

National Indian Health Board



Submitted via FederalRegister.gov

April 2, 2019

Attn: Sasha Gersten-Paal, Chief
Certification Policy Branch
Program Development Division
Food and Nutrition Service, USDA
3101 Park Center Drive
Alexandria, Virginia 22302

RE: Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults without Dependents (RIN: 0584-AE57)

Dear Chief Gersten-Paal,

On behalf of the National Indian Health Board (NIHB),¹ we are writing to respond to the proposed changes by the United States Department of Agriculture (USDA)/Food and Nutrition Service (FNS or the agency) to the able-bodied adults without dependents (ABAWDs) waiver requirements. We believe that the proposed rule goes against SNAP's primary purpose to improve nutrition and alleviate hunger in eligible, low-income households.² This is particularly true for the American Indian/Alaska Native (AI/AN) population, where about a quarter of all AI/AN individuals are enrolled in SNAP.

Background

The USDA/FNS proposes to update standards for approving state work requirement waivers for SNAP beneficiaries that are ABAWDs. ABAWDs may currently receive benefits for only 3 months in a 36-month period, unless they meet certain work requirements. States may request waivers to exempt ABAWDs from the time limit in areas that have an unemployment rate above 10 percent or that lack sufficient jobs. Current regulations at 7 C.F.R. § 273.24(f) set standards and requirements for the data and evidence that states must provide to FNS to support ABAWD

¹ Established in 1972, the National Indian Health Board (NIHB) is an inter-Tribal organization that advocates on behalf of Tribal governments for the provision of quality health care to all American Indians and Alaska Natives (AI/ANs). The NIHB is governed by a Board of Directors consisting of a representative from each of the twelve Indian Health Service (IHS) Areas. Each Area Health Board elects a representative to sit on the NIHB Board of Directors. In areas where there is no Area Health Board, Tribal governments choose a representative who communicates policy information and concerns of the Tribes in that area with the NIHB. Whether Tribes operate their entire health care program through contracts or compacts with IHS under Public Law 93-638, the Indian Self-Determination and Education Assistance Act (ISDEAA), or continue to also rely on IHS for delivery of some, or even most, of their health care, the NIHB is their advocate.

² See section 2 of the Food and Nutrition Act of 2008 (7 U.S.C. 2011).



waiver requests. States enjoy considerable flexibility to request waivers under the current regulations. According to FNS, this flexibility has resulted in the widespread use of waivers during a given period of low unemployment, which reduces application of work requirements.

Impact of the Proposed Rule

With respect to Tribes, the agency has acknowledged its duties under Executive Order (E.O.) 13175, “Consultation and Coordination with Indian Tribal Governments,” yet did not properly consult with Tribes before publishing this proposed rule. The proposed rule’s language states:

*USDA's Office of Tribal Relations (OTR) has . . . **determined that this rule has tribal implications** that require tribal consultation under [E.O.] 13175. **FNS invited Tribal leaders to a consultation held on March 14, 2018.** Tribal leaders did not provide any statement or feedback to the agency on rule. **FNS and OTR will determine if a future consultation is needed.** If a Tribe requests consultation, FNS will work with OTR to ensure meaningful consultation is provided where changes . . . identified herein are not expressly mandated by Congress.*

However, in the Advanced Notice of Proposed Rulemaking (ANPRM), issued February 23, 2018 [prior to the 2019 proposed rule], the agency wrote:

*FNS has assessed the impact of this ANPRM on Indian tribes and determined that **this ANPRM does not, to our knowledge, have tribal implications that require tribal consultation** under E.O. 13175. If a Tribe requests consultation, FNS will work with the [OTR] to ensure meaningful consultation is provided where changes, additions and modifications identified herein are not expressly mandated by Congress.³*

The agency’s statements failed to give Tribes adequate notice of the potential Tribal impacts of both the ANPRM and the proposed rule, and denied Tribes the opportunity for consultation. Although the agency writes in the proposed rule that it “invited Tribal leaders to a consultation held on March 14, 2018,” this is an erroneous statement. The agency did speak with some Tribal representatives on March 14, 2018 – over the phone. The call took place as part of a series of quarterly teleconference calls that the USDA hosts to discuss the entirety of its food programming in Indian Country,⁴ not just those services with heavy Tribal participation, such as SNAP. E.O. 13175 includes specific requirements and provisions for federal agencies to follow in order for their engagement with Tribes to qualify as Tribal consultation. These requirements were not met in the March 14, 2018, phone call. Moreover, the teleconference call did not serve as a substitute for Tribal consultation. Requirements under E.O. 13175 include promulgating

³ Federal Register, Supplemental Nutrition Assistance Program: Requirements and Services for Able-Bodied Adults without Dependents (Feb. 23, 2018), <https://www.regulations.gov/document?D=FNS-2018-0004-0001>.

⁴ Native Farm Bill Coalition, Re: Proposed Rule: Supplemental Nutrition Assistance Program (SNAP): Requirement for Able-Bodied Adults without Dependents RIN 0584-AE57 (March 2019), <https://seedsofnativehealth.org/wp-content/uploads/2019/03/NFBC-ABAWDS-SNAP-comments-template-letter.pdf> (letter substitutes March 4, 2018, for March 14, 2018).



steps for Tribes to apply for waivers of regulatory requirements and “*increasing opportunities for utilizing flexible policy approaches at the Indian tribal level.*” None of these requirements were reflected in the proposed rule. Meaningful Tribal consultation, as defined in Executive Order (E.O.) 13175, is a cooperative, responsive, mutual exchange between the federal government and Tribes; it is more than an informal roundtable discussion, a listening session, or a quarterly phone call.

Tribal Comments & Recommendations

The United States (U.S.) has a unique legal and political relationship with American Indian and Alaska Native Tribal governments established through and confirmed by the U.S. Constitution, treaties, federal statutes, executive orders, and judicial decisions. Central to this relationship is the federal government’s trust responsibility to protect the interests of Indian Tribes and communities. The federal trust responsibility is the responsibility of all government agencies, including the USDA. As such, NIHB requests that the agency properly consult with Tribes before the proposed rule is finalized and implemented. Specifically, we recommend that the agency take the following steps to fulfill its obligations under E.O. 13175.

1. The agency must consult with Tribes before the proposed rule is *finalized*.

E.O. 13175 applies when policies have Tribal implications. The direct definition of policies that have Tribal implications, under E.O. 13175, refers to regulations, legislative comments, or proposed legislation or policy statements that have “substantial direct effects on one or more Indian Tribes . . . or on the distribution of power and responsibilities between the federal government and Indian Tribes.” Regulatory changes that impact or propose to limit the ability for AI/AN individuals to access food benefits would drastically impact the health, safety and wellness of Tribal citizens, and have a “Tribal impact.” Not consulting with Tribes on this matter directly contradicts E.O. 13175. The proposed rule thus requires Tribal consultation before advancing through the regulatory process.

2. The agency must consult with Tribes before the proposed rule is *implemented*.

Meaningful Tribal consultation means that Tribes should be consulted at *each stage* of the regulatory process when a proposed regulation has Tribal implications. This includes consultation during the drafting and finalizing of the proposed rule *prior to* implementation, and again during the *actual implementation* of the rule. Tribes therefore request the opportunity to consult with the USDA and FNS prior to the implementation of the proposed rule. If proper Tribal consultation that adheres to E.O. 13175 requirements cannot be achieved, the implementation date of the proposed rule should be delayed to allow the agency flexibility to schedule the consultation with Tribes.

To provide context, the partial federal government shutdown, which lasted 35 days, took a toll on Tribes’ ability to provide health care and many other critical services to their communities, like the delivery of commodity foods. Uncertainty about whether monthly SNAP disbursements would continue uninterrupted also fueled the anxiety that Tribes had already suffered over



diminishing resources. This included the lack of staff support for problems arising out of day-to-day government administration, not just for a Tribe's food program.⁵ The impacts of the shutdown forced a reprioritization of services and priorities that left Tribes unable to adequately respond to federal requests for comment on this proposed rule.

Congresswoman Marcia Fudge echoed these sentiments in her letter to USDA Secretary Sonny Perdue on February 1, 2019, requesting an extension to the comment period, which was not granted. Congresswoman Fudge's letter requested an extension of the comment period from the original 60 days to 120 days on the basis that it would allow for "meaningful and robust comments" given the complexity of and significant interest in this topic, and "the opportunity to better inform [the agency] of the hardships that [would] result."⁶

In light of the aforementioned hardships faced by Tribes, the failure to properly consult with Tribes on this proposed rule is an especially troubling decision by the agency, and one which could be rectified through proper consultation.

3. Tribes should be granted flexibility to report unemployment data in a manner that is best suited to each reservation area.

Under the proposed rule, although there is language to indicate that Tribes could report their own data, the agency would require states to report unemployment rates using data from the Bureau of Labor Statistics (BLS) where available. The proposed rule notes that the agency "*would consider other data in line with BLS methods or considered reliable. This allows for flexibility if new methods or data are developed for Indian Reservation or United States Territory regions currently with limited or no data.*" States in some cases may already report unemployment data on behalf of Tribes. Nonetheless, Tribal governments are sovereign nations. As such, states should not have the exclusive power to report unemployment data on behalf of Tribes and entire reservation areas. USDA should allow Tribes to report data to the agency as they see fit. We request that the agency develop standards specific Tribes so that Tribes may submit their own data if they so choose. Undertaking proper Tribal consultation could inform the agency's creation of Tribe-specific standards.

4. Tribes should be exempt from work requirements.

Due to health disparities, geographic barriers/food deserts,⁷ food insecurity, and other unique challenges faced by AI/ANs in the U.S., unemployment data does not provide a comprehensive

⁵ Testimony of Mary Greene Trottier, President of the National Association of Food Distribution Programs on Indian Reservations (Jan. 15, 2019),

<https://naturalresources.house.gov/imo/media/doc/Mary%20Greene%20Trottier-Testimony.pdf>.

⁶ Letter to Secretary Perdue (Feb. 1, 2019),

https://fudge.house.gov/uploads/Letter%20to%20USDA%20Secretary%20Perdue_SNAP%20Rule%202_1_2019.pdf.

⁷ As defined by USDA, a location "with no or extremely limited retail food sites within reasonable driving distance" to a person's home. From Testimony of Mary Greene Trottier (Jan. 15, 2019),

<https://naturalresources.house.gov/imo/media/doc/Mary%20Greene%20Trottier-Testimony.pdf>.



picture of the situation on Indian Reservations. Again, the trust responsibility is a federal responsibility and should not be delegated to the states. State-sanctioned work requirements violate the federal government's responsibility to provide critical services to AI/ANs, like the opportunity to receive SNAP benefits. The federal government must also honor the government-to-government relationship between the U.S. and Tribes that is embedded in the Constitution, ratified by numerous treaties, reaffirmed by the Supreme Court, and codified by federal law.

5. Tribes support an unemployment floor of 6 percent.

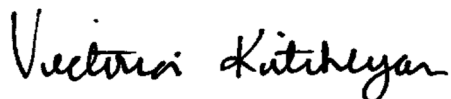
Tribes frequently experience higher rates of unemployment and poverty than the rest of the country. In some places, unemployment is in excess of 80 percent. In combination with the factors discussed above, the levels of unemployment on American Indian reservations in the U.S. vastly exceed the agency's proposed 10 percent threshold. Therefore, Tribes advocate for the lowest possible unemployment floor proposed by the agency, that is, 6 percent. Tribes and NIHB would also be open to discussions around a separate unemployment floor specifically for Tribes, given the disproportionately higher rates of unemployment in Tribal versus non-Tribal communities. Such a process would also honor the government-to-government relationship and E.O. 13175, which requires agencies to consider flexible approaches to developing and implementing regulations that impact Tribes.

6. Tribes oppose the proposed rule's language that the state governor must endorse the state's application for a waiver.

Each Tribe's relationship with the governor varies by state. Further, the trust responsibility is a federal government responsibility. Final governor approval is inconsistent with the government-to-government relationship between the U.S. and Tribal governments. This relationship cannot be shifted to the state. We request that there can only be consideration of a state's ABAWD waiver after there is Tribal consultation between the federal government and affected Tribes in the state.

We appreciate the opportunity to provide the Tribal perspective on the proposed rule. Should you have any questions about our comments as set forth in this letter, please contact Devin Delrow, NIHB's Director of Policy, at ddelrow@nihb.org. We look forward to the opportunity to consult with USDA/FNS on this matter, and to a continued relationship with the agency and division offices.

Best regards,



Victoria Kitcheyan,
Chair, National Indian Health Board

