with the press. NCFA has diverted approximately 150 hours of its employees' time away from

[1] Since the filing of the Complaint, the size of NCFA's membership has increased from 60 to 105 member agencies, now encompassing over 300 offices nationwide.

their normal operations to educate the member agencies regarding compliance with the new Guidelines. *See* Johnson Decl. ¶ 8.

28. The 2015 Guidelines impose significant burdens (financial and otherwise) on NCFA's member agencies. Compl. ¶ 39; Johnson Decl. ¶¶ 9–13.

29. The placement practices and operations of NCFA's member agencies have been and will continue to be adversely affected by the 2015 Guidelines. Compl. ¶ 38; Johnson Decl. ¶ 11. To maintain their state licenses, NCFA's member agencies must comply with applicable laws, and many of NCFA's member agencies are attempting to comply with the 2015 Guidelines because those Guidelines are phrased in mandatory terms and were made effective immediately. Compl. ¶ 38; Johnson Decl. ¶ 11.

30. For example, for every prospective adoption, the 2015 Guidelines require NCFA's members to "conduct an investigation into whether the child is an Indian child." 80 Fed. Reg. at 10,152. "If there is reason to believe that the 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." *Id.* If the child is determined to be an "Indian child," the 2015 Guidelines further mandate that NCFA's member agencies then conduct a "diligent search" for an adoptive placement that fulfills ICWA's placement preferences. *Id*. at 10,157. Under the 2015 Guidelines, this effort must include "an explanation of the actions that must be taken to propose an alternative placement," to, among others, all "reasonably identifiable[] members of the Indian child's extended family members." *Id.*

31. Some of NCFA's member agencies have dedicated significant resources to conducting the "investigation" and "diligent search" required by the 2015 Guidelines. Johnson Decl. ¶ 13.

ARGUMENT

I. THE 2015 GUIDELINES VIOLATE THE ADMINISTRATIVE PROCEDURE ACT.

A party is entitled to summary judgment if it "shows that there is no genuine dispute as to any material fact" and that it "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The APA "confines judicial review of executive branch decisions to the administrative record of proceedings before the pertinent agency." *Shipbuilders Council of Am. v. U.S. Dep't of Homeland Sec.*, 770 F. Supp. 2d 793, 802 (E.D. Va. 2011). "As such, there can be no genuine issue of material fact in an APA action, and the legal questions presented in [an APA] action are therefore ripe for resolution on . . . summary judgment." *Id.* at 802–03. There are no material issues of fact in dispute relevant to NCFA's APA claim.

The 2015 Guidelines violate the APA because they are legislative rules that were issued without adherence to the notice-and-comment rulemaking procedures required by 5 U.S.C. § 553. The 2015 Guidelines should therefore be held unlawful and set aside.

A. The 2015 Guidelines Constitute Legislative Rules To Which The APA's Notice-And-Comment Requirements Apply.

Foundational principles of administrative law require that "legislative" or "substantive" rules be promulgated through notice-and-comment rulemaking. *See* 5 U.S.C. § 553. The APA's notice-and-comment requirements "are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to

the rule and thereby enhance the quality of judicial review." *Int'l United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

As a general matter, interpretive rules or general policy statements need not always be promulgated pursuant to notice-and-comment rulemaking. *See Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014). But an agency's "characterization of its statement as an exposition of its policy or an interpretation of [a] standard does not preclude [a court from] finding that it is something more." *Nat'l Knitwear Mfrs. Ass'n v. Consumer Prod. Safety Comm'n*, 666 F.2d 81, 83 (4th Cir. 1981). Out of various factors that courts may consider in deciding whether a rule is legislative, "[t]he most important factor concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities." *Nat'l Mining Ass'n*, 758 F.3d at 252. "A substantive or legislative rule," in contrast to an interpretive rule, "has the force of law, and creates new law or imposes new rights or duties." *Jerri's Ceramic Arts, Inc. v. Consumer Prod. Safety Comm'n*, 874 F.2d 205, 207 (4th Cir. 1989). An agency rule that professes to be a "guideline" is nonetheless a legislative rule if it "reads like an ukase." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000); *see also id.* (holding that a "guidance document" was a legislative rule because "[i]t commands, it requires, it orders, it dictates").

Regardless of their disingenuous title, the 2015 Guidelines plainly direct regulated parties, including state courts, in mandatory terms. *See Jerri's Ceramic Arts*, 874 F.2d at 208 ("[T]he language of the [agency] statement and related comments establishes that more is involved than mere 'interpretation.'"). Indeed, the plain language of an agency's "interpretive guidance" can serve as "conclusive evidence that the agency believes its statement imposes new duties that have the force of law." *Id.*

The 2015 Guidelines dictate in mandatory language to state courts, state social services agencies, and state-licensed foster and adoption agencies the manner in which they must address cases involving the custody and placement of "Indian children." The 2015 Guidelines use the word "must" 101 times. *See, e.g.*, 80 Fed. Reg. at 10,152 ("Agencies and State courts, in every child custody proceeding, must ask whether the child is or could be an Indian child and conduct an investigation into whether the child is an Indian child."); *id*. ("If there is any reason to believe the child is an Indian child, the agency and State court must treat the child as an Indian child, unless and until it is determined that the child is not a member or is not eligible for membership in an Indian tribe."); *id.* at 10,149 (state agency "must demonstrate that it conducted a diligent search to identify placement options that satisfy the placement preferences"). The 2015 Guidelines also tell state authorities what they "may not" do ten times. *See, e.g.*, *id*. at 10,156 ("In determining whether good cause exists, the court may not consider whether the case is at an advanced stage or whether transfer would result in a change in the placement of the child . . . .").

Consistent with the 2015 Guidelines' mandatory and prohibitory language, state courts and agencies believe the 2015 Guidelines to be binding, and the 2015 Guidelines are having immediate legal consequences. For example, some of NCFA's members are now treating the 2015 Guidelines as binding by carrying out the required "investigation" and "diligent search," at great cost to those member agencies. *See supra* pp. 9-10. NCFA and its member agencies are diverting significant resources and employee hours to comply with the 2015 Guidelines. *See supra* pp. 8-10. The 2015 Guidelines thus are affecting legal rights and obligations of Indian children, Indian parents, state courts, and both private and state-run child welfare agencies.

In addition, the BIA's significant departure from prior policy suggests that the 2015 Guidelines are legislative rules subject to notice-and-comment rulemaking. *See Jerri's Ceramic*

Arts, 874 F.2d at 208 ("The fact that the statement altered a long-standing position cannot readily be discounted."). The greater the departure from prior policy, "the less likely the change can be considered merely interpretive." *Id.*; *see also N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 764–66 (4th Cir. 2012) (holding that agency's suspension of existing regulations and reinstatement of prior regulations constituted legislative rulemaking subject to notice-and-comment requirements). Here, the 2015 Guidelines constitute a dramatic departure from over three decades of BIA policy. *See supra* pp. 3–8. That change in policy has had and will continue to have sweeping effects across the country. Thus, it must be considered a legislative rule that should have been promulgated pursuant to notice-and-comment rulemaking.

B. The Department and BIA Failed To Comply With the APA's Notice-And-Comment Requirements.

Although the 2015 Guidelines operate as legislative rules, regulated entities and interested parties, including NCFA and its members, were not afforded an opportunity to comment on the 2015 Guidelines as required by Section 553 of the APA. There is no question that the BIA failed to comply with the APA's notice-and-comment requirements. At most, the BIA sent a letter to certain tribal leaders requesting comments on the regulations, *see supra* p. 4, but that sort of truncated notice-and-comment procedure falls far short of the APA's requirements.

Section 553 requires that "[g]eneral notice of proposed rulemaking shall be published in the Federal Register," and after such notice is made, an agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b)–(c). An agency falls short of these requirements if it fails to consider an entire category of potential comments or otherwise restricts the notice-and-comment

process in a way that deprives interested persons a "meaningful opportunity" to comment. *N.C. Growers' Ass'n*, 702 F.3d at 769–70.

The BIA does not—and cannot—claim to have complied with the APA's notice-and-comment requirements. There was no published notice whatsoever in advance of the publication of the 2015 Guidelines. While certain tribal leaders were given notice of the potential change, thousands of other interested stakeholders, including NCFA and its members, were deprived of a meaningful opportunity to participate in the process that effected a sea change in the law. That glaring procedural defect alone requires that the 2015 Guidelines be set aside.

CONCLUSION

For the foregoing reasons, this Court should hold unlawful and set aside the 2015 Guidelines and grant summary judgment in NCFA's favor on its APA claims.

Date: July 30, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of July, 2015, I will cause to be electronically filed the foregoing with the Clerk of the Court for the Eastern District of Virginia using the CM/ECF system. I further certify that service on the following will be accomplished by electronic and first-class mail:

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