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The National Indian Child Welfare Association, the National Congress of American Indians, the Association on American Indian Affairs, and the Native American Rights Fund appreciate the opportunity to provide comments through the tribal consultation process on the Indian Child Welfare Act (ICWA) and federal agencies' roles in promoting federal protections for Native children and families. As our federal partners have acknowledged, these tribal consultations are critical to ensure compliance with ICWA and strengthen its implementation.

In our decades of engagement and support of tribal leaders, tribal child welfare directors and staff, and advocates across the country, we have heard recurring themes about challenges regarding ICWA implementation and compliance as well as dozens of examples of places and models that are facilitating ICWA implementation with better outcomes for Native children and families. Our comments, which are organized in response to the three prompting questions in the formal consultation notice, summarize what tribal leaders, staff, advocates, and community members have shared with us and our own experiences working in support of ICWA. We welcome questions, clarification, and additional conversation about any of the comments below.

Question 1: What additional supports would Tribal leaders find helpful to build their Tribe's capacity to exercise their rights and responsibilities under ICWA?

Flexible funding that can be used to develop and implement tribal cultural services and supports and has reasonable administrative requirements is a key factor in a tribe's ability to respond effectively to ICWA cases. States depend on tribal nations to implement ICWA properly and help develop and carry out appropriate case plans. This includes appropriate preventive and rehabilitative services, temporary and permanent placements, and identification of qualified expert witnesses (QEW) and extended family members. Tribal nations also play a central role in providing appropriate ICWA education and collaboration that support state caseworkers, supervisors, attorneys, judges, and state utilized service providers. When tribal nations have sufficient and flexible funding, they help to ensure that ICWA is implemented properly and tribal children's and families' unique needs are met. Increasing flexible funding to tribal nations through existing funding sources that tribes are eligible for, such as Title IV-B Subparts 1 and 2 of the Social Security Act and ICWA funding through the Bureau of Indian Affairs (BIA) is a step in the right direction.

However, tribal nations face serious disparities in access to federal child welfare funding, receiving less than 1% of the total amount of federal funding allocated for child welfare purposes each year while representing approximately 3.7% of the child population in the United States. A key part of this disparity occurs because tribal governments are not eligible to directly administer federal funding that states have access to, such as the Social Services Block Grant or Medicaid. These two funding sources comprise almost 25% of the federal funds allocated for child welfare purposes to states each year. Additionally, funding like the Social Services Block Grant is very flexible and can be used to help states cover other underfunded, but much needed, areas of service. Urban Indian centers also play an important role in supporting ICWA implementation in urban areas, yet only receive \$2 million a year on average from the BIA ICWA Off-Reservation grant program.

Recruiting, hiring, training, supervising, and retaining tribal child welfare agency and court personnel has become even more challenging since the pandemic. While having sufficient funding to offer competitive

salaries and benefits is part of the challenge, so is having resources to effectively onboard new tribal staff and provide high quality supervision and professional development to existing staff. Having a well-trained and supported workforce is key to a tribal nation's ability to carry out their rights and responsibilities under ICWA. States rely on federal programs like Title IV-E of the Social Security Act to provide education stipends to encourage and support students to become child welfare professionals and training existing child welfare workers. However, most tribal nations don't have the capacity to administer the Title IV-E program due to the extremely high level of administrative reporting requirements, so they are left without the resources to support tribal students that would be best suited for these positions in tribal communities and to provide training to their existing workforce. For many tribal child welfare administrators, the cost of recruiting and training their workforce and maintaining services for children and families is an ongoing struggle. Training options often pit reduced cost training that is not designed for child welfare workers in tribal settings against tribally designed training that is more costly. Tribal nations need a reliable funding stream, like Title IV-E, that can support formal education, recruitment, and ongoing development needs of tribal child welfare staff and support appropriate responses to local workforce needs and realities. Additional strategies could include more training opportunities sponsored by federal agencies, but these need to be carefully designed by tribal nations and American Indian and Alaska Native organizations with expertise in child welfare services.

Data is a critical element of being able to identify and understand challenges in implementing ICWA in specific jurisdictions, what the best solutions may be, and how to use existing resources wisely to address particular challenges and support promising practices and policies. For example, Native children face disproportionality in state foster care systems, being overrepresented at 2-3 times their population rate nationally and even higher in several states individually, but the available data includes both ICWA cases and non-ICWA cases, so improvements are needed to link this data more directly to ICWA compliance. ICWA is the only major federal child welfare law that does not have regular data collected related to its requirements and intended purposes available for policymaker and public review. The Administration for Children and Families (ACF) has stated their intent to restore the Adoption and Foster Care Analysis and Reporting System data elements for Native children in state foster care systems that were eliminated in 2020, which is an important step in improving transparency and accountability related to ICWA. In addition, tribal nations need their own data systems to track their work related to supporting state ICWA implementation, and there is little to no funding available for them to develop and operate case management information systems. State data systems are a crucial component of their child welfare work and have been supported with federal funding for over three decades, yet very few tribal nations have the funding and capacity to establish this crucial system component.

Question 2: Are there specific supports you believe the federal government could provide to help state courts and child welfare agencies meet their obligations under ICWA? In your experience, are there specific aspects or requirements of ICWA where state courts and agencies need to build greater understanding or capacity?

Incentives play an important role in helping state courts and child welfare agencies improve their implementation of ICWA and meet other federal child welfare priorities. Incentives include things like funding to encourage healthy tribal-state relationships in child welfare through demonstration or start up projects, providing additional funding for reaching compliance goals, and providing technical assistance and training to boost state compliance with ICWA. Each of these options have their own benefits and challenges, but together they create an environment that communicates a federal priority on implementing ICWA properly and support to do so.

A regular federal review of state ICWA compliance would be an important step in improving implementation. Currently, states are not required to report on their implementation through a periodic review so the burden of tracking and promoting compliance happens on a case-by-case basis, which is highly inefficient and ineffective. A few states have created their own review systems, like Washington State, but this is a voluntary effort and not required in other states and doesn't promote a uniform approach across states to ICWA transparency and accountability. DOI, DOJ, and HHS should consult with tribes and states specifically about how to create and implement an ongoing process to monitor and address ICWA compliance. Other data-related strategies that could be beneficial would include collecting

child welfare data similar to what is collected in other federal data systems, but screening for ICWA cases as opposed to self-identified classification by race. For example, active efforts, a key requirement of ICWA that is central to preventing out-of-home placement of Native children and supporting reunification after removal, could benefit from data that enumerates reunification rates of Native children and number of re-entries into the child welfare system. This type of data could be extremely helpful in understanding state implementation of ICWA.

QEWs in ICWA cases are a unique requirement under the law that serves to ensure that, even when a tribe is not able to intervene in a case, there is someone providing information about the cultural implications of an agency's proposed actions. Without QEWs, important decisions regarding the removal of a child from their home or termination of parental rights could lack critical cultural information and perspective that have bearing on whether these actions are needed or other viable alternatives, including culturally based solutions, exist. Recruiting and supporting QEWs often involves a child's tribe, but this is work that tribes are not compensated for, and when tribes cannot intervene or assist, states may hold the proceeding without a QEW or use a state employee. Furthermore, there are misperceptions about what a QEW is in an ICWA case and how that differs from the use of expert witnesses for other purposes. To improve QEW use, Oregon partnered with tribal nations within the state to improve recruitment and support for QEWs. This has improved the use of QEWs, even in cases where tribes are not able to intervene.

Title IV-B, Subpart 1 of the Social Security Act contains a plan requirement that requires states to provide a description of measures they intend to take to comply with ICWA developed in consultation with tribal governments. This plan requirement has been in law since 1994 but has proved much less impactful in improving tribal-state collaboration on ICWA implementation than originally intended. One of the challenges has been the process ACF uses to approve these state plan descriptions. In some cases, ACF has approved state plans that lacked sufficient description of measures to comply with ICWA and/or were not developed through meaningful consultation with tribal governments in their state. In these cases, the result is little to no measurable progress in efforts to improve ICWA compliance and/or positive tribal-state relations in child welfare which is essential to improving ICWA compliance. A more thorough examination of state plan descriptions is needed. Such an examination should involve confirmation of consultation and assessment of its adequacy through tribal feedback to achieve the original intent of this provision.

Finally, voluntary adoptions of Native children have become a flash point in efforts to protect Native children and improve ICWA compliance. Increasing pressures to find children for prospective adoptive parents in the United States has increasingly involved Native children in contested cases that push the boundaries of ethical child welfare practice and ICWA's requirements. Increasing numbers of states have deregulated private adoption and have enacted laws that stand in conflict with ICWA's measured and reasonable approach to adoption of Native children. State courts, state interstate compact directors, and Native families are pressured to relent to aggressive and coercive tactics of private adoption facilitators who try to adopt Native children outside the requirements of ICWA. While private adoptions of Native children represent a smaller proportion of cases compared to foster care placements, private adoption cases represent almost all of the highly publicized and contested ICWA cases that seek to dismantle ICWA's protections. More education of involved parties on ICWA's requirements, regular monitoring of private adoptions involving Native children, and active enforcement of ICWA's requirements in voluntary placements is needed.

Question 3: Are there existing State-Tribe collaborative partnerships or processes that you believe have helped support effective implementation of ICWA?

State ICWA laws have become an increasingly common way to improve ICWA compliance. Sixteen states now have state ICWA laws, and more states have expressed interest in establishing their own. While state ICWA laws are initiated by tribal nations, state support has been an important element in gaining passage. In Oregon, the tribal nations within the state and a broad coalition of ICWA allies, including the state and other child advocacy organizations, developed two legislative bills that were enacted into law in two different legislative sessions. The new state laws not only reiterated the existing federal law, but also raised the standards in several areas such as notice in voluntary proceedings, utilizing tribal customary

adoption, and use of QEWs. In other states, a more streamlined version of the federal law was adopted, like North Dakota, which captured the federal law and provided some clarification for local implementation. The collaborative tribal-state dialogue, assessment, and planning that happens before policy or practice changes can occur has been an area where federal support has been helpful. ACF has provided grants to states and tribes working together on ICWA practice and policy improvements that provide a structure for dialogue, assessment, and planning and contributes to improved tribal-state relations in child welfare. An additional resource for other states and tribes that are contemplating collaborative efforts, including passage and implementation of state ICWA laws, would be providing descriptions of the efforts and strategies used in each state, including any related data. As more tribes and states consider collaborative efforts, having additional data and information to inform their process would be extremely valuable.

State court improvement projects working with tribal nations and tribal court improvement projects have been positive developments. Out of these intergovernmental collaborations have come new forums where tribal and state court representatives can discuss their mutual interests and explore new opportunities for improving ICWA compliance in court systems. Some of the results of these collaborations have been the development of ICWA courts in state jurisdictions (11 states), ICWA bench guides for state court judges (California and Oregon), collaborative training, and new data collection. Currently, there are over 20 state ICWA courts and numerous state-tribal court improvement partnerships operating in several different states. These innovations have also improved the ability of tribal nations to transfer cases successfully from state court to tribal court. Another strategy could be to establish robust assessment of the effectiveness of state court improvement projects related to ICWA implementation by identifying the most successful models for helping state court improvement projects and child welfare agencies reach ICWA compliance goals.

Provision of active efforts is a primary ICWA requirement that helps tribal children stay connected to their families, communities, and culture. Even with the 11 examples of active efforts provided in the federal ICWA regulations, there are still many state jurisdictions where active efforts are confused with reasonable efforts or not well understood in general. In some states, there has been a concerted effort to provide more clarification and training on what constitutes active efforts and what does not. States like California, North Dakota, and Oregon have provided more explanation of what constitutes active efforts and how they might look in the context of a child's case. These materials are used in training and supplement the federal regulation examples by providing additional context and an understanding of how to implement active efforts and evaluate whether ICWA requirements under foster care or termination of parental rights proceedings are being complied with.