



# USET

SOVEREIGNTY PROTECTION FUND

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*Transmitted electronically to:  
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June 14, 2024

Bryan Newland  
Assistant Secretary for Indian  
Affairs  
Department of the Interior  
1849 C St NW  
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Jeff Hild  
Principal Assistant Secretary  
Administration for Children  
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Department of Health and  
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300 C St NW  
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Gina Allery  
Deputy Assistant Attorney  
General  
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Environment and Natural  
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950 Pennsylvania Ave NW  
Washington, DC 20530

Dear Assistant Secretary Newland, Principal Deputy Secretary Hild, and Deputy Assistant Attorney General Allery,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the request for Tribal consultation from the Departments of the Interior (DOI), Health and Human Services (HHS), and Justice (DOJ) on joint agency efforts to strengthen implementation of the Indian Child Welfare Act (ICWA). USET SPF appreciates this opportunity to provide the agencies with comments and recommendations on this critical topic.

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.<sup>1</sup> 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.

Despite ICWA's enactment nearly 50 years ago, Tribal Nations continue to witness the uneven, inconsistent, and often inadequate application of ICWA's provisions across state systems. This has caused the avoidable breakup of Native families and placement instability for Native children—the very problems ICWA was intended to remedy. Currently, ICWA's operation in state systems is opaque due to a lack of data tracking implementation of its procedural protections, many states do not comply with all of the

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<sup>1</sup> 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 the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

*Because there is Strength in Unity*

requirements of ICWA, and many Tribal Nations lack the resources necessary to monitor state compliance and exercise all of our rights and responsibilities under ICWA. We offer the following comments and recommendations in the hope that ICWA implementation will be improved to protect our children, families, and communities.

### **Enhanced Child Welfare Resources for Tribal Nations**

Tribal child welfare agencies and Tribal courts require increased and sustained funding and resources for monitoring state ICWA activities and compliance, intervening and assisting with placement identification in state cases, and accepting Tribal jurisdiction over cases. Often, Tribal Nations lack the resources necessary for tracking ICWA-eligible children in state systems. Since state agencies and courts frequently fail to determine a child's eligibility under ICWA and provide the required notifications, resulting in the denial of ICWA protections, increased resources for monitoring activities would enhance Tribal Nations' ability to protect our children and families. Additionally, when a Tribal Nation participates in a state case related to one of its children, that state welfare agency often leans on the Tribal Nation to identify and vet potential ICWA compliant placements—which can be a costly endeavor. Further, some Tribal Nations currently lack the infrastructure necessary to accept Tribal jurisdiction over ICWA cases. These different priorities and responsibilities all require substantial financial and workforce resources and investments in building Tribal institutions and capacity. Many Tribal Nations are, therefore, forced to prioritize certain activities over others due to a lack of comprehensive resources for child welfare.

Additionally, the federal resources that flow to Tribal Nations must reflect our status as inherently sovereign governmental entities owed trust and treaty obligations, including federal resources related to child welfare. As sovereign governments with a responsibility to protect our children, families, and communities, we require access to resources on par with other governmental entities. The United States has trust and treaty obligations and responsibilities to Tribal Nations to provide for the health and welfare of our citizens and communities, and providing appropriate resources for Tribal child welfare programs is an important part of those obligations. Not only should funding for Tribal Nations' child welfare activities be significantly increased, but the funding should be non-competitive and eligible for self-governance contracting and compacting and other funding flexibility mechanisms in accordance with Executive Order 14112. In an atmosphere where Tribal Nations are already struggling with funding and human capital, forcing us to compete with each other for limited resources in the form of grant dollars, which also often come with overly burdensome reporting and administrative requirements, is a failure of the federal government's trust and treaty obligations. Tribal Nations require the flexibility to administer funding, programs, and services in the ways our communities need, and we require substantially increased resources to do that work.

### **Technical Assistance in ICWA Compliance for States**

Beyond increasing direct resources and funding for Tribal Nations, Congress and the Administration should prioritize enhancing resources for providing states technical assistance and education to increase their ICWA compliance. Some states have established information centers or "help desks" on Indian child welfare as a place for case workers, court officials, and others seeking guidance on ICWA notification and compliance requirements. Resources should be available for state and Tribal entities to collaboratively develop resource centers with experts on call to explain ICWA's requirements, including any relevant interplays with state policies, and to facilitate coordination between the appropriate parties.

Further, some state and local agencies have developed and promulgated written materials reminding stakeholders and officials to inquire about ICWA eligibility and follow certain steps when ICWA is triggered, and some have included questions regarding ICWA eligibility in all relevant court documents. When developed in close coordination with Tribal Nations, USET SPF supports efforts like these to promote awareness of and compliance with ICWA. We call on the federal agencies to make clear to state welfare agencies and courts that their ICWA obligations include identifying ICWA-compliant placements, in

consultation with Tribal Nations, and we urge the necessary resources be provided to them for that purpose.

### **Establish and Enforce Enhanced Data Collection on State ICWA Compliance**

At present, there is no reliable or standardized mechanism for detecting state failures in following ICWA's mandates. USET SPF, along with numerous Tribal Nations and organizations, has long called for more data collection on ICWA implementation and compliance. It is unquestionable that many state and local entities are currently non-compliant with ICWA in a variety of ways, but the absence of a mandatory, standardized mechanism for monitoring compliance complicates advocacy efforts in this space. Requiring state agencies and court systems to report on the steps they took to satisfy certain ICWA requirements would shed light on which state agencies are out of compliance and which ICWA procedural protections are not being implemented. This data would allow the federal government and states to direct resources, training, and oversight to the most necessary areas.

USET SPF recently submitted comments to HHS on proposed amendments to the Adoption and Foster Care Analysis and Reporting System (AFCARS) regulations. The proposed amendments would compel state agencies to collect several new data elements related to ICWA compliance, and USET SPF offered our strong support for these amendments. 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. We also believe the added data collection will itself increase ICWA compliance, as it will require staff to affirmatively mark whether or not they met each of ICWA's procedural requirements in a particular case.

### **Establish Best Practices for ICWA Implementation and Tribal-State Coordination**

Inconsistent application of ICWA's requirements could be greatly mitigated by increased collaboration between Tribal Nations and state agencies and courts. In addition to providing resources for collaboratively-operated ICWA information centers, as discussed above, the federal government should issue guidance providing best practices for cultivating relationships between state entities and Tribal Nations on child welfare. This should also include states establishing, in close coordination with Tribal Nations, state-level ICWA best practices and compliance plans that meet all current federal and state mandates and promote Tribal-state collaboration in ICWA application. Creating and memorializing agreed-upon ICWA compliance goals and practices at the state level will help hold stakeholders accountable and promote understanding of ICWA's mandates across state systems. As states will often rely on Tribal Nations for assistance in identifying appropriate placements, and as identification of an ICWA-eligible child often requires knowledge of and coordination with Tribal Nations, the mere act of collaboratively creating shared goals and practices will lend itself to closer relationships and better ICWA implementation and outcomes. This may prove particularly effective in states like those in the USET SPF region where the Tribal presence in state systems is often minimized or overlooked due to our smaller populations.

### **Federal Guidance on Placement Across State Boundaries**

We urge the federal agencies to provide guidance regarding coordination between multiple states and Tribal Nations on placement of ICWA-eligible children across state boundaries. Tribal Nations recognize and care for our citizens regardless of where they live. A child may be the subject of a state case, but an ICWA-compliant placement—or even the child's Tribal Nation itself—may be located outside that state. In coordinating between states on such a placement, including under the processes of the Interstate Compact on the Placement of Children, ICWA still applies. ICWA compliance can get lost in the complicated process of coordinating placement across state boundaries, and this is unacceptable.

### **Require ICWA Compliance and Cultural Competency Training for Child Welfare Professionals**

Inconsistent application of ICWA's requirements across state systems is evidence that training on the law,

including its history and importance, should be required for all professionals involved with child welfare as a condition of federal child welfare funding. This should include front-line staff at child welfare agencies, attorneys involved in child welfare cases, judges, and Tribal leadership and professionals. ICWA-eligible children and families are too often wrongly denied ICWA's protections because state officials and staff are unaware of their obligations under federal law. In addition to covering federal legal requirements, this training should include any specific protections beyond ICWA included in state and local regulations. It is imperative that all those involved in child welfare cases understand the entire atmosphere of requirements and protections in their area, including ICWA, and this training should be ongoing to ensure that ICWA remains top of mind for state and local professionals.

This training should include not only information on ICWA's mandates, but also education on its history, goals, and purpose. ICWA was created to remedy some of the very problems that remain pervasive in state child welfare systems. Persistent lack of knowledge regarding the decades of abuse, neglect, and wrongful removal of large numbers of American Indian and Alaskan Native children from their families continues to lend itself to the avoidable breakup of Native families and instability for Native children. Importantly, this training must be developed in close consultation with Tribal Nations and should incorporate the guidance of ICWA experts and Tribal child welfare professionals to ensure that accurate, culturally competent information is provided in the trainings.

#### **Federal Funding Contingent on ICWA Training and Implementation**

USET SPF believes that federal funding for state child welfare activities should be contingent upon compliance with training and implementation requirements. For far too long, state and public agencies have misinterpreted or been otherwise non-compliant with ICWA—a fact that is wholly unacceptable. The federal government has a legal obligation to protect Native children and families, and conditioning child welfare funding on consistent ICWA compliance training and implementation is a good first step toward that goal.

#### **Conclusion**

USET SPF appreciates this opportunity to provide the agencies with comments and recommendations on this critical topic. In the nearly 50 years since ICWA's passage, there have been countless stories of success in protecting Native children, families, and communities, but so much more work remains to ensure that ICWA is protected and that its purpose is fully realized. Tribal Nations require enhanced resources to implement and administer child welfare programs and services, as well as for exercising our rights and responsibilities under ICWA. In addition, the federal government must take additional steps to promote ICWA compliance through education, guidance, and enhanced state-Tribal collaboration. USET SPF stands in support of all efforts to strengthen implementation of and to protect ICWA, as we know that our greatest resources as Tribal Nations are our children and families. For more information or further discussion, please contact Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at: [Lmalerba@usetinc.org](mailto:Lmalerba@usetinc.org) or Katie Klass, USET/USET SPF General Counsel, at: [Kklass@usetinc.org](mailto:Kklass@usetinc.org).

Sincerely,



Kirk Francis  
President



Kitcki A. Carroll  
Executive Director