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PUEBLO OF ISLETA

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By E-MAIL: *CBComments@acf.hhs.gov*

Ms. Kathleen McHugh
Director, Policy Division
Department of Health and Human Services
Administration for Children and Families
330 C Street S.W.
Washington, D.C. 20024

Re: RIN 0970-AC72; Advanced Notice of Proposed Rulemaking, Adoption and Foster Care Analysis Reporting System.

On behalf of the Pueblo of Isleta ("Pueblo"), we appreciate this opportunity to comment on the Advanced Notice of Proposed Rulemaking ("ANPRM") regarding the Adoption and Foster Care Automated Reporting System ("AFCARS") data elements related to the Indian Child Welfare Act of 1978 ("ICWA"). The Final AFCARS Rule ("Final Rule") was published in the Federal Register on December 14, 2016, and requires collection of state-level data on American Indian and Alaska Native children in state child welfare systems. The Final Rule is a significant and positive step forward in ensuring that the federal government fulfills its trust responsibility to Indian tribes and recognizing the agency's role with respect to ICWA compliance.

The Pueblo is deeply concerned that for a second time since the Final Rule was promulgated, the Administration for Children and Families ("ACF") is seeking comments on the inclusion of the ICWA Data Elements in AFCARS. Given how the Federal Register notices related to the Final Rule have been drafted there appears to be a focused effort to obtain public comments that would justify eliminating the ICWA Data Elements as overly burdensome and/or outside of ACF's authority. For example, the Federal Register Notice issued by ACF seeking to delay implementation of the Final Rule—which was issued the same day as the ANPRM—states that

> [t]he scope and complexity of data elements related to ICWA was also a concern. We note that most of the ICWA-related data elements in the [Final Rule] are also not tied to statutory reporting requirements in title IV-E or IV-B. Rather, they were finalized to be consistent with the Department of the Interior's Final Rule on ICWA . . . .

See Adoption and Foster Care Analysis and Reporting System, 83 Fed. Reg. 11449 (Mar. 15, 2018) (to be codified at 45 CFR pt. 1355).

Adoption and Foster Care Analysis and Reporting System, 81 Fed. Reg. 90524 (Dec. 14, 2016) (to be codified at 45 C.F.R. pt. 1355).

Adoption and Foster Care Analysis and Reporting System, 83 Fed. Reg. 11450, 11451 (Mar. 15, 2018) (to be codified at 45 C.F.R. pt. 1355).

The current effort by ACF to undermine the Final Rule is not supported by the record in the Final Rule and completely ignores the efforts that ACF undertook to not only examine its legal authority but also seek public comment and consult with Indian tribes before issuing the Final Rule.

Congress enacted ICWA in response to "an alarmingly high percentage of Indian families [that] are broken up by the removal, often unwarranted of their children . . . an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions."[4] Unfortunately, since ICWA's enactment over 35 years ago, Indian children are still disproportionally represented in state foster care and adoptive proceedings across the country. Although comprehensive data is still lacking, 2007 Pew survey found the presence of Indian children in foster care is 1.6 times greater than the expected rate. More significantly, states with large Native American populations have even higher disproportional representation of Indian children in foster care.[5] In order to fully appreciate this disproportionality we must have better data relating to Indian children in state systems. Requiring states to report on specific ICWA data elements can also have a positive impact on ensuring ICWA compliance and consistency across state agencies.

As discussed below, the Pueblo requests that ACF move forward with implementation of the Final Rule without changes to ICWA data collection.

I. ACF has the authority to include ICWA data elements in AFCARS.

Section 479 of the Social Security Act ("SSA") and foundational Indian law principles clearly support ACF's authority to collect ICWA related data as part of AFCARS. The Final Rule reflects a recognition that the absence of data relating to ICWA may adversely impact the proper implementation of ICWA by state agencies and courts. In re-examining this matter, ACF has exercised its authority in a considered manner based on established legal principles.[6] The inclusion of ICWA data in AFCARS is also timely given that the Department of the Interior published regulations implementing ICWA in 2016.[7] It is also worth noting that during the webinar held on

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[4] 25 U.S.C. § 1901(4).

[5] "Time for Reform, A Matter of Justice for American Indian and Alaska Native Children," at 5 NICWA (accessed May 31, 2018), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/foster_care_reform/nicwareportpdf.pdf.

[6] The Administrative Procedures Act ("APA") explicitly contemplates changes over time in Federal agency rules, by stating that "'rulemaking'" means agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). And in accordance with the APA, only a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy. *See e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (". . . we fully recognize that '[regulatory] agencies do not establish rules of conduct to last forever' . . .and that an agency must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances. *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968).)'". *See also, FCC v. Fox TV Stations*, 556 U.S. 502 (2009) (involving a change to a 25-year old FCC policy, the Court noted that the APA requires no heightened review—beyond the usual "arbitrary and capricious" review—for an agency's change in policy.).

[7] Indian Child Welfare Proceedings, 81 Fed. Reg. 38778 (Jun. 14, 2016) (to be codified at 25 C.F.R. pt. 23).

April 25, 2018, ACF representatives stated that ACF has broad authority to collect any data on children under the IV-E program.[8]

Pursuant to Section 479 of SSA, the Secretary of the Department of Health and Human Services ("Secretary") is required to promulgate final regulations to collect data from states related to adoptive and foster care children in order for states to receive federal funding for title IV-E eligible programs.[9] The resulting AFCARS regulations requires states to report on a multitude of data elements relating to a child's foster and adoptive care placements by state agencies,[10] but until 2016 were silent with respect to the collection of ICWA specific information. Although some states voluntarily collect information related to race (i.e., whether a child involved in a custody proceeding is an Indian child) this classification deviates from existing Federal law relating to Indians and results in inconsistent, inaccurate, and incomplete reporting across states on the number of Indian children in state custody and little to no reporting on whether states have complied with the statutory mandates of ICWA for Indian children.

Nothing in Section 279 of the SSA precludes the agency from including ICWA specific data elements in AFCARS. Rather, Congress directed and gave the Secretary specific authority to determine how to reliably and consistently collect "comprehensive national information with respect to . . . the demographics of adoptive and foster children and their biological and adoptive or foster parents," including the number, status and characteristics of such children placed in or removed from foster care or adoptive placements in and out of state, and who are victims of sex trafficking.[11] And, in implementing Congress' directive it is appropriate and within the Secretary's discretion to determine what statutory terms like "demographics" and "characteristics" mean "with respect to adoptive and foster children and their biological and adoptive or foster parents."

In determining the meaning of these terms, the Secretary must take into account the special relationship between the United States and Indian tribes and ICWA, an existing Federal law, that requires states to follow specific processes and procedures for Indian children in foster care or who will be put in adoptive placements. The United States Supreme Court has long recognized that "Indian tribes are 'distinct, independent political communities'"[12] in which it is "undisputed" that a trust relationship exists between the United States and Indian tribes.[13] Congress has "plenary

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[8] Three limitations or constraints to the collection of data were provided verbally by ACF presenters—that the data collection (1) cannot divert resources unnecessarily, (2) needs to be reliable and (3) needs to be capable of being reported consistently. As discussed throughout this submission, the ICWA Data elements do not unnecessarily divert resources because it will help the federal government, tribes and states monitor ICWA compliance to improve services to ensure compliance with Congressional mandate to protect Indian children. In addition, the data elements are broken down into discrete questions, rather than broad categories, to ensure that the reporting is reliable and consistent.

[9] 42 U.S.C. § 679(c).

[10] 45 C.F.R. § 1355.40 and appendices.

[11] 42 U.S.C. § 679(c)(3).

[12] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

[13] *See United States v. Long* 324 F.3d 475, 479-80 (7th Cir. 2003) ("[c]ourts have attributed Congress's plenary powers over Indian relations to the Indian Commerce Clause . . . and to Congress's protectorate or trust relationship with the Indian tribes") (citing *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989), and *United States v. Kagama*, 118 U.S. 375, 383-84 (1886)); *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2324-2325 (2011) ("We do

power" to deal with Indians tribes and that includes the plenary authority to legislate with regard to individual Indians.[14] And, "[o]n numerous occasions [the Supreme] Court specifically has upheld legislation that singles out Indians for particular and special treatment."[15] For example, in *Morton v. Mancari*, the Supreme Court held that a statute providing a hiring preference and a policy providing a promotion preference at the Bureau of Indian Affairs to members of federally recognized Indian tribes did not violate either the Equal Employment Opportunity Act of 1972 or the Due Process Clause of the Fifth Amendment, because such a preference was not racial, but rather it turned on the special legal and political status of Indians[16] and was both "reasonable and rationally designed to further Indian self-government."[17]

Since *Mancari*, the Supreme Court has consistently rejected challenges to statutes that singled out Indians for special treatment.[18] In *United States v. Antelope*, the Court established that *Mancari* stands more broadly for "the conclusion that federal regulation of Indian affairs is not based on impermissible racial classifications," but is instead "rooted in the unique status of Indians as a separate people with their own political institutions."[19] Applicable here, in 1978 Congress enacted ICWA to protect Indian children in foster and adoptive care. As noted above, ICWA requires specific processes and procedures that must be followed for "Indian child[ren]"[20] involved in a state "child custody proceeding."[21] These include for example, special placement preferences for foster care or adoption, provisions that require notification to parents and Indian tribes, heightened standards for ensuring reunification and termination of parental rights. ICWA's protections for Indian children and families are now widely considered the "gold standard" among national child welfare organizations. *See* Brief of Casey Family Programs, *et al.* as *Amici Curiae*

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not question 'the undisputed existence of a general trust relationship between the United States and the Indian people'" (citation omitted)).

[14] *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 837 (1982); *see also United States v. Lara*, 541 U.S. 193, 200 (2004) ("The central function of the Indian Commerce Clause, we have said, is to provide Congress with plenary power to legislate in the field of Indian affairs" (internal quotation and citation omitted)).

[15] *Mancari*, 417 U.S. at 554-55 (collecting cases).

[16] *See generally Morton v. Mancari*, 417 U.S. 535 (1974).

[17] *Id.* at 555.

[18] *See, e.g.*, *Fisher v. Dist. Ct. of Sixteenth Jud. Dist. of Mont.*, 424 U.S. 382, 390-91 (1976) (holding that exclusive tribal court jurisdiction over adoption proceedings involving Indians is not racial discrimination); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 579-80 (1976) (holding that tax immunity for reservation Indians is not racial discrimination); *United States v. Antelope*, 430 U.S. 641, 646 (1977) (holding that statute bringing crimes committed by Indians on Indian reservations under Federal jurisdiction did not violate due process or equal protection).

[19] *Antelope*, 430 U.S. at 646 (internal quotation and citation omitted).

[20] 25 U.S.C. § 1903(4), "Indian child" means 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.

[21] *See id.* at 1903(1) "child custody proceeding" shall mean and include—(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated; (ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship; (iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and (iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Supporting Respondent, Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013), 2013 WL 1279468 at *1 (filed Mar. 28, 2013) ("[I]n the Indian Child Welfare Act, Congress adopted the gold standard for child welfare policies and practices that should be afforded to all children . . . [I]t would work serious harm to child welfare programs nationwide . . . to curtail the Act's protections and standards.").

In order for the Secretary to collect "comprehensive information" with respect to the "demographic characteristics" of adoptive and foster children and "their biological and adoptive or foster parents," there must be specific data elements that incorporate the unique mandates of ICWA as applied to Indian children. And, as discussed above, Federal law supports and permits the Secretary to create and include specific data elements in AFCARS that relate to Indian children and implementation of ICWA. Retaining ICWA data elements in AFCARS also brings the agency's oversight and integration of ICWA full circle. In 1994 Congress amended Section 422 of the SSA to require all title IV-B state plans to "contain a description, developed after consultation with tribal organizations . . . in the State, of the specific measures taken by the State to comply with the [ICWA]."[22] Most state agencies that receive title IV-E funding for children receiving foster care and adoptive care also receive title IV-B funding. Title IV-B funding assists states in developing programs aimed to support reunification efforts to keep families together. As a child moves through the state system, states are often accessing state programs that receive title IV-B and or title IV-E funding. Thus, title IV-B and title IV-E can be and often are interconnected.[23] The Final Rule will help streamline and strengthen states' ability to comply with ICWA and their title IV-B approved plans.

II. There is no need to question the accuracy of the estimated burden for the collection of information in the Final Rule.

The Final Rule's inclusion of ICWA data elements into AFCARS is not only a positive achievement but necessary to allow ACF to properly carry out its statutory responsibilities and trust obligations. The Final Rule acknowledges that in order for the Secretary to collect "comprehensive information" with respect to the "demographic characteristics" of adoptive and foster children and "their biological and adoptive or foster parents," specific data elements that incorporate the unique mandates of ICWA, as applied to Indian children, must be included. Moreover, the Final Rule thoroughly responded to comments on both the benefits and burdens of the proposed regulatory action.

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[22] 42 U.S.C. § 622(b)(9).

[23] Incorporating ICWA data elements into AFCARS maintains consistency in Congress' statutory schemes governing children in foster and adoptive care and avoids absurd results. Given the lack of legislative history relating to the 1994 amendment of title IV-B, it is reasonable for the Secretary to infer that Congress desired states to adhere to ICWA when implementing title IV-B. Moreover, it does not follow that Congress would intend states to follow ICWA only for purposes of reunification efforts under title-IV-B and ignore ICWA when receiving funding for foster or adoptive placements programs until title IV-E. ICWA is intended to provide statutory protections not only for reunifications of Indian families, but also when Indian children are placed in foster or adoptive care placements. To give one aspect of ICWA more emphasis than another aspect would be absurd. *See United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 542–543 (1940) (holding that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.).

As with any new rule or requirement, there will always be a heavier burden initially when a rule requires the collection of information that has not been previously required, but this burden will be reduced significantly once states and tribes are able to modify their case collection systems to report the new data. In the 2015 NPRM and 2016 SNPRM various interested parties submitted comments regarding the accuracy of burden estimates associated with AFCARS data collection. In response, the Final Rule created and explained a new estimate for the burdens associated with changing data systems and collecting and reporting data. The new burden estimates are sufficient and reasonable. For ACF to solicit information relating solely to the potential burden of the regulations without also soliciting information and comments on its potential benefits is also arbitrary, capricious, an abuse of discretion, and not in accordance with the AFCARS authorizing statute.

In any event, a number of states have enacted state companions to ICWA and already collect much of the information being sought by the Final Rule even if their electronic case file systems may need to be updated so that the information can be electronically pulled for AFCARS purposes. *See, e.g.,* Minn. Stat. §§260.751-260.835 (2015); Neb. Rev. Stat. §§43-1501-43-1517 (2015); Iowa Code Ann. §§232B.1-232B.14 (2003). Other states have enacted laws that clearly reflect the voluntary adoption of ICWA as official state policy. *See, e.g.,* Ind. Code Ann. § 31-28-6-1 (2012) (stating "[t]he public child placing agency in the sending state shall oversee compliance with the provisions of the Indian Child Welfare Act"); La. Child. Code Ann. art. 1629 (2010) (same); Ohio Rev. Code Ann. § 5103.20 (2006) (same). As such, for many states the overall burden of collecting the ICWA data elements will not be high. For those states that do not have state based ICWA policies, the data elements will assist not only in ensuring consistent and uniform reporting, but in complying with the mandates of ICWA.

III. The ICWA data elements are necessary for consistency and to allow the agency to properly carry out its functions.

The ICWA data elements are critical to ensuring that states are consistently and uniformly implementing the statutory mandates of ICWA. ACF received comments for both the 2015 NPRM and the 2016 SNPRM regarding the specific data elements to ensure quality data collection in keeping with the AFCARS authorizing statute. As discussed above and documented in prior comments, the data to be collected ensures that ACF is implementing its statutory obligations consistent with ICWA and the trust responsibility. The Final Rule will produce necessary information, previously missing from AFCARS, which will guide, clarify, and improve outcomes for Indian children and families in state child welfare systems.

Any reporting on Indian children and ICWA compliance is currently voluntary. Until the Final Rule is implemented, there are not any standards for reporting on ICWA compliance. In a 2005 Report, the General Accountability Office found that to improve the usefulness of data and information collected regarding ICWA in Child and Family Review Services reports submitted by states, ACF should require states to provide more reporting on ICWA.[24] The Final Rule, which

[24] Indian Child Welfare Act, *Existing Information on Implementation Issues Could be Used to Target Guidance and Assistance to States,* GAO 05-290 at 5 (2005) (accessed May 31, 2018) https://www.gao.gov/new.items/d05290.pdf

reflects the Department of the Interior's national standards for ICWA compliance, will aid in ensuring consistent ICWA reporting by all 50 states. Thus, the ICWA data elements will comport with AFCARS goal of providing "[n]ational standards . . . for each statewide data indicator. [And b]y measuring state performance against national standards on statewide data indicators, the Children's Bureau can assist states in continuously monitoring their performance on child outcomes and better understand the entirety of their child welfare systems."[25]

IV. ACF can minimize the burden of the collection of information by providing technical assistance.

Rather than change the Final Rule, ACF should aggressively promote and provide technical assistance to state agencies that need assistance in implementing the Final Rule. ACF could also conduct an evaluation of state case management systems to determine if there are technological improvements or alternative mechanisms that would allow for a streamlined approach to data sharing between states and ACF. Lastly, ACF could provide limited grant funding to aid state agencies in updating their case management systems to allow for ICWA data collection.

V. Conclusion.

When ICWA was passed in 1978, it restored hope that tribes would have a greater role in the protection of their children, their greatest resource for the future. The Final Rule will close the gap on much needed data relating to national implementation and compliance with ICWA. Requiring comprehensive information across states on Indian children will lead to better practices and ultimately greater compliance with this ICWA. With this data federal, state and tribal governments can better understand how many Indian children, and at what stage in their case, are receiving ICWA protections. By understanding how and when ICWA is utilized, appropriate steps can be taken to reduce disproportionality and to achieve greater permanence for Indian children, their families and tribes. As such, the Pueblo opposes any changes to the Final Rule that would modify or eliminate the ICWA data elements.

Thank you for consideration of these written comments.

Sincerely,

Pueblo of Isleta
J. Robert Benavides
Governor

[25] Child and Families Services Reviews, Procedures Manual at 5 (Nov. 2005), (accessed May 31, 2018 TIME) https://www.acf.hhs.gov/sites/default/files/cb/round3_procedures_manual.pdf