



NATIONAL CONGRESS OF AMERICAN INDIANS

April 2, 2019

Certification Policy Branch
SNAP Program Development Division
Food and Nutrition Service, USDA
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Alexandria, VA 22303

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Via Electronic Submission

RE: Food and Nutrition Service's Proposed Rule Regarding Supplemental Nutrition Assistance Program Requirements for Able-Bodied Adults without Dependents

The National Congress of American Indians (NCAI) is the oldest, largest, and most representative American Indian and Alaska Native organization serving the broad interests of tribal governments and communities. NCAI submits the following comments in response to the Food and Nutrition Service's (FNS) proposed changes to regulations implementing the *Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults without Dependents* (Proposed Rule). See 84 Fed. Reg. 980 (proposed February 1, 2019).

Tribal nations have a significant interest in U.S. Department of Agriculture (USDA) nutrition assistance programs. American Indians and Alaska Natives are "more than twice as likely as the general population to face hunger and food insecurity at any given time."¹ USDA programs such as the Food Distribution Program on Indian Reservations (FDPIR) and the Supplemental Nutrition Assistance Program (SNAP) provide Native communities access to important food and nutrition resources that help address the high rates of hunger and food insecurity. Changes to these programs that limit eligibility of American Indian and Alaska Native people will increase rates of hunger and food insecurity in Indian Country and will negatively affect the overall wellbeing of Native people who depend on these programs.

Given these concerns, NCAI cannot support the Proposed Rule's changes to SNAP regarding limiting the waivers that allow able-bodied adults without dependents (ABAWD) to receive SNAP and new limitations on carryover exemptions for the following reasons:

1. Congress was clear in its intent when it chose not to expand the scope of current SNAP work requirements during its consideration of the recently enacted 2018 Farm Bill;
2. USDA fell short of its federal trust responsibilities by failing to engage in meaningful consultation with tribal nations;
3. The Proposed Rule will undermine the effectiveness and delivery of FDPIR in Indian Country;

¹ [U.S. Commission on Civil Rights, *A Quiet Crisis Report*, at xi \(July 2003\).](#)

4. Limiting the number of waivers available to states will negatively impact tribal communities; and
5. Economic arguments used to justify the Proposed Rule do not accurately reflect conditions in Indian Country.

The Proposed Rule is Inconsistent with Congressional Intent

Congress delegated authority to USDA to administer the SNAP program, and USDA must implement the program consistent with the intent of Congress.² Congress regularly updates national policy for federal feeding programs, including SNAP, during its consideration and passage of the Farm Bill.

Congress debated imposing stricter limits on SNAP eligibility and ultimately decided not to upset the current standards during its passage of the latest Farm Bill. In December 2018, the Farm Bill (H.R. 2) Conference Committee released its Conference Report that would eventually be agreed to by both the House and the Senate. The Joint Explanatory Statement that accompanied the Conference Report discussed proposed changes to work requirements for SNAP. The House version of the bill contained stricter work requirements and limited waiver criteria for states. The Senate version did not contain such provisions. The Conference adopted the House provisions but amended them to ensure the final bill made no significant changes to existing work requirements or to criteria that states may use to request waivers.³ That version was signed into law on December 20, 2018.

The Proposed Rule would change current SNAP regulations by imposing stricter work requirements and limiting current waiver criteria. Therefore, the Proposed Rule is inconsistent with Congressional intent, as evidenced by the recent enactment of the 2018 Farm Bill *without* significant changes to SNAP eligibility.

USDA Did Not Engage in Meaningful Consultation Regarding the Propose Rule

On February 20, 2018, USDA issued an Advance Notice of Proposed Rulemaking (ANPRM) and solicited feedback on a wide variety of issues pertaining to SNAP waivers. In the ANPRM, FNS determined that the ANPRM did not have tribal implications that required tribal consultation as mandated by Executive Order 13175. Despite this determination, FNS held a tribal “consultation” on March 14, 2018 that reportedly did not produce any statement or feedback on the ANPRM.

First, USDA did have an obligation to engage in meaningful consultation with tribal nations pursuant to Executive Order 13175 and USDA’s own Departmental Regulations implementing tribal consultation, which mandate consultation where USDA “policy actions . . . may have tribal implications.”⁴ Tribal implications are defined as “substantial direct effects on one or more Indian Tribes.”⁵ The Proposed Rule will limit SNAP eligibility and affect how states determine which areas can use carryover exemptions. These changes will have a substantial direct impact on many

² See *Congressional Declaration of Policy*, 7 U.S.C. § 2011 (2019).

³ H.R. Rep. No. 115-1072, at 70 (2018) (Conf. Rep.).

⁴ See USDA, Departmental Regulation 1350-002, *Tribal Consultation, Coordination and Collaboration* (USDA Consultation Policy), Sec. 5. (Jan. 13, 2018).

⁵ *Id.*

citizens of tribal nations who are eligible for SNAP benefits under current rules and will place additional strain on the already under-resourced FDPIR program.

Second, the March 14 “consultation” was not a meaningful consultation between USDA and tribal leaders. Meaningful consultation requires, at a minimum, that USDA’s consultation be consistent with its consultation accountability requirements, as listed at Sec. 5(b) of the USDA Consultation Policy.⁶ This requires certain “critical triggers, minimum standards, consultation processes, reporting, education, training, and other aspects.”⁷ Instead, the March 14 “consultation” on the Proposed Rule occurred during a quarterly USDA teleconference in which many other non-related USDA food assistance programs were discussed. Additionally, the official on the call did not have the authority necessary to engage in meaningful consultation with tribal leaders. This teleconference discussion of many USDA food assistance programs, not just SNAP, does not meet the requirements of meaningful consultation.

Also, [NCAI Resolution MOH-17-001, A Call on Congress to Enact Legislation That Will Ensure Uniform, Effective, and Meaningful Consultation with Indian Nations and Tribes Whenever Federal Activities Have Tribal Impacts](#), states that “government-to-government consultation should occur with representatives of federal agencies that are both informed about the tribal government’s requests or critiques of a proposed federal action and empowered to make decisions about the scope of the proposed action” and agencies engaged in tribal consultation should “review written and oral comments, and provide meaningful responses to the comments in writing, in a timely manner.”⁸

Proceeding with the Proposed Rule without tribal consultation is inconsistent with Executive Order 13175, the USDA Consultation Policy, and the federal government’s trust responsibility to tribal nations. We urge USDA to engage in consultation consistent with the standards set forth in Executive Order 13175, the USDA Consultation Policy, and NCAI Resolution MOH-17-001.

The Proposed Rule Will Have Negative Impacts on FDPIR

In FY 2017, the average monthly participation for FDPIR was 90,083 individuals.⁹ FDPIR is a critical resource to address food insecurity and hunger in Native communities. FDPIR is an alternative to SNAP, meaning a person cannot receive both FDPIR benefits and SNAP benefits in a given month. Changes that affect the accessibility of SNAP will force more participants to seek FDPIR assistance, placing a direct strain on a program that is chronically underfunded. This strain will undermine the effectiveness and delivery of FDPIR benefits for those who rely on the program to meet their basic needs.

⁶ *Id.* at Sec. 5(b).

⁷ *Id.*

⁸ NCAI Resolution MOH-17-001, *A Call on Congress to Enact Legislation That Will Ensure Uniform, Effective, and Meaningful Consultation with Indian Nations and Tribes Whenever Federal Activities Have Tribal Impacts*, (June 15, 2017) available at: <http://www.ncai.org/resources/resolutions/a-call-on-congress-to-enact-legislation-that-will-ensure-uniform-effective-and-meaningful-consultation-with-indian-nations-and-tribes-when-ever-federal-activities-have-tribal-impacts> (last updated March 30, 2019).

⁹ USDA, *Food and Nutrition Service Nutrition Program Fact Sheet*, at 2 (January 2018) available at: <https://fns-prod.azureedge.net/sites/default/files/fdpir/pfs-fdpir.pdf>

If USDA proceeds with the Proposed Rule, it must include an exemption from the waiver approval process for Indian Country to avoid putting additional strain on FDPIR and other USDA food assistance programs serving tribal communities.

Limiting the Number of State Waivers Will Negatively Affect Tribal Communities

Limiting the number of waivers states receive will cause tribal nations to be neglected despite the tremendous need for exemptions for their communities. The Proposed Rule's limitation of carryover waivers will mean fewer available waivers overall. States have no obligation to seek waivers for tribal areas and with fewer waivers, states may elect to prioritize non-tribal areas over tribal areas when determining how to allocate their waivers. Any decrease in the number of waivers granted to tribal areas will exacerbate issues of food insecurity and hunger in tribal communities because these areas would not be exempted from work requirements, making SNAP less accessible. Accordingly, USDA should not adopt its proposed limitations on state carryover waivers.

If USDA decides to adopt this new standard, USDA must exempt tribal areas so that waivers for tribal areas do not count against a state's waiver allowance. This will help ensure tribal communities receive waivers when necessary and that the wellbeing of tribal communities is not subjugated to state decision-making processes that may not place adequate priority on ensuring food security for individuals living in Indian Country.

Economic Justifications are Not Representative of Conditions in Indian Country

USDA justifies the Proposed Rule on economic arguments that do not reflect conditions in Indian Country. The Proposed Rule justifies its proposal based on trends of decreased unemployment across the country; however, this is not the case in many tribal communities. In fact, tribal communities experience higher rates of unemployment than any other group, with some reservations experiencing unemployment rates of 80 percent or higher.¹⁰ Accordingly, although the justification for the Proposed Rule may make sense in certain portions of the United States, the impact in Indian Country would be to impose severe hardship on tribal citizens, many of whom live in remote areas where there simply are not many employment opportunities.

Furthermore, there is a lack of robust data available that accurately illustrates economic conditions in tribal communities. USDA acknowledges broader data issues affecting Indian Country by providing special consideration of data that will be used to determine unemployment rates for tribal and other similarly situated areas. Without sufficient data to accurately describe conditions in tribal communities that could justify more stringent standards, USDA should not impose the Proposed Rule on Indian Country. Instead, USDA should apply its exemption of waiver criteria for tribal areas to the entire waiver process and exempt tribal communities from states' waiver allocations.

The 2019 government shutdown has had, and will continue to have, lingering effects on tribal economies. Many tribal nations were forced to divert funds from other programs to maintain essential human services such as healthcare. The long-term effects of the shutdown are unknown at this point, but they may have implications that will be further exacerbated by implementation of the Proposed Rule. Also, while the 2018 Farm Bill increased tribal parity and granted tribal access to

¹⁰ [U.S. Commission on Civil Rights, *Broken Promises: Continuing Federal Funding Shortfall for Native Americans*, at 8 \(December 2018\).](#)

many programs that would spur economic development, these benefits will not be realized until much later in the implementation process. USDA should delay implementation of the Proposed Rule to allow for meaningful consultation and for a more robust analysis of the economic conditions, both realized and not yet realized, that were used to justify the Proposed Rule.

Conclusion

NCAI appreciates the opportunity to provide comments to ensure tribal priorities are considered during USDA's consideration of the Proposed Rule so that regulatory changes reflect the needs of tribal nations and their citizens. We look forward to working with you further on this important topic. If you have questions, please contact Government Affairs Director Jacob Schellinger at jschellinger@ncai.org or Wilma Mankiller Policy Fellow Ashleigh Fixico at afixico@ncai.org.

Sincerely,

A handwritten signature in black ink that reads "Jefferson Keel". The signature is written in a cursive style with a large, prominent initial "J".

Jefferson Keel
President of the National Congress of American Indians