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Xavier Becerra
Secretary
Department of Health and Human Services
200 Independence Avenue SW
Washington DC 20201

Jeff Hild
Assistant Secretary
Administration for Children and Families
Department of Health and Human Services
300 C Street SW
Washington DC 20201

Re: Comments of United South and Eastern Tribes Sovereignty Protection Fund on Notice of Proposed Rulemaking Amending Adoption and Foster Care Analysis and Reporting System Regulations, RIN 0970-AC98

Dear Secretary Becerra and Assistant Secretary Hild:

The United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) is pleased to provide the Administration for Children and Families (ACF) with the following comments on the Notice of Proposed Rulemaking to amend the Adoption and Foster Care Analysis and Reporting System (AFCARS) regulations. The substantive regulatory amendments are found at 45 C.F.R. § 1355.44, which defines out-of-home care data file elements for reporting purposes. USET SPF appreciates this opportunity to provide comments on the proposed regulation amendments, and we offer our support for the proposed enhanced data collection requirements related to Indian Child Welfare Act (ICWA) procedural protections.

USET SPF is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.[1] USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

A. Support for Proposed Rule

Despite ICWA's enactment nearly 50 years ago, Tribal Nations continue to witness the uneven and inconsistent application of ICWA's provisions across state systems. This has caused the avoidable break up

[1] USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mi'kmaq Nation (ME), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA), and Wampanoag Tribe of Gay Head (Aquinnah) (MA).

of Native families and placement instability for Native children—the very problems ICWA was intended to remedy. Currently, ICWA's operation in state courts is opaque due to a lack of data tracking implementation of its procedural protections. USET SPF strongly supports the proposed regulations' use of data collection to facilitate consistent and robust implementation of ICWA. Indeed, USET SPF has pushed for more data collection on the United States' fulfillment of its trust and treaty obligations across the federal government, and collection of ICWA data is in alignment with this priority.

At the same time, the constitutionality of ICWA—and the constitutionality of the United States' ability to deliver on its trust and treaty obligations to Tribal Nations and Native people more broadly—has come under attack in recent years. USET SPF strongly supports the proposed regulations' collection of data on how ICWA functions, as it may prove useful in any future constitutional attacks against ICWA.

B. Consistent and Robust Implementation of ICWA

The proposed amendments to the regulations call for the collection of significant data elements from state agencies on their implementation of ICWA's enumerated procedural protections. This data collection serves important purposes for implementation. It would shed light on which state agencies are out of compliance and which ICWA procedural protections are not being implemented, allowing the federal government and states to direct resources, training, and pressure to the most necessary areas. Gathering data on non-compliance would also help ICWA advocates pursue legal and policy avenues to force states that have resisted ICWA most ardently to shift their practices to better align with their sister states. Last, the mere act of forcing state actors to attest to whether they complied with each of ICWA's procedural protections is likely to itself encourage compliance.

The proposed regulations would collect many new data elements. For example, the new rule proposes to collect data from states on whether they inquired with certain enumerated individuals about a child's status as an "Indian" as defined in ICWA, as well as data on when the state agency first discovered that a child is or may be protected by ICWA. This is particularly important, as Native children and families have frequently been denied ICWA's protections because a court or agency failed to determine a child's Native status. Not only can this failure result in Native children losing rightful protection under ICWA, but it can also create insufficient service provision, delay or repetition in court proceedings, and placement instability for the affected child. By requiring a state agency to answer whether its staff inquired with specific individuals about if a child may qualify under ICWA, a state agency is more likely to *actually* inquire with those individuals. USET SPF supports the collection of this data and believes it will help ensure timely identification of children protected under ICWA across state agencies.

ACF also proposes a requirement for states to report whether a request to transfer to Tribal court was received, and whether there was a denial of the request. In the past, in comments USET SPF submitted to the Bureau of Indian Affairs (BIA) regarding ICWA implementation guidance, we noted that state courts have often inappropriately found "good cause" to not transfer a case to Tribal court. Current guidelines also state that, in BIA's experience, the "good clause" exception has been "used to deny transfers for reasons that frustrate the purposes of ICWA." USET SPF believes that capturing this information will reveal the extent to which this practice is still happening. Understanding why and how often transfers are being denied would provide valuable insight into state and Tribal courts and welfare systems, including areas where more extensive resources or training may be beneficial.

The proposed rule would also require states to report which potential placements met the placement preferences of ICWA and were willing to accept placement for the child. And the rule would require information as to whether the state agency made active efforts to prevent the breakup of the Native family in

accordance with ICWA. USET SPF concurs with the importance of these data points, as available information indicates that state agencies inconsistently seek ICWA compliant placements and only sometimes provide active efforts.

However, as drafted, the regulations do not request a state provide a qualitative description of its actions or decisions under ICWA, instead asking only "yes" or "no" questions. For example, state agencies are not required to provide their reasoning for denying a request to transfer a case to Tribal court or for denying an available and ICWA compliant placement as "unsuitable." Additionally, the regulations do not require state agencies to describe the active efforts they claim to have provided or to describe what efforts they made to locate ICWA compliant placements. Without this information, the data collected is of limited use, and we, therefore, urge ACF to consider requesting this qualitative information. However, we note the need to protect confidential and sensitive information in the process of data collection.

ICWA's primary purpose is to keep Native children connected to their families, Tribal communities, and cultures. Yet, as of 2015, more than 50% of adopted Native children were placed in non-Native homes. We agree that collecting more data related to ICWA's procedural protections will help enable federal agencies and states to target policy development, training, and technical assistance to specific areas of need, and we believe such data collection could also inform Congress of whether legislative action is necessary. USET SPF is strongly supportive of ACF's proposed amendments to require additional information from state agencies on implementation of each of ICWA's procedural protections.

C. Potential Future Constitutionality Attacks

Within a 10-year span, we have seen ICWA come under attack twice in the U.S. Supreme Court: first in *Adoptive Couple v. Baby Girl,* 570 U.S. 637, 656 (2013), and second in *Haaland v. Brackeen*, 599 U.S. 255 (2023). Plaintiffs are also making equal protection arguments in other contexts, challenging Tribal Nations' and Native peoples' beneficial treatment in furtherance of the United States' trust and treaty obligations in the context of the Indian Gaming Regulatory Act, government contracting, and other areas.

The proceedings in these cases and the language in the Court's opinions worryingly indicate that we have not seen the end of equal protection and other constitutional attacks. The federal government's trust and treaty obligations derive from centuries of taking our lands and resources and impeding our sovereign authorities, and thus the federal government has a duty to defend its own ability under its own Constitution to deliver on those obligations.

Though the U.S. Supreme Court said in *Morton v. Mancari,* 417 U.S. 535, 555 (1974), that a hiring preference for Native people within the BIA was a non-suspect political classification rather than racial discrimination under the Constitution's equal protection requirements, we are increasingly seeing attempts to narrow that decision's application—including in the context of ICWA. Those seeking to limit *Mancari* argue government actions taken on behalf of Tribal Nations or Native people are only a non-suspect political classification under limited circumstances. Some have argued this special political status applies only when directed at enrolled Tribal citizens. Others have argued it only applies when taken on behalf of Native people or activities occurring on or near reservations. Others have argued it applies only when different treatment is tied to Tribal self-government. And still others have argued it only applies when dealing with uniquely Indian interests—such as Native land, Tribal or communal status, or culture.

These limitations are not reflective of *Mancari*, its progeny cases, the reasoning in these decisions to support our special political status, or our lived history and reality. We are opposed to any attempt to limit *Mancari* such that the United States is not able to deliver on aspects of its trust and treaty obligations owed to Tribal

Nations and Native people. The United States' courts may not use the United States' own legal concept of equal protection embedded in a governing document it crafted for itself to limit its ability to deliver on obligations it owes to us. *Mancari* must stand whole and intact.

Yet, to bat down Plaintiffs' arguments without requiring the Court to issue a narrowed equal protection test, or if any of these narrowing efforts were to wrongly succeed and then be held up against ICWA, we would be in the best position to defend ICWA if we could demonstrate that ICWA already operates narrowly. ACF might consider collecting additional data that could be used to defend the constitutionality of ICWA.

Importantly, we also call on ACF to remove all references to "race" when referring to Native children and Native placements covered by ICWA, especially in 45 C.F.R. § 1355.44(b)(7)(i), (e)(11)(i), (e)(16)(i), (h)(5)(i), and (h)(10)(i). ICWA's procedural protections do not apply to Native children on the basis of race, and it is important ACF not unintentionally imply otherwise.

Conclusion

USET SPF appreciates the opportunity to provide comments in support of the proposed regulations, and we hope our comments have provided additional context on the necessity of improved data collection regarding ICWA implementation. While there are countless stories of the success of ICWA over the last decades, more work remains to ensure it is protected and its purpose is fully realized. For more information or further discussion, please contact Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at: Lmalerba@usteinc.org or Katie Klass, USET/USET SPF General Counsel, at: kklass@usetinc.org.

Sincerely,

Kirk Francis
President

Kitcki A. Carroll
Executive Director