

**List of Subjects in 40 CFR Part 300**

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Natural resources, Oil pollution, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

**Authority:** 33 U.S.C. 1321(d); 42 U.S.C. 9601–9657; E.O. 13626, 77 FR 56749, 3CFR, 2013 Comp., p. 306; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p.351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p.193.

Dated: March 28, 2016.

**Mathy Stanislaus,**

*Assistant Administrator, Office of Land and Emergency Management.*

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**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Administration for Children and Families****45 CFR Part 1355**

**RIN 0970–AC47**

**Adoption and Foster Care Analysis and Reporting System**

**AGENCY:** Administration on Children, Youth and Families (ACYF), Administration for Children and Families (ACF), Department of Health and Human Services (HHS).

**ACTION:** Supplemental notice of proposed rulemaking.

**SUMMARY:** On February 9, 2015, the Administration for Children and Families (ACF) published a Notice of Proposed Rulemaking (NPRM) to amend the Adoption and Foster Care Analysis and Reporting System (AFCARS) regulations to modify the requirements for title IV–E agencies to collect and report data to ACF on children in out-of-home care and who were adopted or in a legal guardianship with a title IV–E subsidized adoption or guardianship agreement. In this supplemental notice of proposed rulemaking (SNPRM), ACF proposes to require that state title IV–E agencies collect and report additional data elements related to the Indian Child Welfare Act of 1978 (ICWA) in the AFCARS. ACF will consider the public comments on this SNPRM as well as comments already received on the February 9, 2015 NPRM and issue one final AFCARS rule.

**DATES:** Submit written or electronic comments on this Supplemental Notice

of Proposed Rulemaking on or before May 9, 2016.

**ADDRESSES:** We encourage the public to submit comments electronically to ensure they are received in a timely manner. Please be sure to include identifying information on any correspondence. To download an electronic version of the proposed rule, please go to <http://www.regulations.gov/>. You may submit comments, identified by docket number, by any of the following methods:

- **Federal eRulemaking Portal:** <http://www.regulations.gov/>. Follow the instructions for submitting comments.

**Mail:** Written comments may be submitted to Kathleen McHugh, United States Department of Health and Human Services, Administration for Children and Families, Director, Policy Division, 330 C Street SW., Washington, DC 20024.

- Please be aware that mail sent in response to this SNPRM may take an additional 3 to 4 days to process due to security screening of mail.

- **Hand Delivery/Courier:** If you choose to use an express, overnight, or other special delivery method, please ensure that the carrier will deliver to the above address Monday through Friday during the hours of 9 a.m. to 5 p.m., excluding holidays.

**Instructions:** All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to [www.regulations.gov](http://www.regulations.gov/), including any personal information provided. For detailed instructions on submitting comments, see the “Public Participation” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Comments that concern information collection requirements must be sent to the Office of Management and Budget (OMB) at the address listed in the Paperwork Reduction Act (PRA) section of this preamble. A copy of these comments also may be sent to the Department representative listed above.

**FOR FURTHER INFORMATION CONTACT:** Kathleen McHugh, United States Department of Health and Human Services, Administration for Children and Families, Director, Policy Division. To contact Kathleen McHugh, please use the following email address: [cbcomments@acf.hhs.gov](mailto:cbcomments@acf.hhs.gov). Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1–800–877–8339 between 8 a.m. and 7 p.m. Eastern Time.

**SUPPLEMENTARY INFORMATION:**

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**I. Background***Adoption and Foster Care Automated Reporting System (AFCARS)*

Section 479 of the Social Security Act (the Act) requires that ACF regulate a national data collection system that provides comprehensive demographic and case-specific information on all children who are in foster care or adopted with title IV–E agency involvement (42 U.S.C. 679).

Historically, the broad underlying legislative directive has always been the establishment and administration of a system for “the collection of data with respect to adoption and foster care in the United States.” Such data collection system is the Adoption and Foster Care Automated Reporting System (AFCARS).

The AFCARS statute with regard to data collection systems requires the following: (1) The data collection system developed and implemented shall avoid unnecessary diversion of resources from adoption and foster care agencies; (2) the data collection system shall assure that any data that is collected is reliable and consistent over time and among jurisdictions through the use of uniform definitions and methodologies; (3) the data collection system shall provide: Comprehensive national information with respect to the demographic characteristics of adoptive and foster children and their biological and adoptive foster parents; the status of the foster care population, the number and characteristics of children placed in and removed from foster care; children adopted or for whom adoptions have been terminated; children placed in foster care outside the state which has placement and care responsibility; the extent and nature of assistance provided by federal, state, and local adoption and foster care programs; the characteristics of the children with respect to whom such assistance is provided; and the annual number of children in foster care who are identified as sex trafficking victims including those who were victims before entering foster care; and those who were victims while in foster care; and (4) the data collection system will utilize appropriate requirements and incentives to ensure that the system

functions reliably throughout the United States.

ACF issued the AFCARS NPRM (80 FR 7132, hereafter referred to as the February 2015 AFCARS NPRM) to amend the AFCARS regulations at 45 CFR 1355.40 and the appendices to part 1355. In it, ACF proposed to modify the requirements for title IV–E agencies to collect and report data to ACF on children in out-of-home care and who were adopted or in a legal guardianship with a title IV–E subsidized adoption or guardianship agreement. At the time the February 2015 AFCARS NPRM was issued, ACF concluded that it did not have enforcement authority regarding ICWA and, therefore, was not able to make the requested changes or additions to the AFCARS data elements regarding ICWA.

However, in the time since publication of the February 2015 AFCARS NPRM, ACF legal counsel re-examined the issue and determined it is within ACF's existing authority to collect state-level ICWA-related data on American Indian and Alaska Native (AI/AN) children in child welfare systems pursuant to section 479 of the Social Security Act. Such determination was informed by comments received on the February 2015 AFCARS NPRM as well as an extensive re-evaluation of the scope of ACF's statutory and regulatory authority.

#### *Indian Child Welfare Act*

In 1970, President Nixon declared that termination, the then-current federal policy to terminate Indian tribal governments, sell tribal land, and move AI/AN peoples from ancestral lands to assimilate them into 'American' society, was wrong and should be replaced by Indian *self-determination* which recognized the inherent retained right of Indian nations to govern themselves. From that time, the federal government began implementing new policies of Indian self-determination under which tribal sovereignty and self-governance were fostered, allowing tribes to operate programs once solely administered by the federal government. It also increased federal support and benefits available to tribes to strengthen capacity and self-sufficiency.

Against this backdrop, the Indian Child Welfare Act (ICWA) was enacted in 1978 to address concerns over the consequences to Indian children, Indian families, and Indian tribes of child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes. See 25 U.S.C. 1901 *et seq.* ICWA has been characterized as embodying the "gold standard" for child welfare policy

and practice in the United States and establishes minimum federal jurisdictional, procedural, and substantive standards intended to achieve the purposes of protecting the rights of Indian children to live with their families, to stabilize and foster continued tribal existence, and to facilitate permanency for children, families, and tribes.

However, ACF has never collected ICWA-related data. Using the data elements proposed in the SNPRM, ACF proposes to collect ICWA-related data on AI/AN children in child welfare systems for several uses in the public interest including: To assess the current state of foster care and adoption of Indian children under the Act, to develop future national policies concerning ACF programs that affect Indian children under the Act, and to meet federal trust obligations under established federal policies.

ICWA was enacted by Congress in response to alarming numbers of AI/AN children being removed from their families by public and private child welfare agencies, most often being placed in non-Indian homes far from their tribal communities. Congress found that, "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." (25 U.S.C. 1901 (3)) Accordingly, through ICWA, Congress declared the policy of the United States is to protect the best interests of Indian children, to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the removal of Indian children from their families, and to place such children in foster or adoptive homes that reflect the unique values of Indian cultures. Finally, Congress calls for providing assistance to Indian tribes in the operation of child and family service programs. (25 U.S.C. 1902) ICWA was enacted to protect American Indian families and to give tribes a role in making child welfare decisions for AI/AN children. AI/AN children are subject to ICWA when they are unmarried persons under the age of 18 and are either (a) a member of an Indian tribe or (b) are eligible for membership in an Indian tribe and are the biological child of a member of an Indian tribe. ICWA expressly requires, among other things, that: (1) A tribe is notified when the state places an "Indian child" in foster care or seeks to terminate parental rights on behalf of such a child, (2) a tribe is given an opportunity to intervene in any state proceeding for foster care placement and termination of parental rights to a child subject to ICWA, and (3) that a preference be given

to placing the Indian child with extended family or tribal families.

#### *Use of AFCARS Data*

AFCARS is designed to collect uniform, reliable information from title IV–B and title IV–E agencies on children who are under the agencies' responsibility for placement, care, or supervision. AFCARS was established to provide data that would assist in policy development and program management. Although ICWA was passed more than 30 years ago, it is unclear how well state agencies and courts have implemented ICWA's requirements into practice. Even in states with large AI/AN populations, there may be confusion regarding how and when to apply the law, including providing notice to tribes and making active efforts to prevent removal and reunite children with their Indian families as required under ICWA. This is further complicated by the fact that there is no comprehensive national data on the status of AI/AN children for whom ICWA applies at any stage in the adoption or foster care system. AFCARS data can bridge this gap.

Additional AFCARS data elements are proposed to enhance the type and quality of information title IV–E agencies report to ACF. ACF's proposals, embodied in this SNPRM, are motivated by the Administration's vision of healthy, resilient, and thriving Indian children and families as well as the continued vitality and integrity of Indian tribes. More specifically, the proposals reflected in this SNPRM manifest Department-wide priorities to affirmatively protect the best interests of Indian children and to promote the stability and security of Indian tribes, families, and children.

ACF proposes to collect data elements in AFCARS related to ICWA's statutory standards for removal, foster care placement, and adoption proceedings. More specifically, through this SNPRM, ACF will improve the AFCARS data collection system to provide more comprehensive demographic and case-specific information on all children, including children subject to ICWA, who are in foster care or adopted with title IV–E agency involvement. Additionally, ACF intends to use the data to:

1. Address the unique needs of AI/AN children in foster care or adoption, and their families.

In 2005, the Government Accountability Office (GAO) issued a report titled "Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States"

(GAO-05-290). In addition to noting that no national data on children subject to ICWA was available, GAO asserts that the extent to which states and tribes work together to implement ICWA and title IV-E/IV-B requirements affects outcomes for Indian children in state foster care systems. The report also discusses how the Adoption and Safe Families Act (Pub. L. 105-89) influences placement decisions and outcomes for Indian children, noting the following: "Decisions regarding the placement of children subject to ICWA as they enter and leave foster care can be influenced by how long it takes to determine whether a child is subject to the law, the availability of American Indian foster and adoptive homes, and the level of cooperation between states and tribes. According to several child welfare officials, these factors, which are unique to American Indian children, can play an important role in placement decisions, including the characteristics of the foster home in which the child will be placed, the number of placements a child will have, and the duration of the stay." (GAO-05-290, p.3). The proposed ICWA data will help address the unique needs of Indian children in foster care or adoption and their families by clarifying how the ICWA requirements and how title IV-E/IV-B requirements affect placement of Indian children.

2. Assess the current state of adoption and foster care programs and relevant trends that affect AI/AN families.

American Indian and Alaska Native children are over-represented in child welfare systems at higher rates than any other racial or ethnic group. In 2013, American Indian children were over-represented among children in foster care by a factor of 2.4, compared to their proportion of the population. From 2000 to 2013, the degree of over-representation of AI/AN children substantially increased from 1.5 to 2.4, and the degree of disproportionality varies widely by state (National Council of Juvenile and Family Court Judges, 2015). At this time, there is very limited data available to help understand the reasons for the varying degrees of disproportionality. Proposed ICWA-related AFCARS data elements will shed light on the relationship between implementing ICWA requirements and outcomes for AI/AN children. In addition, the proposed data elements will provide additional information to help identify the real or perceived barriers encountered by states in identifying AI/AN children in their child welfare systems. Finally, proposed ICWA-related AFCARS data elements will provide currently unavailable

information that will help to assess the extent to which the fidelity of ICWA implementation influences permanent placements for Indian children and the length of stay in out-of-home care. The proposed ICWA data will also help to inform efforts to compare program practices, processes, or outcomes between states and over the course of time, which would allow the Children's Bureau to identify trends and highlight and build upon strengths and best practices.

3. Improve training and technical assistance to help states comply with title IV-E, and title IV-B of the Social Security Act.

Through the Children's Bureau, ACF provides state title IV-E agencies with technical assistance to help agencies implement federal requirements and improve their child welfare programs (as authorized by section 435 and 476 of the Social Security Act). Between federal fiscal year (FFY) 2010 and FFY 2014, ACF received 31 requests for tailored consultation from state agencies and title IV-B tribes (separately or in collaboration) for assistance with examining or supporting ICWA implementation. In response to these requests, ACF-supported technical assistance providers delivered more than 3,700 hours of direct, tailored consultation to state agencies and tribes related to ICWA.

In FFY 2015, 24 state title IV-E agencies participated in discussions with ACF and its technical assistance providers about their potential areas of need for capacity building and improvement. One third of these agencies identified themselves as having ICWA implementation related needs for technical assistance. Data related to ICWA will assist ACF to improve training content, target subject areas, and identify geographies in which training will be helpful.

4. Develop future national policies concerning its programs.

Additional proposed ICWA-related data will allow ACF and the Children's Bureau to more effectively plan, coordinate, and lead AI/AN programming across ACF operations, with other Departments such as the Bureau of Indian Affairs (BIA) in the Department of the Interior, the Department of Justice (DOJ), and throughout the federal government. By collecting additional data, the federal government will also have a more complete understanding of how state agencies interact with Indian children and families as well as how many children subject to ICWA come to the attention of state child welfare agencies nationwide. This additional data will

help align performance measures, build an evidence base that informs policy and practice, and better ensure that federal funds are being directed in a way that delivers significantly better results for AI/AN families. This critical role aligns with the research, evaluation, and technical assistance responsibilities of the Children's Bureau.

5. Inform and expand partnerships across federal agencies that invest in Indian families and that promote resilient, thriving tribal communities through several initiatives.

AFCARS data on the wellbeing of AI/AN children will help multiple federal agencies identify needs and gaps, expand best practices, and shape new policy and technical assistance. Several of the current interagency initiatives that will benefit include:

- *Generation Indigenous*. On December 3, 2014, President Obama launched Generation Indigenous (Gen-I), "an initiative that takes a comprehensive, culturally appropriate approach to help improve the lives of, and opportunities for, Native youth." On July 9, 2015, the Executive Office of the President, Office of Management and Budget, issued Executive Memo M-15-17 identifying Native youth budget priorities including "services that keep families together. These could be family assistance services, home improvement programs, alternatives to incarceration, and employment support services. Agencies should focus on programs that support the capacity building and programmatic support necessary to implement ICWA."

- *The Department of Justice Defending Childhood Initiative and the Task Force on American Indian and Alaska Native Children Exposed to Violence*. The Task Force report recommended that ACF, BIA, DOJ, and tribes develop a modernized unified data-collection system designed to collect ICWA-related AFCARS data on all AI/AN children who are placed into foster care by their agency.

- *HHS Secretary's Tribal Advisory Committee (STAC)*. In 2014, the STAC specifically identified improved federal data collection on ICWA as a priority need. In early 2015, the STAC identified AFCARS as a vehicle for ICWA data elements. The STAC expressed their view that ACF has a critical role in collecting important data, promoting effective tribal/state collaborations, increasing state capacity to comply with ICWA, and reversing the inequities and disproportionate representation and poor outcomes for children that can occur when ICWA is not followed. In order to assist the Administration in implementing ICWA and protecting AI/

AN children and families, the STAC requested enhanced “collection of data elements related to key ICWA requirements in individual ICWA cases and greater oversight of the title IV–B requirement for states to consult with tribes on measures to comply with ICWA (STAC follow-up letter to the Secretary, June, 30, 2015, pp 9–10).” <http://www.hhs.gov/about/agencies/iea/tribal-affairs/about-stac/index.html#>.

- Interagency ICWA Working Group Projects, including the Bureau of Indian Affairs initiative to update state guidance on ICWA and promulgate ICWA regulations. The BIA Bureau of Indian Affairs updated the Guidelines for State Courts and Agencies in Indian Child Custody Proceedings (80 FR 10146, issued February 25, 2015, hereafter referred to as the Guidelines) and has issued proposed regulations for State Courts and Agencies in Indian Child Custody Proceedings (proposed at 80 FR 14880, issued March 20, 2015) to help ensure Indian children are not removed from their communities, cultures, and extended families in conflict with ICWA’s express mandates.

Consistent with the Administration’s focus on Indian children, the Department of the Interior, DOJ, and HHS engaged in extensive interagency collaboration to promote compliance with ICWA and agreed to continue to collaborate. This work involved collaborating on ICWA-related regulations, including the BIA regulations and this SNPRM.

6. Implement Tribal sovereignty principles and Federal trust responsibilities.

Improving AFCARS to inform ACF and other federal agencies is consistent with ACF’s implementation of government-to-government principles of engagement with AI/AN tribes and respect for our trust responsibilities. ACF’s understanding of fundamental principles of tribal sovereignty is reflected in both the Department’s and ACF’s Tribal Consultation Policies which state:

“The special government-to-government relationship between the Federal Government and Indian Tribes, established in 1787, is based on the Constitution, and has been given form and substance by numerous treaties, laws, Supreme Court decisions, and Executive Orders, and reaffirms the right of Indian Tribes to self-government and self-determination. Indian Tribes exercise inherent sovereign powers over their citizens and territory. The U.S. shall continue to work with Indian Tribes on a government-to-government basis to address issues concerning Tribal self-government, Tribal trust resources, Tribal treaties and other rights.”

“Tribal self-government has been demonstrated to improve and perpetuate the government-to-government relationship and strengthen Tribal control over Federal funding that it receives, and its internal program management. Indian Tribes participation in the development of public health and human services policy ensures locally relevant and culturally appropriate approaches to public issues.” (Section 3, Department of Health and Human Services Tribal Consultation Policy).

“Our Nation, under the law of the U.S. and in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government and self-determination. Indian tribes exercise inherent sovereign powers over their members and territory. The U.S. continues to work with Indian tribes on a government-to-government basis to address issues concerning tribal self-government, tribal trust resources, tribal treaties, and other rights.” (Section 4, ACF Tribal Consultation Policy).

These principles are also reflected in ICWA through Congressional recognition of “the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people.” (25 U.S.C. 1901)

ACF announced its intent to publish a SNPRM in a **Federal Register** document issued on April 2, 2015 (80 FR 17713). Section 479 of the Social Security Act contains some express limits on the authority of ACF to collect data including: Data collected under AFCARS must avoid an unnecessary diversion of resources from agencies responsible for adoption and foster care (section 479(c)(1) of the Act) and must assure that any data that is collected is reliable and consistent over time and among jurisdictions through the use of uniform definitions and methodologies (section 479(c)(2) of the Act). With respect to the requirement in section 479(c)(1) of the Act, ACF tailored the proposed data elements to collect only the most essential information regarding Indian children in foster care and children who have been adopted with state title IV–E agency involvement. Most data elements will only be required for children who are determined to be Indian children as defined in ICWA. Furthermore, the statutory authority under section 479 of the Act is limited to data with respect to adoption and foster care. ACF is not proposing to require tribal title IV–E agencies to collect and report ICWA-related data elements in proposed paragraph (i) because ICWA does not apply to placements by Indian tribes. The data elements in § 1355.43(i) are subject to the same compliance and penalty requirements in §§ 1355.45 and 1355.46, respectively, proposed in the

February 2015 AFCARS NPRM (80 FR 7187–7192 and 7220–7221).

## II. Statutory Authority

Sections 479 and 474(f) of the Act provide HHS the authority to require that title IV–E agencies maintain a data collection system which provides comprehensive national information related to adopted and foster children and requires that the Secretary of Health and Human Services regulate a national data collection system to provide comprehensive case level information and impose penalties for failure to submit AFCARS data under certain circumstances. Section 1102 of the Act instructs the Secretary to promulgate regulations necessary for the effective administration of the functions for which she is responsible under the Act.

## III. Public Participation

ACF invites the public to comment on all aspects of the ICWA-related data elements proposed in this SNPRM. In addition, ACF specifically invites comment on which, if any, of the proposed data elements the state title IV–E agencies currently collect. ACF will review and consider all comments that are germane and received during the comment period on this SNPRM as well as those previously submitted in response to the February 2015 AFCARS NPRM, and issue one final rule on AFCARS.

## IV. Consultation and Regulation Development

To inform the development of the ICWA-related data elements proposed in this SNPRM, ACF reviewed public comments received in response to the February 2015 AFCARS NPRM, held tribal and state consultation and listening sessions, and consulted with federal agency experts, as outlined below.

1. Consideration of comments on the February 2015 AFCARS NPRM that addresses ICWA-related data elements.

ACF received approximately 45 comments that proposed/recommended including new data elements in AFCARS related to ICWA. Twenty-five of the commenters were tribes or tribal organizations, four were state child welfare departments, and the remaining were public interest organizations, academics/universities, and individuals. Of the 45 comments, 18 commenters submitted the same or similar form letter that recommended additional data elements providing information about the applicability of ICWA for children in out-of-home care and proposed revisions to the data elements proposed in the February 2015 AFCARS NPRM to

capture ICWA-related data. The commenters recommended approximately 62 new or revised data elements that addressed the following: Identification of Indian children and their family structure; tribal notification and intervention in state court proceedings; the relationship of the foster parents and other providers to the Indian child; decisions to place an Indian child in out-of-home care (including data on active efforts and continued custody); whether a placement was licensed by an Indian tribe; whether the placement preferences in ICWA were followed and both the voluntary and involuntary termination of parental rights. ACF did not receive specific suggestions from the four state child welfare agencies on which ICWA-related data elements to include in AFCARS.

#### 2. Tribal consultation session.

The Children's Bureau held a tribal consultation via conference call on May 1, 2015, that was co-facilitated by the Children's Bureau's (CB) Associate Commissioner and the Chairperson of the ACF Tribal Advisory Committee, who also serves as the Vice Chair of the Jamestown S'Klallam Tribal Council. The CB conducted the session to obtain input from tribal leaders on proposed AFCARS data elements related to ICWA. Comments were solicited during the call to determine essential data elements that title IV-E agencies should report to AFCARS including, but not limited to: Whether the requirements of ICWA were applied to a child; notice for child welfare proceedings; active efforts to prevent removal or to reunify the Indian child with the child's biological or adoptive parents or Indian custodian; placement preferences under ICWA; and terminations of parental rights for an Indian child. Tribal representatives did not provide specific suggestions on the call but noted during the call that they would provide formal comments on the SNPRM when it was issued.

#### 3. Solicited input from members of the National Association of Public Child Welfare Administrators (NAPCWA).

The NAPCWA, an affiliate of the American Public Human Services Association (APHSA) hosted a conference call with state members of NAPCWA (*i.e.*, representatives of state child welfare agencies) and the Children's Bureau on April 27, 2015. The purpose of the call was to obtain input from state members on what data state title IV-E agencies currently collect regarding ICWA and what they believed were the most important information title IV-E agencies should report in AFCARS related to ICWA. Representatives from 13 states

participated in the conference call and stated that some of their states currently collect information in their information system related to Indian children, such as tribal membership, tribal notification, and tribal enrollment status. They noted that some of the information with regard to ICWA, such as placement preferences and active efforts, are contained in case files, case notes, or other narratives, and not currently captured within their information systems, and noted issues with extraction of such data for AFCARS reporting. They also indicated that their information systems would need to be changed and upgraded to report ICWA-related data in AFCARS and that new processes would need to be developed to collect and extract the requested information. They noted that they would need to train workers to accurately collect the data. They indicated that additional funding is necessary for costs associated with data collection. Participating state representatives also expressed concern about adding data elements that would require information from state courts, unlike other AFCARS data elements which are available within the title IV-E agency's information system. Given that state title IV-E agencies and courts do not typically exchange data, workers may need to gather and enter state court information manually.

#### 4. Input from federal agency experts regarding ICWA.

In December 2014, at the White House Tribal Nations conference, Attorney General Holder announced an initiative to promote compliance with ICWA. This initiative included partnering with the Departments of Health and Human Services and the Interior to ensure all tools available to the federal government are used to promote compliance with ICWA. Federal Departments have a strong interest in collecting data elements related to ICWA. To further interagency collaboration in this area, DOI, DOJ, and HHS have engaged in extensive discussions focused on ICWA, including the sharing of agencies' expertise for the development of ICWA-related regulations, including AFCARS.

As part of on-going intra- and inter-agency collaboration, ACF consulted with federal experts on what data exists, or not, and its utility in understanding the well-being of Indian children, youth, and families. ACF also consulted with federal partners on the ICWA statutory requirements in 25 U.S.C. 1901 *et seq.*, DOI's *Guidelines*, and Notice of Proposed Rulemaking to implement *ICWA Regulations for State Courts and Agencies in Indian Child Custody Proceedings* (80 FR 14880, issued March 20, 2015).

After considering all of the aforementioned input, ACF proposes the addition of paragraph (i) to § 1355.43 (as proposed in the February 2015 AFCARS NPRM). Section 479 of the Act permits broader data collection in order to establish a true national data collection system that provides comprehensive demographic and case-specific information on all children who are in foster care and adopted with title IV-E agency involvement, to assess the current state of adoption and foster care programs in general, as well as to develop future national policies concerning these programs. Collecting data on Indian children, including ICWA-related data, is within the authority of section 479 because it is in line with the statutory goal of assessing the status of children in foster care. ACF is exercising its authority to propose a limited new set of ICWA-related data because section 479(a) authorizes "the collection of data with respect to adoption and foster care in the United States" and Indian children are children living within the United States and are those intended to benefit from *both* ICWA and titles IV-B and IV-E. The supplemental proposed rule includes data relevant to AI/AN children that supports ACF in assessing the current state of the well-being of Indian children as well as state implementation of title IV-E and IV-B. ACF proposes to use the collected data to make data-informed assessments; and to develop future policies concerning tribal-state consultation, ICWA implementation, and training and technical assistance to support states in the implementation of title IV-B and title IV-E programs.

ACF will analyze all pertinent comments to this SNPRM along with prior comments received on the February 2015 AFCARS NPRM and issue one final rule on AFCARS in which the ICWA-related data elements will be included. ACF understands from consultation and the regulatory development process that some of the information sought in this SNPRM for inclusion in AFCARS might be contained in agency case files. However, a number of the proposed data elements seek information related to court findings and this represents a shift toward increased reporting on the activity of the court in AFCARS. In this SNPRM, ACF proposes that state title IV-E agencies report information believed to be contained in court orders that the state title IV-E agency would have ready access to or would typically be contained within the state title IV-E agency case files. ACF is seeking input from state title IV-E agencies on

whether they would be readily able to report the information in AFCARS for the data elements that relate to court activities and if there would be difficulties in doing so. We encourage agencies to describe the nature of the issues they would face, and possible approaches to addressing these concerns in light of the importance of having this information.

## V. Section-by-Section Discussion of SNPRM

### *Section 1355.43(i) Data Elements Related to the Indian Child Welfare Act (ICWA)*

In paragraph (i), ACF proposes to require that state title IV–E agencies collect and report certain ICWA-related information on children in the AFCARS out-of-home care reporting population. ACF does not require state title IV–E agencies to report the data elements proposed in paragraph (i) for an Indian child who remains under the tribe’s responsibility, placement, and care but for which the state provides IV–E foster care maintenance payments pursuant to a state–tribal agreement as described in section 472(a)(2)(B)(ii) of the Act. This is because the state’s agreement with the tribe is to provide title IV–E foster care maintenance payments to a child under the tribe’s placement and care responsibility. Additionally, tribal title IV–E agencies are not required to collect and report the data elements proposed in paragraph (i). The data elements in § 1355.43(i) are subject to the same compliance and penalty requirements in §§ 1355.45 and 1355.46, respectively, proposed in the February 2015 AFCARS NPRM (80 FR 7187–7192 and 7220–7221).

#### Definitions

In paragraph (i)(1), ACF proposes to require that unless otherwise specified, the following terms have the same meaning as in ICWA, at 25 U.S.C. 1903: Child custody proceeding, extended family member, Indian, Indian child, Indian child’s tribe, Indian custodian, Indian organization, Indian tribe, parent, reservation, and tribal court. It is important to note that the term “Indian child” in this section does not refer to a racial classification, but rather is defined by ICWA as a child who is either a member of an Indian tribe, or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. Each term is listed in the regulatory language below with the corresponding ICWA statutory citation.

In paragraph (i)(2), ACF proposes to require that for all children in the out-

of-home care reporting population per § 1355.41(a), the state title IV–E agency must complete the data elements in paragraphs (i)(3) through (5).

#### Identifying an “Indian Child” Under the Indian Child Welfare Act

In paragraph (i)(3), ACF proposes to require that the state title IV–E agency report whether the state title IV–E agency inquired about pertinent information on a child’s status as an “Indian child” under ICWA. This includes: Reporting whether the child is a member of or eligible for membership in an Indian tribe; the child’s biological or adoptive parents are members of an Indian tribe; inquiring about the child’s status as an “Indian child” with the child, his/her biological or adoptive parents (if not deceased), and the child’s Indian custodian (if the child has one); ascertaining whether the domicile or residence of the child, parent, or the Indian custodian is known by the agency, or is shown to be, on an Indian reservation.

This data will provide information on whether state title IV–E agencies and state courts are evaluating whether the child meets the definition of “Indian child” under ICWA. These are threshold questions indicating whether the state title IV–E agency knows or has “reason to know” that a child is an Indian child and thus is subject to the protections under ICWA. Without inquiry, many Indian children are not identified, thereby denying children, parents, and Indian tribes procedural and substantive protections under ICWA. These data elements represent the minimum that a state title IV–E agency should be collecting to determine whether the child is an Indian child under ICWA. Such elements will help establish demographics necessary in identifying ICWA cases that involve parents who are tribal members or that involve an Indian custodian. Proactively identifying Indian children will improve the AFCARS data on AI/AN child foster care cases, adoption through the title IV–E agencies, as well as provide a base for understanding the percentage of AI/AN cases to which ICWA applies. More accurate data will help ACF better understand the scope of ICWA’s impact in AI/AN child foster care cases and state systems, help identify where the application of ICWA may need reinforcement, and help inform ACF technical assistance to state title IV–E agencies.

#### Application of ICWA

In paragraph (i)(4), ACF proposes to require that the state title IV–E agency indicate whether it knows or has reason

to know that the child is an Indian child under ICWA. If so, the state title IV–E agency must indicate the date that the state title IV–E agency discovered information that indicates that the child is or may be an Indian child and identify all federally recognized Indian tribes identified that may potentially be the Indian child’s tribe(s).

In paragraph (i)(5), ACF proposes that the state title IV–E agency must indicate whether a court order indicates that a court found that ICWA applies, the date of the finding, and the name of the Indian tribe if listed on the court order.

If the state title IV–E agency responds with “yes” to the data elements in paragraphs (i)(4) or (5), then the agency must complete the remaining applicable paragraphs (i)(6) through (29) of this section, which includes information on: Transfers to tribal court; notification of child custody proceedings; active efforts to prevent removal and to reunify with the Indian family; foster care and adoptive placement preferences; and termination of parental rights.

Because not all AI/AN children meet the definition of “Indian child” under ICWA, these data elements are critical to identify the national number of AI/AN child foster care cases to which ICWA applies. Data elements related to whether ICWA applies are essential because application of ICWA triggers procedural and substantive protections. The date the agency received information as to whether the child is an Indian child under ICWA is essential to understanding the time-lapse between knowing that a child is an Indian child and tribal notification. A long time-lapse can indicate a delay in the application of the ICWA protections. Additionally, identifying Indian tribes that may potentially be the Indian child’s tribe will help tribes, states, and the federal government direct resources into developing relationships that will streamline the process of identifying Indian children.

#### Transfer to Tribal Court

In paragraphs (i)(6) and (7), ACF proposes to require that the state title IV–E agency report certain information on whether a case was transferred from state court to tribal court, in accordance with 25 U.S.C. 1911(b). In paragraphs (i)(6), ACF proposes to require that the state title IV–E agency report whether a court order indicates that the Indian child’s parent, Indian custodian, or Indian child’s tribe requested, orally on the record or in writing, that the state court transfer the case to the tribal court of the Indian child’s tribe, in accordance with 25 U.S.C. 1911(b), at any point during the report period. In paragraph

(i)(7), if the state court denied the request to transfer the case to tribal court, ACF proposes to require that the state title IV–E agency report whether there is a court order that indicates the reason(s) why the case was not transferred to the tribal court. If a court order exists, justification for denying a transfer must be indicated from among a list of three options, as outlined in ICWA statute: (1) Either of the parents objected to transferring the case to the tribal court; or (2) the tribal court declined the transfer to the tribal court; or (3) the state court found good cause not to transfer the case to the tribal court.

The data in this section will provide an understanding of how many children in foster care with ICWA protections are or are not transferred to the Indian child's tribe and an understanding of the reasons why a state court did not transfer the case. Additionally, ACYF–CB–PI–14–03 (issued March 5, 2014) requires, among other things, that states develop, in consultation with tribes, measures to determine whether tribes are able to effectively intervene and, where appropriate, transfer proceedings to tribal jurisdiction. One focus of the Child and Family Services Reviews conducted by the Children's Bureau is the importance of preserving a child's cultural connections. This data will aid in understanding how a state may preserve a child's connection to his/her tribe. In addition, transfer data will aid in identifying capacity needs and issues in tribal child welfare systems that may prevent tribes from taking jurisdiction. Transfer data will help identify opportunities to build relationships between states and tribes. The data will also indicate whether additional tribal court resources are needed to improve transfer rates, or additional training for state courts is required regarding appropriate "good cause" exceptions to transfer.

#### Notification

In paragraphs (i)(8) through (10), ACF proposes to require that the state title IV–E agency report certain information about legal notice to the Indian child's parent, Indian custodian, and Indian child's tribe regarding the child custody proceeding as defined in ICWA. ACF proposes to require that the state title IV–E agency report: Whether the Indian child's biological or adoptive parent or Indian custodian were given proper legal notice of the child custody proceeding more than 10 days prior to the first child custody proceeding in accordance with 25 U.S.C. 1912(a); whether the Indian child's tribe (if known) was given proper legal notice of

the child custody proceedings more than 10 days prior to the first child custody proceeding; which Indian tribe(s) were sent notice of the child custody proceeding; and whether the state title IV–E agency replied with additional information that the Indian child's tribe(s) requested, if such a request was made.

State child welfare agencies may have this information in their case files, regardless whether the notice was sent by the agency or the court. Notice to the Indian child's parents, Indian custodian, and tribe about child custody proceedings, as defined in ICWA, and the timing of the notice is an essential procedural protection provided by ICWA. ICWA requires that the party seeking foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe of the pending proceedings, including notice of their right of intervention and that no foster care placement or termination of parental rights proceeding shall be held until at least ten days after notice is received (25 U.S.C. 1912(a)). Notifying individuals and tribes of their rights and requirements in every child custody proceeding is critical to meaningful access to and participation in adjudications. Further, improper notice is a common basis for an appeal under ICWA, resulting in failure of process and unnecessary costs and delay. The data reported in this section will provide an understanding of how legal notice and adherence to the timeframes in ICWA may impact an Indian child's case. The data will also help identify technology, capacity, and training needs for meeting legal notice requirements, as well as opportunities for technical assistance and relationship-building between states and tribes.

#### Active Efforts To Prevent Removal and Reunify the Indian Family

In paragraphs (i)(11) through (13), ACF proposes to require that the state title IV–E agency report whether and when the state title IV–E agency began to make active efforts to prevent the breakup of the Indian family prior to the child's most recent out-of-home care episode, whether the court found in a court order that the state title IV–E agency made active efforts to prevent the breakup of the Indian family, and that these efforts were unsuccessful, and what active efforts the state title IV–E agency made to prevent the breakup of the Indian family (see 25 U.S.C. 1912(d)).

Providing active efforts to prevent the breakup of Indian families is a key

component of the ICWA protections (25 U.S.C. 1912(d)). Under ICWA, any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child must demonstrate to the court that active efforts have been made to provide remedial services and rehabilitative programs designed to avoid the need to remove the Indian child, or terminate parental rights. Thus, state title IV–E agencies are required to identify and offer programs and services to prevent the breakup of Indian families which includes services to maintain and reunite an Indian child with his or her family and to promote the stability and security of the Indian family. Where such efforts are meaningful and effective, exits from child welfare systems increase and a reduction in disproportionality in state child welfare systems logically follows.

Proposed ICWA-related AFCARS data regarding active efforts will provide a better understanding of the status of Indian children in foster care, how these efforts may impact an Indian child's case, and the role of the courts in making findings. The data will also help identify service needs and efficacy; capacity needs; the need for training and technical assistance; and opportunities to build relationships between states and tribes.

#### Removals

In paragraph (i)(14), ACF proposes to require that the state title IV–E agency report whether the state court found by clear and convincing evidence, in a court order, that continued custody of the Indian child by the parent or Indian custodian was likely to result in serious emotional or physical damage to the Indian child in accordance with 25 U.S.C. 1912(e); and whether the court finding indicates that the state court's finding was supported by the testimony of a qualified expert witness in accordance with 25 U.S.C. 1912(e).

This is an important protection under ICWA for Indian children given that the standard for removal of an Indian child is established by ICWA and may be different than in non-ICWA foster care cases. In ICWA, Congress created minimum federal standards for removal to prevent the continued breakup of Indian families. ICWA's legislative history reflects clear Congressional intent: "It is clear then that the Indian child welfare crisis is of massive proportions and that Indian families face vastly greater risks of involuntary separation than are typical of our society as a whole." (H. Rep. 95–1386 (July 24, 1978)). The proposed ICWA-related AFCARS data element will provide data on the extent to which

Indian children are removed in a manner that conforms to ICWA's statutory standard, informs ACF about the frequency of and evidentiary standards applied to removals of Indian children, helps identify needs for training and technical assistance related to ICWA statutory standards, and highlights substantive opportunities for building and improving relationships between states and tribes.

#### Foster Care and Pre-Adoptive Placement Preferences

In paragraphs (i)(15) through (18), ACF proposes to require that state title IV-E agencies report certain information on the foster care and pre-adoptive placement of Indian children, specifically, the placement of such children in the least restrictive setting that most approximates a family within reasonable proximity to his or her home in accordance with preferences established in ICWA at 25 U.S.C. 1915(b), or preferences established by tribal resolution 25. U.S.C. 1915(c).

In paragraph (i)(15), the state title IV-E agency must indicate which foster care and pre-adoptive placements from a list of five are available to accept placement of the Indian child. The five placements options are: A member of the Indian child's extended family; a foster home licensed, approved, or specified by the Indian child's tribe; an Indian foster home licensed or approved by an authorized non-Indian licensing authority; 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; and a placement that complies with the order of preference for foster care or pre-adoptive placements established by an Indian child's tribe, in accordance with 25 U.S.C. 1915(c).

In paragraph (i)(16), the state title IV-E agency must indicate whether the Indian child's current placement as of the end of the report period meets the placement preferences of ICWA at 25 U.S.C. 1915(b) by indicating with whom the Indian child is placed from a list of six response options. The placements are: A member of the Indian child's extended family; a foster home licensed, approved, or specified by the Indian child's tribe; an Indian foster home licensed or approved by an authorized non-Indian licensing authority; 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; a placement that complies with the order of preference for foster care or pre-adoptive placements established by

an Indian child's tribe, in accordance with 25 U.S.C. 1915(c); or none.

In paragraph (i)(17), the state title IV-E agency must indicate whether the state court made a finding of good cause, on a court order, to place the Indian child with someone who is not listed in the placement preferences of ICWA in 25 U.S.C. 1915(b) or the placement preferences of the Indian child's tribe, if the placement preferences for foster care and pre-adoptive placements were not followed. In paragraph (i)(18), the state title IV-E agency must indicate the state court's basis for the finding of good cause, as indicated on the court order, from a list of five response options: Request of the biological parents; request of the Indian child; the unavailability of a suitable placement that meets the placement preferences in ICWA at 25 U.S.C. 1915; the extraordinary physical or emotional needs of the Indian child; or other.

The requirements around placement preferences in ICWA are a key piece of the protections mandated by ICWA. Placement preferences serve to protect the best interests of Indian children and promote the stability and security of families and Indian tribes by keeping Indian children with their extended families or in Indian foster homes and communities. The placement preferences in ICWA are congruent with the title IV-E plan requirement in section 471(a)(19) of the Act regarding preference to an adult relative over a non-related caregiver when determining the placement for a child. Data from the National Survey of Child and Adolescent Well-Being indicates that opportunities for kinship placements vary widely by age for AI/AN children when compared to other children of the same age. New AFCARS data will help to adequately assess the current status of kinship placements as well as to help identify a national plan for meeting permanency goals through kinship placements.

Factors unique to Indian children, including the availability of American Indian foster homes, influence decisions about the placement of Indian children. These factors include the characteristics of the foster home, the number of placements a child will have, and the duration of the stay (GAO-05-290, p.3). The information from these data elements will allow ACF to distinguish between ICWA cases in which there was no available ICWA-preferred placement and those cases where an available ICWA-preferred placement was not used despite its availability. The data will help to identify trends or problems that may require enhanced recruitment of potential Indian foster homes or relative

placements. This information will help to identify the training and technical assistance needs of states to support recruitment and support foster families to meet the unique cultural, social, extracurricular, and linguistic needs of Indian children. Reporting information on good cause will help agencies better understand why the ICWA placement preferences are not followed. In addition, such information will aid in targeting training and resources needed to assist states in improving Indian child outcomes.

#### Termination of Parental Rights

In paragraphs (i)(19) through (24), ACF proposes to require that the state title IV-E agency report information regarding voluntary and involuntary terminations of parental rights (TPR), which include tribal customary adoptions. The information includes: Whether the rights of the Indian child's parents or Indian custodian were involuntarily or voluntarily terminated; whether, prior to ordering an involuntary termination of parental rights, the state court found beyond a reasonable doubt, in a court order, that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child in accordance with 25 U.S.C. 1912(f); whether the state court indicates that its finding was supported by the testimony of a qualified expert witness in accordance with 25 U.S.C. 1912(f); and if the TPR was voluntary, whether there is a court order that indicates that the voluntary consent to termination for the biological or adoptive mother and biological or adoptive father or Indian custodian was made in writing and recorded in the presence of a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian in accordance with 25 U.S.C. 1913.

Distinguishing between involuntary and voluntary terminations of parental rights is important in ICWA given specific protections that must be provided in each context (25 U.S.C. 1912(e), (f) and 25 U.S.C. 1913). In addition, termination standards are important protections for Indian children under ICWA given that Congress specifically created minimum federal standards for removal of an Indian child to prevent the breakup of Indian families and to promote the stability and security of families and Indian tribes by preserving the child's



links to their parents and to the tribe through the child's parent(s). Further, a TPR may affect a child's ability to be a full member of his/her tribe, preventing the child from accessing services and benefits available to tribal members. Whether the Indian child's parents' rights were terminated in a manner that conforms to the statutory standard informs ACF as to when an Indian child's parental rights are terminated, helps identify the need for training and technical assistance to meet statutory standards, and highlights substantive opportunities for building relationships between states and tribes.

**Adoption Proceedings**

In paragraphs (i)(25) through (29), ACF proposes to require that the state title IV-E agency report certain information on adoptive placement preferences, which are requirements in ICWA at 25 U.S.C. 1915(a), if the Indian child exited foster care to adoption per § 1355.43(g).

In paragraph (i)(25), the state title IV-E agency must indicate whether the child exited foster care to adoption per § 1355.43(g). This is a driver question for this section; if the state title IV-E agency indicates "yes," then the agency must complete the elements in this section; if the state title IV-E agency indicates "no," then the agency must skip the elements in this section.

In paragraph (i)(26), the state title IV-E agency must indicate which adoptive placements from a list of four were willing to accept placement of the Indian child. Adoption placements preferences are found in ICWA at 25 U.S.C. 1915(a) as follows: A member of the Indian child's extended family;

other members of the Indian child's tribe; other Indian families; or a placement that complies with the order of preference for adoptive placements established by an Indian child's tribe, in accordance with 25 U.S.C. 1915(c).

In paragraph (i)(27), the state title IV-E agency must indicate whether the placement reported in § 1355.43(h) meets the placement preferences of ICWA in 25 U.S.C. 1915(a) by indicating with whom the Indian child is placed from a list of five response options. The placements preferences are: A member of the Indian child's extended family; other members of the Indian child's tribe; other Indian families; or a placement that complies with the order of preference for adoptive placements established by an Indian child's tribe, in accordance with 25 U.S.C. 1915(c); or none.

In paragraph (i)(28), the state title IV-E agency must indicate whether the state court made a finding of good cause, in a court order, to place the Indian child with someone who is not listed in the placement preferences of ICWA in 25 U.S.C. 1915(a) or the placement preferences of the Indian child's tribe, if the placement preferences for adoptive placements were not followed. In paragraph (i)(29), the state title IV-E agency must indicate the state court's basis for the finding of good cause, as indicated in the court order, from a list of five response options: Request of the biological parents; request of the Indian child; the unavailability of a suitable placement that meets the placement preferences in ICWA at 25 U.S.C. 1915; the extraordinary physical or emotional needs of the Indian child; or other.

The requirements for adoption placement preferences in ICWA are a key piece of the protections provided under ICWA. Placement preferences serve the policies of protecting the best interests of Indian children and promoting the stability and security of families and Indian tribes by keeping adopted Indian children with their extended families, tribes or communities. These data elements will help provide greater understanding on how best to support Indian children in cases where adoption is the outcome. The data are important to assist in identifying trends or problems that may require enhanced recruitment of potential Indian adoptive homes or relative placements. The information from these data elements will allow ACF to distinguish between ICWA cases in which there was no available ICWA-placement and those cases where an available ICWA-placement was not used. The data will help assess the current status of kinship guardianship placements as well as to help identify a national plan for meeting permanency goals through kinship guardianship. This information will help to identify the scope of resources for training and technical assistance needed for states to recruit and support adoptive families to meet the unique cultural, social, and enrichment activity needs of Indian children. Reporting information on good cause to not follow ICWA adoption placement preferences will help to understand why the ICWA placement preferences are not followed, and will aid in identifying targeted training and resource needs to assist states in improving Indian child outcomes.

**ATTACHMENT A—PROPOSED OUT-OF-HOME CARE DATA FILE ELEMENTS RELATED TO ICWA**

Category & applicability	Element	Response options	Section citation
Identifying an "Indian Child" under the Indian Child Welfare Act. These data elements will be reported for all children.	Indicate whether the state title IV-E agency researched whether there is a reason to know that the child is an "Indian child" under ICWA: <ul style="list-style-type: none"> <li>• Indicate whether the state agency inquired with the child's biological or adoptive mother.</li> <li>• Indicate whether the biological or adoptive mother is a member of an Indian tribe.</li> <li>• Indicate whether the state agency inquired with the child's biological or adoptive father.</li> <li>• Indicate whether the biological or adoptive father is a member of an Indian tribe.</li> <li>• Indicate whether the state agency inquired with the child's Indian custodian, if the child has one.</li> </ul>	..... Yes. No. The biological or adoptive mother is deceased. Yes. No. Unknown. Yes. No. The biological or adoptive father is deceased. Yes. No. Unknown. Yes. No. Child does not have an Indian custodian.	1355.43(i)(3).

ATTACHMENT A—PROPOSED OUT-OF-HOME CARE DATA FILE ELEMENTS RELATED TO ICWA—Continued

Category & applicability	Element	Response options	Section citation
Application of ICWA .....	<ul style="list-style-type: none"> <li>Indicate whether the state agency inquired with the child who is the subject of the proceeding.</li> <li>Indicate whether the child is a member of or eligible for membership in an Indian tribe.</li> <li>Indicate whether the domicile or residence of the child, parent, or the Indian custodian is known by the agency to be, or is shown to be, on an Indian reservation.</li> <li>Indicate whether the state title IV–E agency knows or has reason to know that the child is an Indian child as defined by ICWA.</li> </ul>	Yes. No.  Yes. No. Unknown.  Yes. No.  Yes .....	1355.43(i)(4).
These data elements will be reported for all children.	<ul style="list-style-type: none"> <li>Indicate the date that the state title IV–E agency discovered the information that indicates that the child is or may be an Indian child.</li> <li>Indicate the name(s) of all federally recognized Indian tribe(s) identified that may potentially be the Indian child’s tribe(s).</li> </ul>	Date..  Name(s)..	
These data elements will be reported for all children.	Indicate whether a court order indicates that the court found that ICWA applies. <ul style="list-style-type: none"> <li>Indicate the date of the court finding .....</li> <li>Indicate the name of the Indian tribe(s) that the court found is the Indian child’s tribe, if listed on the court order.</li> </ul>	Yes, ICWA applies ..... No, ICWA does not apply. No court finding. Date. Name(s). No name listed.	1355.43(i)(5).
Transfer to tribal court .....	Indicate whether there is a court order that indicates that the Indian child’s parent, Indian custodian, or Indian child’s tribe requested, orally on the record or in writing, that the state court transfer the case to the tribal court of the Indian child’s tribe, in accordance with 25 U.S.C. 1911(b), at any point during the report period.	Yes .....	1355.43(i)(6).
These data elements and all of those below only apply to Indian children.	If the state court denied the request to transfer the case to tribal court, indicate whether there is a court order that indicates the reason(s) why the case was not transferred to the tribal court. <ul style="list-style-type: none"> <li>Either of the parents objected to transferring the case to the tribal court.</li> <li>The tribal court declined the transfer to the tribal court.</li> <li>The state court found good cause not to transfer the case to the tribal court.</li> </ul>	Yes .....	1355.43(i)(7).
Notification .....	Indicate whether the Indian child’s parent or Indian custodian was given proper legal notice more than 10 days prior to the first child custody proceeding in accordance with 25 U.S.C. 1912(a).	Yes .....	1355.43(i)(8).
	Indicate whether the Indian child’s tribe(s) was given proper legal notice more than 10 days prior to the first child custody proceeding in accordance with 25 U.S.C. 1912(a).	Yes No. The child’s Indian tribe is unknown. Name(s) .....	1355.43(i)(9).
	Indicate the name(s) of the Indian tribe(s) that were sent notice for a child custody proceeding as required in ICWA at 25 U.S.C. 1912(a).	Yes .....	1355.43(i)(10).
Active efforts to prevent removal and reunify with Indian family.	If the tribe(s) requested additional information, indicate whether the state title IV–E agency replied with the additional information that the Indian tribe(s) requested.  Indicate the date that the state title IV–E agency began making active efforts to prevent the breakup of the Indian family for the most recent removal reported in § 1355.43(d) of the Indian child in accordance with 25 U.S.C. 1912(d).  Indicate whether the court found, in a court order, that the state title IV–E agency made active efforts to prevent the breakup of the Indian family for the most recent removal reported in § 1355.43(d) and that these efforts were unsuccessful in accordance with 25 U.S.C. 1912(d).	Date .....  Yes .....	1355.43(i)(11).  1355.43(i)(12).



ATTACHMENT A—PROPOSED OUT-OF-HOME CARE DATA FILE ELEMENTS RELATED TO ICWA—Continued

Category & applicability	Element	Response options	Section citation
		An Indian foster home licensed or approved by an authorized non-Indian licensing authority. 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. A placement that complies with the order of preference for foster care or pre-adoptive placements established by an Indian child's tribe, in accordance with 25 U.S.C. 1915(c). None.	
	If the placement preferences for foster care or pre-adoptive placements were not followed, indicate whether the court made a finding of good cause, on a court order, to place the Indian child with someone who is not listed in the placement preferences of ICWA in 25 U.S.C. 1915(b) or the placement preferences of the Indian child's tribe.	Yes ..... No.	1355.43(i)(17).
	Indicate the state court's basis for the finding of good cause, as indicated on the court order.	.....	1355.43(i)(18).
	<ul style="list-style-type: none"> <li>• Request of biological parents .....</li> <li>• Request of Indian child .....</li> <li>• The unavailability of a suitable placement that meets the placement preferences in ICWA at 25 U.S.C. 1915.</li> <li>• The extraordinary physical or emotional needs of the Indian child.</li> <li>• Other .....</li> </ul>	Yes. No. Yes. No. Yes. No. Yes. No. Yes. No.	
Termination of parental rights .....	Indicate whether the termination of parental (or Indian custodian rights) was voluntary or involuntary.	Voluntary ..... Involuntary.	1355.43(i)(19).
	Indicate whether, prior to ordering a termination of parental rights, the state court found beyond a reasonable doubt, in a court order, that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child in accordance with 25 U.S.C. 1912(f).	Yes ..... No.	1355.43(i)(20).
	Indicate whether the court finding, reported for paragraph (i)(20), indicates that the state court's finding was supported by the testimony of a qualified expert witness in accordance with 25 U.S.C. 1912(f).	Yes ..... No.	1344.43(i)(21).
	If voluntary, indicate whether there is a court order that indicates that the voluntary consent to termination for the biological or adoptive mother was made in writing and recorded in the presence of a judge in accordance with 25 U.S.C. 1913.	Yes ..... No. Does not apply.	1355.43(i)(22).
	If voluntary, indicate whether there is a court order that indicates that the voluntary consent to termination for the biological or adoptive father was made in writing and recorded in the presence of a judge in accordance with 25 U.S.C. 1913.	Yes ..... No. Does not apply.	1355.43(i)(23).
	If voluntary, indicate whether there is a court order that indicates that the voluntary consent to termination for the Indian custodian was made in writing and recorded in the presence of a judge in accordance with 25 U.S.C. 1913.	Yes ..... No. Does not apply.	1355.43(i)(24).
Adoption proceedings .....	Indicate whether the Indian child exited foster care to adoption per § 1355.43(g).	Yes ..... No.	1355.43(i)(25).
	Indicate which adoptive placements that meet the placement preferences in ICWA at 25 U.S.C. 1915(a) were willing to accept placement.	.....	1355.43(i)(26).

ATTACHMENT A—PROPOSED OUT-OF-HOME CARE DATA FILE ELEMENTS RELATED TO ICWA—Continued

Category & applicability	Element	Response options	Section citation
	<ul style="list-style-type: none"> <li>• A member of the Indian child's extended family.</li> <li>• Other members of the Indian child's tribe .....</li> <li>• Other Indian families .....</li> <li>• A placement that complies with the order of preference for foster care or pre-adoptive placements established by an Indian child's tribe, in accordance with 25 U.S.C. 1915(c).</li> </ul> <p>Indicate whether the placement reported in § 1355.43(h) meets the placement preferences of ICWA in 25 U.S.C. 1915(a) by indicating with whom the Indian child is placed.</p> <p>Other Indian families. A placement that complies with the order of preference for foster care or pre-adoptive placements established by an Indian child's tribe, in accordance with 25 U.S.C. 1915(c).</p> <p>None. If the placement preferences for adoption were not followed, indicate whether the court made a finding of good cause, on a court order, to place the Indian child with someone who is not listed in the placement preferences of ICWA in 25 U.S.C. 1915(a) or the placement preferences of the Indian child's tribe.</p> <p>Indicate whether there is a court order that indicates the court's basis for the finding of good cause.</p> <ul style="list-style-type: none"> <li>• Request of the biological parents .....</li> <li>• Request of the Indian child .....</li> <li>• The unavailability of a suitable placement that meets the placement preferences in ICWA at 25 U.S.C. 1915.</li> <li>• The extraordinary physical or emotional needs of the Indian child.</li> <li>• Other .....</li> </ul>	<p>Yes. No. Yes. No. Yes. No. Yes. No.</p> <p>A member of the Indian child's extended family. Other members of the Indian child's tribe.</p> <p>Yes .....</p> <p>No.</p> <p>.....</p> <p>Yes. No. Yes. No. Yes. No. Yes. No.</p>	<p>1355.43(i)(27).</p> <p>1355.43(i)(28).</p> <p>1355.43(i)(29).</p>

**VI. Regulatory Impact Analysis**

*Executive Order 12866*

Executive Order (E.O.) 12866 requires that regulations be drafted to ensure that they are consistent with the priorities and principles set forth in the E.O. The Department has determined that this proposed rule is consistent with these priorities and principles. In particular, ACF has determined that a regulation is the best and most cost effective way to implement the statutory mandate for a data collection system regarding children in foster care and those that are adopted and support other statutory obligations to provide oversight of child welfare programs. ACF consulted with the Office of Management and Budget (OMB) and determined that this proposed rule does meet the criteria for a significant regulatory action under E.O. 12866. Thus, it was subject to OMB review.

ACF determined that the costs to title IV-E agencies as a result of this rule will not be significant. Federal reimbursement under title IV-E will be available for a portion of the costs that title IV-E agencies will incur as a result of the revisions proposed in this rule, depending on each agency's cost allocation plan, information system, and other factors.

*Alternatives Considered:*

1. ACF considered not collecting certain ICWA-related data in AFCARS. Not including ICWA-related data elements in AFCARS, or including too few data elements, may exclude Indian children and families from the additional benefit of improving AFCARS data.

2. ACF considered whether other existing data sets could yield similar information. ACF determined that AFCARS is the only comprehensive case-level data set on the incidence and experiences of children who are in

foster care and/or adoption or guardianship with the involvement of the state or tribal title IV-E agency.

3. Previously, ACF considered whether to permit title IV-E agencies to sample and report information on a representative population of children. Such an alternative is unacceptable given the significant limitations associated with using a sampling approach for collecting data, including data on AI/AN children who are in foster care, adoption, and guardianship programs. Under a sampling approach, ACF would be unable to report reliable data responsive to the Annual Outcomes Report to Congress, the Report to Congress on the Social and Economic Conditions of Native Americans, and Adoption Incentives. Second, when using a sample, small population subgroups (e.g., children who spend very long periods in foster care or children who are adopted or run away) might occur so rarely in the data such

that analysis on these subgroups would not be meaningful. Sampling error with respect to AI/AN populations is already a well-established issue affecting the validity and meaningfulness of large national surveys like the American Community Survey. It is a well-established that, historically, quantitative and qualitative data on AI/AN populations, including children, has been incomplete and unreliable resulting in such populations being among the most under-counted populations groups in the United States.

4. In each of 18 states, there were fewer than 10 Indian children in foster care according to FY 2013 AFCARS data. For states that have few Indian children in foster care, ACF considered alternatives to collecting ICWA-related data through AFCARS, such as providing an exemption from reporting, or an alternative submission process or that would be less burdensome. While ACF recognizes collecting the proposed ICWA-related data may be burdensome for states with few Indian children in foster care, the alternative approaches are not feasible due to:

- The statutory requirement that AFCARS data be comprehensive. Section 479(c)(3) requires that AFCARS provide “comprehensive national information.” Exempting some states from reporting the proposed ICWA-related data elements is not consistent with this statutory mandate, and would render it difficult to use this data for development of national policies for Indian children.

- The statutory requirement for assessing penalties on AFCARS data. Section 474(f) of the Act penalizes the title IV–E agency for non-compliance based on the total amount expended by the state for administration of foster care activities. The statute provides for mandatory penalties, therefore, we are not authorized to permit some states to be subject to a penalty and not others. In addition, allowing states an alternate submission process would complicate and/or prevent the assessment of penalties as proposed in the February 9, 2015 NPRM in proposed § 1355.46, including penalties for failure to submit data files free of cross-file errors, missing, invalid, or internally inconsistent data, or tardy transactions for each data element of applicable records.

- State agencies that elect to have a SACWIS provide some of the proposed ICWA-related data elements as part of the system requirements will already

have systems designed to capture some ICWA-related data.

#### *Regulatory Flexibility Analysis*

The Secretary certifies, under 5 U.S.C. 605(b), as enacted by the Regulatory Flexibility Act (Pub. L. 96–354), that this rule will not result in a significant impact on a substantial number of small entities. This proposed rule does not affect small entities because it is applicable only to state title IV–E agencies.

#### *Unfunded Mandates Reform Act*

The Unfunded Mandates Reform Act (Pub. L. 104–4) requires agencies to prepare an assessment of anticipated costs and benefits before proposing any rule that may result in an annual expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation). That threshold level is currently approximately \$146 million. This proposed rule does not impose any mandates on state, local, or tribal governments, or the private sector that will result in an annual expenditure of \$100 million or more.

#### *Congressional Review*

This regulation is not a major rule as defined in 5 U.S.C. 8.

#### *Assessment of Federal Regulations and Policies on Families*

Section 654 of the Treasury and General Government Appropriations Act of 2000 (Pub. L. 106–58) requires federal agencies to determine whether a proposed policy or regulation may affect family well-being. If the agency’s determination is affirmative, then the agency must prepare an impact assessment addressing seven criteria specified in the law. These proposed regulations will not have an impact on family well-being as defined in the law.

#### *Executive Order 13132*

Executive Order (E.O.) 13132 requires that federal agencies consult with state and local government officials in the development of regulatory policies with Federalism implications. Consistent with E.O. 13132, the Department specifically solicits comments from state and local government officials on this proposed rule.

#### *Paperwork Reduction Act*

Under the Paperwork Reduction Act (44 U.S.C. 35, as amended) (PRA), all

Departments are required to submit to OMB for review and approval any reporting or recordkeeping requirements inherent in a proposed or final rule. Information collection for AFCARS is currently authorized under OMB number 0970–0422. This supplemental notice of proposed rulemaking contains new information collection requirements in proposed § 1355.43, the out-of-home care data file that the Department has submitted to OMB for its review. This SNPRM proposes to require state title IV–E agencies to collect and report ICWA-related data elements in the AFCARS out-of-home care data file. PRA rules require that ACF estimate the total burden created by this SNPRM regardless of what information is already available.

*Comments to the February 2015 AFCARS NPRM:* ACF understands from comments on the February 2015 AFCARS NPRM that National Association of Public Child Welfare Administrators (NAPCWA) and the states felt that our burden estimates were low for determining the costs to implement the proposed data elements in AFCARS NPRM. However, very few states provided estimates on the burden hours or actual costs to implement the AFCARS NPRM. The comments were primarily about technical or programmer costs to modify the information system to extract the proposed data elements. This did not include the work associated with child welfare agency workers gathering information or being trained in data entry. The estimates received to modify a state information system to extract the proposed AFCARS NPRM data elements (approximately 100) ranged from 2,000 hours to 20,000 hours. Although ACF appreciates that these states provided this information on hourly and cost burden estimates, ACF received too few estimates to assist in calculating the state costs for information systems and other burden associated with this SNPRM. Therefore, ACF provides estimates using the best available information.

#### Burden Estimate

ACF estimates the annual reporting and record keeping burden hours of this SNPRM to be 192,285 hours. ACF estimates a one-time burden associated with this SNPRM to be 85,072 hours. The 52 respondents comprise 52 state title IV–E agencies. The following are estimates.

Collection	Number of respondents	Number of responses per respondent	Average burden per year per respondent	Total burden hours
Annual Record Keeping and Reporting Burden .....	52	2	3,697.79	192,285
One-Time Burden .....	52	1	1,636	85,072

In estimating the burden, ACF included both one-time burden estimates and annual burden estimates:

*Annual burden:* The annual burden to the state title IV–E agency includes activities such as: Searching data sources and gathering information, entering the information, extracting the information for AFCARS reporting, and transmitting the information to ACF.

*One time burden:* The one-time burden for this SNPRM, includes activities to: Develop or modify procedures and systems to collect, validate, and verify the information, adjust existing ways to comply with AFCARS requirements, and train personnel on the new AFCARS requirements of this SNPRM.

In developing the burden estimate, ACF made several assumptions about the data in state child welfare information systems. First, ACF assumed that state title IV–E agencies may have access to most of the information for proposed data elements. ACF anticipated the information for these data elements are contained in the state title IV–E agency’s paper or electronic case files. ACF estimated that some of the data elements would only be in paper case files or narrative fields, thus not readily able to be extracted for AFCARS reporting, and would require revisions to the electronic case file so that the information can be extracted for AFCARS reporting. Some of these data elements concern collecting information on court findings and other activities taking place during court processes.

ACF proposes for state title IV–E agencies to report information in court orders that the state title IV–E agency would have ready access to or would typically be in the state title IV–E agency’s case files. ACF is seeking state feedback as to whether the state agency has these readily available in their agency paper files or electronic files. These are:

- A court order indicating that the child’s parent or Indian custodian or the Indian child’s tribe requested orally on the record or in writing that the state court transfer the case to the tribal court of the Indian child’s tribe, in accordance with 25 U.S.C. 1911(b), and, where applicable, the reason(s) why the case was not transferred.

- A court order indicating the court found by clear and convincing evidence, in a court order, that continued custody of the Indian child by the parent or Indian custodian was likely to result in serious emotional or physical damage to the Indian child in accordance with 25 U.S.C. 1912(e).

- A court order indicating that the court made a finding of good cause, and the basis, if the placement preferences for foster care were not followed, to place the Indian child with someone who is not listed in the placement preferences of ICWA in 25 U.S.C. 1915(b) or the placement preferences of the Indian child’s tribe in accordance with 25 U.S.C. 1915(c); and

- If the placement preferences for adoption were not followed, a court finding of good cause, and the basis, on a court order, to place the Indian child with someone who is not listed in the placement preferences of ICWA in 25 U.S.C. 1915(a) or the placement preferences of the Indian child’s tribe.

Second, in order to determine the number of cases for which state title IV–E agencies will have to report the ICWA-related data elements, ACF estimated the out-of-home care reporting population using the most recent FY 2014 AFCARS data available submitted by state title IV–E agencies: 415,129 children were in foster care on September 30, 2014 and 264,746 children entered foster care during FY 2014. The state title IV–E agency will be required to report approximately 3 data elements for all children who are in the out-of-home care reporting population and approximately 24 data elements on children to whom the ICWA-related data elements apply.

To estimate the number of children to whom the ICWA-related data elements apply, ACF used as a proxy those children whose race was reported as “American Indian or Alaska Native” in the most recent FY 2014 AFCARS data available. While not every child of this reported race category will be covered under ICWA, it is likely that the state title IV–E agency will have to explore whether these children may be Indian children as defined in ICWA. Thus, 5,960 children who entered foster care during FY 2014 were reported as American Indian or Alaska Native.

Third, ACF assumed that there will be one-time costs to implement the requirements of this SNPRM and annual costs to collect, input, and report the information. The annual costs involve searching data, gathering the information that meet the requirements of this SNPRM, entering the information, and extracting and submitting the information for AFCARS reporting. The one-time costs mostly involve modifying procedures and systems to collect, validate and verify information, adjusting existing ways to comply with AFCARS; and training personnel on the new AFCARS requirements of this SNPRM.

Fourth, ACF assumed that the one-time burden is similar to how long it would take to make revisions to a SACWIS to be able to meet the requirements of the SNPRM. Currently, 36 states have an operational SACWIS. ACF understands that 24 states opted to collect at least a minimal amount of ICWA-related information per the SACWIS Assessment Review Guide, but also recognize that most state title IV–E agencies will require some revisions to meet the requirements of this SNPRM. As more states build SACWIS, ACF anticipates it will lead to more efficiency in reporting and less cost and burden to the state agencies.

Finally, after reviewing the 2014 Bureau of Labor Statistics data to help determine the costs of the SNPRM, ACF assumed that there will be a mix of staff working to meet both the one-time and annual requirements of this SNPRM with the job role of Management Analyst (13–1111) with a mean hourly wage estimate of \$43.68 and those with the job role of Social and Community Service Managers (11–9151) with a mean hourly wage estimate of \$32.56. Thus, ACF averaged the two wages to come to an average labor rate of \$38.12. In order to ensure we took into account overhead costs associated with these labor costs, ACF doubled this rate.

*Annual Recordkeeping and Reporting Burden Estimate:* ACF estimated the annual recordkeeping and reporting burden by multiplying the time spent on the recordkeeping and reporting activities described below by the number of children in foster care to arrive at the total recordkeeping hours. These estimates represent the work

associated with the state title IV–E agency searching data sources and gathering information, entering the information, extracting the information for AFCARS reporting, and transmitting the information to ACF. These estimates are based on our assumptions, described above, on how much of the information proposed in this SNPRM state title IV–E agencies currently have in their electronic or paper case files or information system or have ready access to, while taking into account that some of the elements may require more effort to gather the information if it is not readily accessible.

- Gathering the information for and entering the ICWA-related data elements that apply to all children who enter foster care on average will take approximately 132,373 annual burden hours. (0.5 hours × 264,746 children who entered foster care = 132,373 annual burden hours for all children in the out-of-home care reporting population)

- Gathering the information for and entering the ICWA-related data elements that apply to children in foster care who are covered by ICWA, on average will take 59,600 annual burden hours. (10 hours × 5,960 children who enter foster care with a race reported as American Indian or Alaska Native = 59,600 annual burden hours for children in the out-of-home care reporting population who are covered by ICWA). ACF estimated that it would take a state title IV–E agency on average 10 hours annually to gather and input the ICWA-related data elements that apply to children in foster care who are covered by ICWA. ACF estimated this by assuming that a state title IV–E agency would be gathering and inputting information for approximately 14 of the proposed data elements for an average foster care episode, if the child is not transferred and there is no TPR or adoption. In cases where the child is transferred, ACF estimated that the burden would decrease because the agency would have fewer data elements to complete and the burden would increase in cases where there is a TPR and the child is adopted because there would be more data elements that the agency would have to complete.

- Extracting and submitting the information to ACF for AFCARS

reporting on average will take 6 annual burden hours per state title IV–E agency. Nationally, the hour burden for all 52 state title IV–E agencies would be 312 (6 hours × 52 states = 312). ACF took into account the number of data elements proposed in this SNPRM when estimating the reporting burden.

ACF added the bullets above and estimate the number of annual recordkeeping and reporting burden hours that workers will spend on ICWA-related AFCARS requirements in the out-of-home care reporting population annually will be 192,285 hours (132,373 + 59,600 + 312 = 192,285). Dividing this annual figure by the 52 state title IV–E agencies, ACF arrived at approximately 3,698 average burden hours per respondent per year for the ICWA-related information in the AFCARS out-of-home care data file. (192,285 ÷ 52 title IV–E agencies = 3,697.79 average burden hours per respondent per year.)

*One-Time Burden Estimate:* ACF estimated the one-time burden by adding up the time spent on the activities described below and multiplying it by the 52 state title IV–E agencies to arrive at the one-time burden hours. The one-time burden estimates represent the work associated with the activities described below. As stated above, ACF came to these estimates by using average estimates for revising a SACWIS, which is the best information available. It is also important to note that states will have the option of updating their systems in a streamlined manner since ACF plans to issue the final rules for new AFCARS regulations and for child welfare information systems.

- Modifying procedures and systems (including developing or acquiring technology) to collect, validate, verify, process, and report the information to ACF on average will take approximately 130 burden hours.

- Adjustments to the existing ways to comply with AFCARS, developing technology and systems to collect and process data on average will take approximately 200 burden hours.

- The administrative tasks associated with training personnel on the new AFCARS requirements of this SNPRM which include reviewing instructions, including training development and

manuals on average will take approximately 30 burden hours.

- Training personnel on the new AFCARS requirements of this SNPRM on average will take approximately 1,276 burden hours. ACF arrived at this estimate by dividing the number of children in foster care on September 30, 2014 (415,129) by an estimated average caseload of 25 cases per worker to arrive at an estimate of 16,605 workers to be trained. ACF divided this number (16,605) by 52 to account for average workers per state title IV–E agency, and arrived at 319 workers. ACF multiplied the workers (319) by the number of estimated hours to complete training (4 hours) to arrive at 1,276 burden hours to train personnel per state title IV–E agency on the new AFCARS requirements. ACF added the burden hours above (1,636 hours) and multiplied by 52 state title IV–E agencies, which results in a one-time burden of 85,072 hours (1,636 × 52 = 85,072 one-time burden hours).

*Total Burden Cost*

ACF used a total cost and burden hour estimates to provide additional detail on projected average cost for each state title IV–E agency implementing the changes described in this SNPRM. Once the burden hours were determined, ACF developed an estimate of the associated cost for state title IV–E agencies to conduct these activities, as applicable. Based on our assumptions above, ACF used an average labor rate of \$38.12 and doubled this rate to account for overhead costs (\$76.24). Based on these rates, ACF estimated the cost for one-time burden to be \$6,485,889.28 (85,072 one-time hours × \$76.24 hourly cost/overhead = \$6,485,889.28) and ACF estimated the cost for annual burden to be \$14,659,808.40 (192,285 annual hours × \$76.24 hourly cost = \$14,659,808.40). Dividing these costs by 52 state title IV–E agencies, ACF estimated the average cost per state title IV–E agency to be \$124,728.64 one-time and \$281,919.39 annually. Federal reimbursement under title IV–E will be available for a portion of the costs that title IV–E agencies will incur as a result of the revisions proposed in this rule, depending on each agency’s cost allocation plan, information system, and other factors.

	Hours	Average hourly labor rate + overhead	Total cost nationwide	Number of respondents	Net average cost per respondent
Total One-Time Burden .....	85,072	\$76.24	\$6,485,889.28	52	\$124,728.64 One-Time.
Total Annual recordkeeping and reporting burden .....	192,285	76.24	14,659,808.40	52	281,919.39 Annually.



In the above estimates, ACF acknowledges: (1) ACF has used average figures for state title IV–E agencies of very different sizes and of which, some states may have larger populations of tribal children served than other states, (2) these are rough estimates of the burden because state title IV–E agencies have not been required previously to report ICWA-related information in AFCARS, and (3) as described, ACF has limited information to use in making these estimates. ACF welcomes comments on these factors and all others in this section.

ACF will consider comments by the public on this proposed collection of information in the following areas:

1. Evaluating whether the proposed collection is necessary for the proper performance of the functions of ACF, including whether the information will have practical utility;

2. Evaluating whether the proposed collection is sufficient to assess and serve the unique needs of AI/AN children under the placement and care of title IV–E agencies;

3. Evaluating the accuracy of ACF's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

4. Enhancing the quality, usefulness, and clarity of the information to be collected; and

5. Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technology, *e.g.*, permitting electronic submission of responses.

OMB is required to make a decision concerning the collection of information contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the Department on the proposed regulations. Written comments to OMB for the proposed information collection should be sent directly to the following: Office of Management and Budget, either by fax to 202–395–6974 or by email to [OIRA\\_submission@omb.eop.gov](mailto:OIRA_submission@omb.eop.gov). Please mark faxes and emails to the attention of the desk officer for ACF.

## VII. Tribal Consultation Statement

As we stated in section IV of this SNPRM, we held one Tribal consultation session via a teleconference call on May 1, 2015 and

we did not receive suggestions from tribal representatives during the call. A few tribal representatives indicated that they would comment on the data elements through the SNPRM when it is issued.

We also stated in section IV of this SNPRM that we analyzed comments to the Feb. 2015 AFCARS NPRM that spoke to ICWA-related data elements to help inform this SNPRM. We received 45 comments that spoke to including new data elements in AFCARS related to ICWA; a majority of which were from tribes/tribal organizations. The commenters recommended data elements that provide basic information about the applicability of ICWA for children in out-of-home care, including: Identification of American Indian and Alaskan Native children and their family structure, tribal notification and intervention in state court proceedings, the relationship of the foster parents and other providers to the child, decisions to place a child in out-of-home care (including data on active efforts and continued custody), whether a placement was licensed by an Indian tribe, whether the placement preferences in ICWA were followed, and termination of parental rights (both voluntary and involuntary).

### List of Subjects in 45 CFR Part 1355

Adoption and foster care, Child welfare, Grant programs—social programs.

(Catalog of Federal Domestic Assistance Program Number 93.658, Foster Care Maintenance; 93.659, Adoption Assistance; 93.645, Child Welfare Services—State Grants).

#### Mark H. Greenberg,

*Acting Assistant Secretary for Children and Families.*

Approved: February 17, 2016.

#### Sylvia M. Burwell,

*Secretary.*

For the reasons set forth in the preamble, 45 CFR part 1355 as proposed to be amended on February 9, 2015 (80 FR 7132), is proposed to be further amended as follows:

### PART 1355—GENERAL

■ 1. The authority citation for part 1355 continues to read as follows:

**Authority:** 42 U.S.C. 620 *et seq.*, 42 U.S.C. 670 *et seq.*; 42 U.S.C. 1302.

■ 2. Amend § 1355.43 by adding paragraph (i) to read as follows:

#### § 1355.43 Out-of-home care data file elements.

\* \* \* \* \*

(i) *Data elements related to the Indian Child Welfare Act (ICWA)*—(1)

*Definitions.* Unless otherwise specified, the following terms as they appear in this paragraph (i) are defined as follows:

*Child custody proceeding* has the same meaning as in 25 U.S.C. 1903(1).

*Extended family member* has the same meaning as in 25 U.S.C. 1903(2).

*Indian* has the same meaning as in 25 U.S.C. 1903(3).

*Indian child* has the same meaning as in 25 U.S.C. 1903(4).

*Indian child's tribe* has the same meaning as in 25 U.S.C. 1903(5).

*Indian custodian* has the same meaning as in 25 U.S.C. 1903(6).

*Indian organization* has the same meaning as in 25 U.S.C. 1903(7).

*Indian tribe* has the same meaning as in 25 U.S.C. 1903(8).

*Parent* has the same meaning as in 25 U.S.C. 1903(9).

*Reservation* has the same meaning as in 25 U.S.C. 1903(10).

*Tribal court* has the same meaning as in 25 U.S.C. 1903(12).

(2) For all children in the out-of-home care reporting population per § 1355.41(a), the state title IV–E agency must complete the data elements in paragraphs (i)(3) through (5) of this section. If the state title IV–E agency responds with “yes” to the data elements in paragraph (i)(4) or (5) of this section, then the agency must complete the remaining applicable paragraphs (i)(6) through (29) of this section.

(3) *Identifying an “Indian Child” under the Indian Child Welfare Act.* Indicate whether the state title IV–E agency researched whether there is a reason to know that the child is an Indian child under ICWA in each paragraph (i)(3)(i) through (viii) of this section.

(i) Indicate whether the state agency inquired with the child's biological or adoptive mother. Indicate “yes,” “no” or “the biological or adoptive mother is deceased.”

(ii) Indicate whether the biological or adoptive mother is a member of an Indian tribe. Indicate “yes,” “no” or “unknown.”

(iii) Indicate whether the state agency inquired with the child's biological or adoptive father. Indicate “yes,” “no,” or “the biological or adoptive father is deceased.”

(iv) Indicate whether the biological or adoptive father is a member of an Indian tribe. Indicate “yes,” “no,” or “unknown.”

(v) Indicate whether the state agency inquired with the child's Indian custodian, if the child has one. Indicate “yes,” “no” or “child does not have an Indian custodian.”

(vi) Indicate whether the state agency inquired with the child who is the subject of the proceeding. Indicate “yes” or “no.”

(vii) Indicate whether the child is a member of or eligible for membership in an Indian tribe. Indicate “yes,” “no,” or “unknown.”

(viii) Indicate whether the domicile or residence of the child, parent, or the Indian custodian is known by the agency to be, or is shown to be, on an Indian reservation. Indicate “yes” or “no.”

(4) *Application of ICWA.* Indicate whether the state title IV–E agency knows or has reason to know that the child is an Indian child as defined by ICWA. Indicate “yes” or “no.” If the state title IV–E agency indicated “yes,” the state title IV–E agency must complete the data elements in paragraphs (i)(4)(i) and (ii) of this section. If the state title IV–E agency indicated “no,” the state title IV–E agency must leave the data elements in paragraphs (i)(4)(i) and (ii) of this section blank.

(i) Indicate the date that the state title IV–E agency discovered the information that indicates that the child is or may be an Indian child.

(ii) Indicate the name(s) of all federally recognized Indian tribe(s) that may potentially be the Indian child’s tribe(s).

(5) Indicate whether a court order indicates that the court found that ICWA applies. Indicate “yes, ICWA applies,” “no, ICWA does not apply,” or “no court finding.” If the state title IV–E agency indicated “yes, ICWA applies,” the state title IV–E agency must complete paragraphs (i)(5)(i) and (ii) of this section. If the state title IV–E agency indicated “no, ICWA does not apply,” the state title IV–E agency must complete the data element in paragraph (i)(5)(i) of this section and leave the data element in paragraph (i)(5)(ii) of this section blank. If the state title IV–E agency indicated “no court finding,” the state title IV–E agency must leave the data elements in paragraphs (i)(5)(i) and (ii) of this section blank.

(i) Indicate the date of the court finding.

(ii) Indicate the name of the Indian tribe(s) that the court found is the Indian child’s tribe, if listed on the court order. If a name is not listed on the court order, the state title IV–E agency must indicate “no name listed.”

(6) *Transfer to tribal court.* Indicate whether there is a court order that indicates that the Indian child’s parent, Indian custodian, or Indian child’s tribe requested, orally on the record or in writing, that the state court transfer the

case to the tribal court of the Indian child’s tribe, in accordance with 25 U.S.C. 1911(b), at any point during the report period. Indicate “yes” or “no.” If the state title IV–E agency indicated “yes,” then the state title IV–E agency must complete the data element in paragraph (i)(7) of this section. If the state title IV–E agency indicated “no,” the state title IV–E agency must leave the data element in paragraph (i)(7) of this section blank.

(7) If the state court denied the request to transfer the case to tribal court, indicate whether there is a court order that indicates the reason(s) why the case was not transferred to the tribal court. Indicate “yes” or “no.” If the title IV–E agency indicated “yes,” then the title IV–E agency must indicate whether each reason in each paragraphs (i)(7)(i) through (iii) of this section is in the court order by indicating “yes” or “no.” If the state title IV–E agency indicates “no,” the title IV–E agency must leave the data elements in paragraphs (i)(7)(i) through (iii) of this section blank.

(i) Either of the parents objected to transferring the case to the tribal court.

(ii) The tribal court declined the transfer to the tribal court.

(iii) The state court found good cause not to transfer the case to the tribal court.

(8) *Notification.* (i) Indicate whether the Indian child’s parent or Indian custodian was given legal notice more than 10 days prior to of the first child custody proceeding in accordance with 25 U.S.C. 1912(a). Indicate “yes” or “no.”

(ii) Indicate whether the Indian child’s tribe(s) was given legal notice more than 10 days prior to the first child custody proceeding in accordance with 25 U.S.C. 1912(a). Indicate “yes”, “no” or “the child’s Indian tribe is unknown.”

(9) Indicate the name(s) of the Indian tribe(s) that were sent notice for a child custody proceeding as required in ICWA at 25 U.S.C. 1912(a).

(10) If the tribe(s) requested additional information, indicate whether the state title IV–E agency replied with the additional information that the Indian tribe(s) requested. If the tribe did not request additional information, indicate “does not apply.” Otherwise, indicate “yes” or “no.”

(11) *Active efforts to prevent removal and reunify with Indian family.* Indicate the date that the state title IV–E agency began making active efforts to prevent the breakup of the Indian family for the most recent removal reported in paragraph (d) of this section of the Indian child in accordance with 25 U.S.C. 1912(d).

(12) Indicate whether the court found, in a court order, that the state title IV–E agency made active efforts to prevent the breakup of the Indian family for the most recent removal reported in paragraph (d) of this section and that these efforts were unsuccessful in accordance with 25 U.S.C. 1912(d). Indicate “yes” or “no.”

(13) Indicate the active efforts that the state title IV–E agency made to prevent the breakup of the Indian family in accordance with 25 U.S.C. 1912(d). Indicate “yes” or “no” for each paragraph (i)(13)(i) through (xi) and (xiii) of this section. Indicate “yes,” “no” or “N/A” for paragraph (i)(13)(xii) of this section.

(i) Identify appropriate services to help the parent.

(ii) Actively assist the parent to obtain services.

(iii) Invite representatives of the Indian child’s tribe to participate in the proceedings.

(iv) Complete a comprehensive assessment of the family.

(v) Focus on safe reunification as the goal for the Indian child.

(vi) Consult with extended family members to provide support for the Indian child.

(vii) Arrange for family interaction in most natural setting safely possible.

(viii) Monitor progress and

participation in services to reunite the Indian family.

(ix) Consider alternative ways of addressing the needs of the Indian child’s parent and extended family if services do not exist or are not available.

(x) Support regular visits and trial home visits consistent with ensuring the Indian child’s safety.

(xi) Conduct or cause to be conducted a diligent search for the Indian child’s extended family members for assistance and possible placement.

(xii) Keep siblings together.

(xiii) Other.

(14) *Removals.* Indicate “yes” or “no” for paragraphs (i)(14)(i) and (ii) of this section: (i) Indicate whether the court found by clear and convincing evidence, in a court order, that continued custody of the Indian child by the parent or Indian custodian was likely to result in serious emotional or physical damage to the Indian child in accordance with 25 U.S.C. 1912(e). (ii) Indicate whether the court finding reported for this paragraph (i)(14), indicates that the state court’s finding was supported by the testimony of a qualified expert witness in accordance with 25 U.S.C. 1912(e).

(15) *Foster care and pre-adoptive placement preferences.* Indicate which foster care or pre-adoptive placements that meet the placement preferences of

ICWA in 25 U.S.C. 1915(b) were available to accept placement. Indicate in each paragraph (i)(15)(i) through (v) of this section “yes” or “no.”

(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.

(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.

(v) A placement that complies with the order of preference for foster care or pre-adoptive placements established by an Indian child’s tribe, in accordance with 25 U.S.C. 1915(c).

(16) For the Indian child’s current foster care or pre-adoptive placement as of the end of the report period per paragraph (e) of this section, indicate whether the placement meets the placement preferences of ICWA in 25 U.S.C. 1915(b) by indicating with whom the Indian child is placed. Indicate “a member of the Indian child’s extended family,” “a foster home licensed, approved, or specified by the Indian child’s tribe,” “an Indian foster home licensed or approved by an authorized non-Indian licensing authority,” “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,” “a placement that complies with the order of preference for foster care or pre-adoptive placements established by an Indian child’s tribe, in accordance with 25 U.S.C. 1915(c)” or “none.”

(17) If the placement preferences for foster care or pre-adoptive placements were not followed, indicate whether the court made a finding of good cause, on a court order, to place the Indian child with someone who is not listed in the placement preferences of ICWA in 25 U.S.C. 1915(b) or the placement preferences of the Indian child’s tribe. Indicate “yes” or “no.” If the state title IV–E agency indicated “yes,” then the state title IV–E agency must complete the data element in paragraph (i)(18) of this section. If the state title IV–E agency indicated “no,” then the state title IV–E agency must leave the data element in paragraph (i)(18) of this section blank.

(18) Indicate the state court’s basis for the finding of good cause, as indicated on the court order, by indicating “yes” or “no” in each paragraph (i)(18)(i) through (v) of this section.

(i) Request of the biological parents.

(ii) Request of the Indian child.

(iii) The unavailability of a suitable placement that meets the placement preferences in ICWA at 25 U.S.C. 1915.

(iv) The extraordinary physical or emotional needs of the Indian child.

(v) Other.

(19) *Termination of parental rights.*

Indicate whether the termination of parental or Indian custodian rights was voluntary or involuntary. Indicate “voluntary” or “involuntary.” If the state title IV–E agency indicated “voluntary”, the state title IV–E agency must leave the data elements in paragraphs (i)(20) and (21) of this section blank. If the state title IV–E agency indicated “involuntary”, the state title IV–E agency must leave the data elements in paragraphs (i)(22) through (24) of this section blank.

(20) Indicate whether, prior to ordering an involuntary termination of parental rights, the state court found beyond a reasonable doubt, in a court order, that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child in accordance with 25 U.S.C. 1912(f). Indicate “yes” or “no.”

(21) Indicate whether the court finding reported for paragraph (i)(20) of this section, indicates that the state court’s finding was supported by the testimony of a qualified expert witness in accordance with 25 U.S.C. 1912(f). Indicate “yes” or “no.”

(22) If voluntary, indicate whether there is a court order that indicates that the voluntary consent to termination for the biological or adoptive mother was made in writing and recorded in the presence of a judge in accordance with 25 U.S.C. 1913. Indicate “yes,” “no,” or “does not apply” if the mother is deceased.

(23) If voluntary, indicate whether there is a court order that indicates that the voluntary consent to termination for the biological or adoptive father was made in writing and recorded in the presence of a judge in accordance with 25 U.S.C. 1913. Indicate “yes,” “no” or “does not apply” if the father is deceased.

(24) If voluntary, indicate whether there is a court order that indicates that the voluntary consent to termination for the Indian custodian was made in writing and recorded in the presence of a judge in accordance with 25 U.S.C. 1913. Indicate “yes,” “no” or “does not apply” if there is no Indian custodian.

(25) *Adoption proceedings.* Indicate whether the Indian child exited foster care to adoption per paragraph (g) of this section. Indicate “yes” or “no.” If the state title IV–E agency indicated “yes,” the state title IV–E agency must

complete the data element in paragraphs (i)(26) through (29) of this section. If the state title IV–E agency indicated “no,” the state title IV–E agency must leave the data element in paragraphs (i)(26) through (29) of this section blank.

(26) Indicate which adoptive placements that meet the placement preferences in ICWA at 25 U.S.C. 1915(a) were willing to accept placement. Indicate in each paragraphs (i)(26)(i) through (iv) of this section “yes” or “no.”

(i) A member of the Indian child’s extended family.

(ii) Other members of the Indian child’s tribe.

(iii) Other Indian families.

(iv) A placement that complies with the order of preference for foster care or pre-adoptive placements established by an Indian child’s tribe, in accordance with 25 U.S.C. 1915(c).

(27) Indicate whether the placement reported in paragraph (h) of this section meets the placement preferences of ICWA in 25 U.S.C. 1915(a) by indicating with whom the Indian child is placed. Indicate “a member of the Indian child’s extended family,” “other members of the Indian child’s tribe,” “other Indian families,” “a placement that complies with the order of preference for foster care or pre-adoptive placements established by an Indian child’s tribe, in accordance with 25 U.S.C. 1915(c),” or “none.”

(28) If the placement preferences for adoption were not followed, indicate whether the court made a finding of good cause, on a court order, to place the Indian child with someone who is not listed in the placement preferences of ICWA in 25 U.S.C. 1915(a) or the placement preferences of the Indian child’s tribe. Indicate “yes” or “no.” If the state title IV–E agency indicated “yes,” then the state title IV–E agency must complete the data element in paragraph (i)(29) of this section. If the state title IV–E agency indicated “no,” then the state title IV–E agency must leave the data element in paragraph (i)(29) of this section blank.

(29) Indicate whether there is a court order that indicates the court’s basis for the finding of good cause, by indicating “yes” or “no” in each paragraph (i)(29)(i) through (v) of this section.

(i) Request of the biological parents.

(ii) Request of the Indian child.

(iii) The unavailability of a suitable placement that meets the placement preferences in ICWA at 25 U.S.C. 1915.

(iv) The extraordinary physical or emotional needs of the Indian child.

(v) Other.

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