OVERSIGHT OF THE INDIAN CHILD WELFARE ACT

MONDAY, JUNE 30, 1980

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Washington, D.C.

The committee met, pursuant to notice, at 10:05 a.m., in room 5110, Dirksen Senate Office Building, Senator John Melcher (chairman of the committee) presiding.

Present: Senator Melcher.

Staff present: Max Richtman, staff director; Peter Taylor, special counsel; Virginia Boylan, staff attorney; Susan Long, professional staff member; and John Mulkey, legislative assistant to Senator DeConcini.

Senator MELCHER. The committee will come to order.

We are having an oversight hearing today on the Indian Child Welfare Act of 1978, Public Law 95-608. The act is fairly new, and at this time we are trying to make sure that it is getting off to a good start. We think it is appropriate—to have an oversight hearing now—to correct any flaws that might be developing and to straighten out some obvious or apparent rough spots in the act itself and how it is implemented.

Today we are going to hear from the administration and the group of Indian leaders across the country who are trying to work with the act. Hopefully, after the completion of this oversight hearing, we will be able to develop a joint assessment of the Indian community and the administrators within the Bureau of Indian Affairs in the Division of Social Services that better reflects the purpose and intent of Congress in the 1978 act.

With the advice and comments of the tribal leaders throughout the Nation who are trying to work with it, we think Congress should be in a better position to advise the administration. I am sure the administration will want to have some input and some advice, both from the Indian nation and from Congress.

Without objection, the act, the staff memorandum, and the excerpt from the Federal Register will be included in the record at this point.

[The material follows. Testimony begins on p. 34.]

Public Law 95-608
95th Congress

An Act

To establish standards for the placement of Indian children in foster or adoptive homes, to prevent the breakup of Indian families, and for other purposes.

Nov. 8, 1978
[S. 1214]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Indian Child Welfare Act of 1978".

Indian Child Welfare Act of 1978.
25 USC 1901 note.

SEC. 2. Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

25 USC 1901.

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

Congress, responsibility for protection of Indians.

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 USC 1902.

SEC. 3. The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

Definitions.
25 USC 1903.

SEC. 4. For the purposes of this Act, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

39-109 O - 79

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act (85 Stat. 688, 689);

43 USC 1606.

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 3(c) of the Alaska Native Claims Settlement Act (85 Stat. 688, 689), as amended;

43 USC 1602.

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of title 18, United States Code and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and
(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

TITLE I—CHILD CUSTODY PROCEEDINGS

Indian tribes, exclusive jurisdiction over Indian child custody proceedings. 25 USC 1911.

SEC. 101. (a) An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

Foster care placement, court proceedings. 25 USC 1912.

SEC. 102. (a) In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the 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, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court

shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to the Act of November 2, 1921 (42 Stat. 208; 25 U.S.C. 13).

(c) Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Parental rights, voluntary termination. 25 USC 1913.

SEC. 103. (a) Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before 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. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

25 USC 1914.

SEC. 104. Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of com-

petent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 101, 102, and 103 of this Act.

Adoptive placement of Indian children. 25 USC 1915.

SEC. 105. (a) In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(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; or

(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.

(c) In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

Petition, return of custody. 25 USC 1916.

SEC. 106. (a) Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 102 of this Act, that such return of custody is not in the best interests of the child.

Removal from foster care home.

(b) Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this Act, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

25 USC 1917.

SEC. 107. Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement,

the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

Reassumption, jurisdiction over child custody proceedings. 25 USC 1918. 18 USC prec. 1151 note. 25 USC 1321. 28 USC 1360 note.

SEC. 108. (a) Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b)(1) In considering the petition and feasibility of the plan of a tribe under subsection (a), the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 101(a) of this Act are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 101(b) of this Act, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 101(a) over limited community or geographic areas without regard for the reservation status of the area affected.

(c) If the Secretary approves any petition under subsection (a), the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a), the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 109 of this Act.

States and Indian tribes, agreements. 25 USC 1919.

SEC. 109. (a) States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such

revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

Improper removal of child from custody. 25 USC 1920.

SEC. 110. Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

25 USC 1921.

SEC. 111. In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this title, the State or Federal court shall apply the State or Federal standard.

Emergency removal of child. 25 USC 1922.

SEC. 112. Nothing in this title shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this title, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

Effective date. 25 USC 1923.

SEC. 113. None of the provisions of this title, except sections 101(a), 108, and 109, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after the enactment of this Act, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

TITLE II—INDIAN CHILD AND FAMILY PROGRAMS

25 USC 1931.

SEC. 201. (a) The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort. Such child and family service programs may include, but are not limited to—

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;

(2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care;

(4) home improvement programs;

(5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;

(6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

(7) a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and

(8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

42 USC 620, 1397.

(b) Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under titles IV–B and XX of the Social Security Act or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this Act. The provision or possibility of assistance under this Act shall not be a basis for the denial or reduction of any assistance otherwise authorized under titles IV–B and XX of the Social Security Act or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

Additional services. 25 USC 1932.

SEC. 202. The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to—

(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;

(2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and

(4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

Funds. 25 USC 1933.

SEC. 203. (a) In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health, Education, and Welfare, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health, Education, and Welfare: *Provided*, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

(b) Funds for the purposes of this Act may be appropriated pursuant to the provisions of the Act of November 2, 1921 (42 Stat. 208), as amended. 25 USC 13.

SEC. 204. For the purposes of sections 202 and 203 of this title, the term "Indian" shall include persons defined in section 4(c) of the Indian Health Care Improvement Act of 1976 (90 Stat. 1400, 1401). 25 USC 1934. 25 USC 1603.

TITLE III—RECORDKEEPING, INFORMATION AVAILABILITY, AND TIMETABLES

Final decree, information to be included. 25 USC 1951.

SEC. 301. (a) Any State court entering a final decree or order in any Indian child adoptive placement after the date of enactment of this Act shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show—

(1) the name and tribal affiliation of the child;
(2) the names and addresses of the biological parents;
(3) the names and addresses of the adoptive parents; and
(4) the identity of any agency having files or information relating to such adoptive placement.

Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (5 U.S.C. 552), as amended.

(b) Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

Effective date. Rules and regulations. 25 USC 1952.

SEC. 302. Within one hundred and eighty days after the enactment of this Act, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this Act.

TITLE IV—MISCELLANEOUS

Day schools. 25 USC 1961.

SEC. 401. (a) It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

Report to congressional committees.

(b) The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health, Education, and Welfare, a report on the feasibility of providing Indian children with schools located near their homes, and to submit such report to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives within two years from the date of this Act. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades.

Copies to each State. 25 USC 1962.

SEC. 402. Within sixty days after enactment of this Act, the Secretary shall send to the Governor, chief justice of the highest court of appeal, and the attorney general of each State a copy of this Act, together with committee reports and an explanation of the provisions of this Act.

25 USC 1963.

SEC. 403. If any provision of this Act or the applicability thereof is held invalid, the remaining provisions of this Act shall not be affected thereby.

Approved November 8, 1978.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 95-1386, accompanying H.R. 12533 (Comm. on Interior and Insular Affairs).
SENATE REPORT No. 95-597 (Comm. on Indian Affairs).
CONGRESSIONAL RECORD:
Vol. 123 (1978): Nov. 4, considered and passed Senate.
Vol. 124 (1978): Oct. 14, H.R. 12533 considered and passed House; passage vacated, and S. 1214, amended, passed in lieu.
Oct. 15, Senate concurred in House amendments.

United States Senate
SELECT COMMITTEE ON INDIAN AFFAIRS
WASHINGTON, D.C. 20510

June 28, 1980

MEMORANDUM

To: John Melcher, Chairman

From: Peter Taylor, Spec. Counsel

Subj: Oversight hearings on Indian Child Welfare Act

The Indian Child Welfare Act was enacted into law November 8, 1978. The jurisdictional provisions of the Act took effect in May of 1979 and have now been in effect a little more than one year. For the most part it appears the Act has been well received by both tribal and state authorities although some bugs have been encountered and a few challenges to the Constitutionality of the Act have been made -- unsuccessfully to date.

The primary problem areas are in the funding of tribal family support and child welfare programs. There are two basic problems: (1) Adequacy of the funds appropriated in FY '80 and sought in FY '81, and (2) the manner in which the B.I.A. distributed the FY '80 funds among the tribes.

B.I.A. disbursement of FY '80 funds.

In FY '80 Congress earmarked $5.5 million for implementaion of the new Indian Child Welfare Act (ICWA). These funds were distributed to tribes, urban Indian organizations, and off-reservation groups in the form of grants. The principal problem is that in determining the amount of funds to be awarded grant applicants, the Bureau used a "formula" based on a $15,000 base per applicant plus a per capita add-on based on a ratio of the

number of people to be served calculated against the number of people to be served nationwide. An initial screening process was employed which culled out 90 applications as unsuitable for funding. Out of 247 applications filed, 157 were approved. However, after this initial screening process no effort was made to distinguish between the nature or quality of the grant proposals. The formula was simply applied and awards made on that basis. The result was that many tribes or groups with ongoing child welfare programs or who submitted comprehensive child welfare programs received no more than those tribes or groups who sought only a planning grant, i.e., approximately $15,000. Thus the Yakima tribe, the Crow tribe, and the Ft. Belknap Indian Community received only the minimum $15,000 grant. The Navajo tribe received only $45,000.

A second problem with the formula funding is that the $15,000 base does not consider the client population to be served. Thus, at Sault St. Marie, Michigan, three grant applications were received in apparent competition with each other, yet each got the minimum $15,000. Consortium of tribes and villages from California and Alaska received disproportionately high funding because they were comprised of numerous very small communities. Each tribe or village in the consortium was apparently counted in at $15,000 each. States or areas with larger tribes such as Billings, Montana; Aberdeen, South Dakota; and Phoenix, Arizona received commensurately less.

The formula funding approach was designed to eliminate complaints of favoritism. While this may be a problem, it is clear that the formula funding approach is unworkable and should either be junked entirely or radically redesigned for use in FY '81.

69-083 O - 80 - 2

FY '81 budget proposal.

The B.I.A. FY '81 budget estimate for General Assistance, the program category from which funds for child welfare programs are drawn, is questionable on two grounds: (1) it appears to under state the service population or "case load", and (2) it appears to under state or distort the "unit cost" per child per month.

It must be remembered that the Indian Child Welfare Act was enacted in November of 1978 when the FY '79 budget was already in place. The ICWA expanded the traditional program functions which could be undertaken with appropriated funds and it also expanded the B.I.A. service population from children and families "on or near" Indian reservations to urban and off-reservation organizations and Indian tribes and groups such as terminated tribes included within the coverage of the Indian Health Care Improvement Act.

Despite this fact, the B.I.A. budget from FY '79 to FY '81 shows (1) no expansion of population to be served, and (2) a decrease of unit costs per child served. The following figures are taken from the B.I.A. budget presentation for FY '80 and FY '81:

Funding levels:	FY 1979	FY 1980	FY 1981
Welfare Grants ($ in thousands)			
General Assistance	$51,101.0	51,101.0	53,356.0
Child Welfare	13,590.0	13,590.0	11,190.0
On-Going Child Welfare	3,800.0	3,800.0	--------
Child Welfare Grants	--------	2,500.0	9,300.0?
	$68,491.0	70,991.0	73,846.0

The increase in the child welfare grant is made up by the transfer of the "on-going child welfare" line item of $3.800.0. Both the 1980 budget and the 1981 budget are premised on a "case load" constant with that of the FY '79 budget. This despite enactment of the ICWA.

Case load:	FY '79	FY '80	FY '81
CW Children per month	3,300	3,300	3,300
Unit costs:			
CW $ per child per month	343.18	343.18	282.57

These figures seem inexplicable. The case load remains constant with the case load figure before enactment of the ICWA. The unit cost actually decreases by $60.61 for 1981. A partial explanation for this abberation lies in the fact that part of the costs of education of handicapped children ($2.4 million) was shifted to the Education budget. However, in both the FY '80 and FY '81 budgets the Bureau justifies increases in the General Assistance funds on the grounds that increases in state standards will result in higher costs.

The FY '81 budget proposal states: "The child welfare caseload has remained relatively constant for the past few years, and there is no projected caseload increase for FY '81." In the face of 157 grant applications, many of which were directed to $15,000 planning grants, this statement of the B.I.A. simply cannot be true.

Projection for FY '81:

Tribes and Indian organizations can derive funds for operation of child welfare programs through two sources; (1) child welfare grants under the ICWA, and (2) contracts with the B.I.A. under P.L. 93-638. Unless the funding level for the grants program is increased substantially and/or the formula allocation abandoned, the primary delivery vehicle for FY '81 will continue to be PL 638 contracts at roughly the same level as presently exists. Alaska and California will be the primary beneficiaries of the ICWA.

federal register

Tuesday
July 31, 1979

Part V

Department of the Interior

Bureau of Indian Affairs

Indian Child Welfare Provisions

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 13

Tribal Reassumption of Jurisdiction Over Child Custody Proceedings

July 24, 1979.

AGENCY: Bureau of Indian Affairs.

ACTION: Final rule.

SUMMARY: The Bureau of Indian Affairs is adding a new part to its regulations to establish procedures by which an Indian tribe may reassume jurisdiction over Indian child custody proceedings as authorized by the Indian Child Welfare Act, Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. 1918.

DATE: This rule becomes effective August 30, 1979.

FOR FURTHER INFORMATION CONTACT: David Etheridge, Office of the Solicitor, Division of Indian Affairs, Department of the Interior, 18th and C Streets, NW., Washington, D.C. 20240; (202) 343-5967.

SUPPLEMENTARY INFORMATION: The authority for issuing these regulations is contained in 25 U.S.C. 1952 and 209 DM 8. This new part was published as proposed rules on April 23, 1979, 44 FR 23992. The comment period on the proposed rules closed on May 23, 1979. Comments were reviewed and considered and changes were made where appropriate.

A. Changes made due to comments received

(1) Section 13.1 has been modified in response to comments urging additional clarification to assure that tribes may reassume jurisdiction without relinquishing their legal arguments that they already had such jurisdiction. One federal district court has ruled that Public Law 83-280 did not deprive tribes of jurisdiction, but merely conferred concurrent jurisdiction on the state. *Confederated Tribes of the Colville Reservation* vs. *Beck*, C-78-76 (E. D. Wash. December 13, 1978). Additionally, disputes continue to exist over whether particular statutes authorizing the sale of certain tribal lands had the effect of transferring to the state jurisdiction over those lands that are sold. *See e.g., United States* vs. *Juvenile*, 453 F. Supp. 1171 (D. S. D. 1978).

(2) Section 13.1 has also been modified to reflect the variety of jurisdictional arrangements authorized by the Indian Child Welfare Act. Where both the tribe and the state currently assert or exercise jurisdiction over the same Indian child custody disputes, the tribe may obtain exclusive jurisdiction. If a state is asserting exclusive jurisdiction, the tribe may take over all jurisdiction or simply obtain jurisdiction concurrent with the state. Additionally, a tribe may reassume partial jurisdiction limited to only certain types of cases. For example, it could take jurisdiction over only a portion of its former reservation area or only over cases referred to it by state courts as authorized under 25 U.S.C. 1918(2).

(3) In response to a comment, specific reference is made to Oklahoma to reflect the intent of Congress, which is clearly stated in the legislative history, that the right to reassume jurisdiction be available to Oklahoma tribes.

(4) A comment that a specific provision be included to authorize groups of tribes to join together so they can pool resources to develop a feasible plan for reassumption of jurisdiction has been adopted as subsection (c). The Act places no restrictions on how tribes organize to assume jurisdiction so long as the final result is a feasible plan. The consortium approach has already been successfully used by tribes in the Northwest and in Nevada. Under such an approach a single court may be designated by several tribes as their tribal court.

(5) In response to a comment, provision has been made for land or communities that acquire reservation status after reassumption of jurisdiction. New subsection (e) states that such land or communities automatically become subject to tribal jurisdiction unless the petition for reassumption specifically states that it does not apply to lands or communities that subsequently acquire reservation status.

(6) Section 13.11 has been modified to delete requirements for information concerning the reservation when a tribe wishes to assume only referral jurisdiction under 25 U.S.C. 1911(b). Such information is not needed for referral jurisdiction since that jurisdiction is not dependent on residence or domicile on a reservation.

(7) A comment that the phrase "clear and definite" be substituted for the word "legal" in referring to the description of the reservation has been adopted. Commenters objected that some tribes may have difficulty meeting the requirements of preparing a "legal description" of the boundaries. The purpose of this requirement is simply to inform the public and government officials what territory is subject to tribal jurisdiction so that uncertainty over this issue will not delay the resolution of child custody matters by the proper court. A "clear and definite" description of the boundaries will suffice for that purpose.

(8) Several commenters objected to the use of the term "judicial system" because it could be construed to be not as broad as the definition of "tribal court" in 25 U.S.C. 1903(12), which includes any "administrative body of a tribe which is vested with authority over child custody proceedings." The use of the term "adjudicate" was considered objectionable for the same reason. The final rules have been revised in light of these comments by referring to a "tribal court as defined in 25 U.S.C. 1903(12)" rather than a "judicial system" and replacing the phrase "adjudicate child custody disputes" with "exercise jurisdiction over Indian child custody matters."

(9) Some commenters said they thought the phrase "persons with a legitimate interest in a child custody proceeding," which was used to describe those persons who would be able to ascertain from the tribe whether a particular child is a member or eligible for membership, is too vague. Accordingly, that phrase has been changed to "a participant in an Indian child custody proceeding."

(10) One commenter pointed out that some tribes operate without any constitution or other form of governing document. Accordingly, the words "if any" have been added after the phrase "constitution or other governing document."

(11) Comments were also made regarding the requirement that the plan provide information concerning court funding. These objections were based on concern that an impasse might develop in which funding would be contingent on reassumption of jurisdiction and reassumption of jurisdiction contingent on funding. If funds will become available when the tribe reassumes jurisdiction, those funds may be listed in the plan. This provision has been modified to make it clear that such funds may be included. This requirement has been retained because availability of funding to implement the reassumption plan is an essential element of feasibility.

(12) Some commenters also objected to the requirement that the plan state how many tribal members there are and how many Indians live on the affected territory, in part, these objections arise due to difficulty some tribes may have in arriving at precise figures. Accordingly, these provisions have been modified to permit estimates where necessary.

(13) One commenter pointed out that the number residing on a tribe's

reservation is irrelevant if the tribe is petitioning only for referral jurisdiction. Therefore, the requirement for that information, for referral jurisdiction only, has been deleted. The requirement that information be provided concerning the number of persons that will become subject to the tribe's jurisdiction and the number of child custody cases expected, has been retained because it is needed to evaluate whether the plan is adequate. Population is one of the specific factors listed by Congress as appropriate for consideration in making a feasibility determination. See 25 U.S.C. 1918(b)(iii).

(14) Many commenters objected to the requirement for a description of support services that will be available to the tribe or tribes when jurisdiction is reassumed. Some feared that the Bureau would only consider those resources normally employed by traditional social service agencies and would not consider special non-institutional resources available uniquely to the tribe. This provision has been modified to make it clear that such a narrow construction of "support services" is not intended. There was also concern expressed that this provision might effectively preclude poorer tribes from reassuming jurisdiction. The listing of support services may include any services available to the tribe regardless of who funds or operates them. The section has been revised to make this point clearer. States, of course, continue to have the same obligations towards Indians residing within their borders as they have to other citizens under the Fourteenth Amendment to the United States Constitution. Some state services, however, may become less available after reassumption of jurisdiction simply because tribal courts lack the jurisdiction that many state courts have to compel state agencies to provide support services. If reassumption of jurisdiction creates a problem in this regard, the tribal plan should state how the tribe plans to deal with it.

(15) A number of comments were received concerning the requirement in § 13.12 that the affected territory must have been previously subject to tribal jurisdiction. Commenters pointed out that such a requirement would exclude lands and communities that acquired reservation status after passage of legislation giving the state jurisdiction. This subsection has been revised to require only that the land be a reservation as defined in the Act and that it be presently occupied by the tribe.

(16) Paragraph (a)(4) has been modified by using the term "tribal court, as defined in 25 U.S.C. 1903(12)," to assure that tribes have as much freedom as possible in establishing procedures.

(17) One commenter objected to paragraph (a)(5) requiring a tribe to have available support services for *any child* who must be removed from the parents as it imposes a heavy burden on tribes since just one severely handicapped child may require extraordinary assistance, the availability of which the tribe may not be able to establish in advance. This provision has been modified to require only that support services be available for *most children*. Tribes, like states, can make special arrangements when especially difficult cases arise. There will be no requirement for an advance showing that facilities are available for the most severe problems. Also, in response to comments, paragraph (a)(5) has been revised to require only that services be in place by the time of reassumption. They need not be in place before that time.

(18) Paragraph (a)(6) has been modified to require only that a procedure be established for identifying persons who will be subject to the tribe's jurisdiction rather than for identifying all tribal members. The Act contemplates that jurisdiction may be reassumed, if the tribe wishes, only over a portion of the total membership of the tribe. Where the reassumption of jurisdiction is so limited, a procedure is needed only to identify those members or persons eligible for membership who will become subject to tribal jurisdiction.

(19) Upon the recommendation of one commenter, a new subsection (b) has been added specifically providing for assistance by the Department to a tribe that may wish to reassume partial jurisdiction if it is unable to develop a feasible plan for total reassumption of jurisdiction. The subsection also provides for Departmental assistance in negotiating agreements with the state under 25 U.S.C. 1919.

(20) In response to comments on § 13.14(b) copies of the notice of reassumption of jurisdiction will be sent to the governor and the highest court in the state as well as the attorney general of the affected state or states to improve the likelihood that all affected state agencies are informed of the change in jurisdiction.

(21) In response to comments on § 13.15 responsibility for the initial decision has been shifted from the Secretary to the Assistant Secretary—Indian Affairs. This change has been made to provide for an administrative appeal before a decision is made that is final for the Department and reviewable in the federal court.

B. Changes not adopted

(1) Some commenters objected to requiring the citation of the statute or statutes which have provided the basis for state assertion of jurisdiction. The objection is based on concern that citation of such a statute might be construed as an admission that state assertion of jurisdiction was legally authorized. The language of this requirement has been modified to make it more clear that it is the state—not necessarily the tribe—which asserts that a particular statute granted the state jurisdiction. This requirement has been retained because it is good legislative practice to know what statutes may be affected when taking action that may result in their effective repeal.

(2) One commenter recommended language to the effect that these regulations establish the right of tribes to reassume jurisdiction. This recommendation has not been adopted because it is the statute—not these regulations—which establishes that right. The regulations merely provide a procedure by which a tribe can exercise the right established in the statute.

(3) A comment recommending use of the term "assertion of exclusive jurisdiction" instead of "reassumption of jurisdiction" has not been adopted. "Reassumption of jurisdiction" is the term used by the Act and it would be unnecessarily confusing to use a different term in the regulations. The concern of the commenter that the term "reassumption" might implicitly concede that the reservation of a petitioning tribe has ever been subject to exclusive state jurisdiction is effectively answered by the explicit language of the section. A tribe need not admit that a state actually has jurisdiction. A petition may be filed if a state has been asserting jurisdiction, regardless of whether such assertion is valid.

(4) A comment that the regulations provide that tribes may regain jurisdiction lost because of a federal adjudication has not been adopted. Section 108 of the Act authorizes reassumption only when jurisdiction has been conferred on a state pursuant to a law. Strictly speaking, jurisdiction is not conferred on a state through court decisions. The decisions simply conclude that a certain law has caused a transfer in jurisdiction.

(5) A comment that reassumption include jurisdiction over child welfare services and investigative and preventive interventions in the homes of Indian children has also not been

adopted. The Act only authorizes reassumption over child custody proceedings. It is not the intent of the Act to exclude anyone from providing services to Indian families. It is only when such services may involve placing the child with someone other than his or her parents or Indian custodian that the Act becomes involved. Where jurisdiction is reassumed, social service agencies must comply with the requirements of a tribal court—not a state court—when placing a child.

(6) One commenter objected generally to the amount of information requested on the ground that it discriminates against tribes that have been subjected to state jurisdiction since those tribes already exercising jurisdiction are not required to provide similar information. Most of the information requirements have been retained because such "discrimination" is mandated by the statute. Under 25 U.S.C. 1918 those tribes that wish to reassume jurisdiction are required to submit a "suitable plan to exercise such jurisdiction" and the Secretary is to determine the "feasibility" of the plan. Congress has imposed no similar requirements on tribes already exercising Indian child custody jurisdiction.

(7) One commenter asked that the regulations be more specific as to which entity is the "governing body" of a tribe. The regulations cannot be more specific because the internal organization differs from tribe to tribe.

(8) One commenter objected to the requirement that the tribe establish a procedure for determining who is a member of a tribe on the grounds that it is the obligation of the parties and the court to make that determination. This recommendation has not been adopted. A method of determining membership was one of the items specifically listed in 25 U.S.C. 1918(b) as a factor the Secretary may consider in determining the feasibility of a plan. It is true that the legal burden for determining whether the Act applies to a particular child is on the parties and the court. This provision does not change that burden. It merely asks that the tribe have a procedure for cooperating with the court or the parties in meeting their burden. Since the tribe is in the best position to know who its own members are, it seems reasonable to ask it to cooperate in that respect. Because of the special needs of children, promptness and certainty are more important in child custody proceedings than they are in most other litigation. Tribal cooperation in this respect will help assure that its members receive the benefits of the Act and will impose only a minimal burden on the tribe.

(9) Some commenters recommended that the Bureau accept without question a tribal governing body's conclusion that the tribe has authorized it to exercise jurisdiction over Indian child custody matters. Under 25 U.S.C. 1918, the Secretary is to determine whether the exercise of jurisdiction is feasible. The exercise of such jurisdiction by an entity that has not been authorized by the tribe to exercise it is clearly not feasible. It has been a longstanding general principle on the part of the Department of the Interior that the Indian tribes are empowered to interpret their own governing documents. Consequently, when this Department is called upon to decide an issue that requires the interpretation of tribal governing documents, it will give great weight to any interpretation of those documents made by an appropriate tribal forum. However, the Department is not necessarily bound thereby. The Secretary cannot accept or acquiesce to a tribal interpretation which is so arbitrary or unreasonable that its application would constitute a violation of the right to due process. *See* Letter decision of Forrest J. Gerard, Assistant Secretary for Indian Affairs, dated August 28, 1978, 5 Indian Law Reporter H–17, 18 (1978). Exercise of jurisdiction by an entity not authorized to exercise it would constitute a violation of the right to due process. Accordingly, the requirement of a citation to the provision in the tribal constitution or other governing document, if any, that authorizes the governing body to exercise jurisdiction over Indian child custody matters has been retained so the Department will have the information it needs in order to make the determination of feasibility. The tribal governing body's conclusion on that point will be given great weight and will be upheld if its interpretation is not arbitrary or unreasonable. If the tribal electorate wishes its governing body to exercise such authority despite the Department's conclusion that its constitution or governing document does not authorize the governing body to do so, the constitution or governing document can be amended. Non-tribal courts are sometimes called upon to interpret tribal laws. *See e.g., Quechan Tribe of Indians* vs. *Rowe*, 531 F. 2d 408 (9th Cir. 1976); *Confederated Tribes of the Colville Indian Reservation* vs. *Washington*, 591 F. 2d 89 (9th Cir. 1979). Clarification of the governing body's authority prior to reassumption of jurisdiction will avoid delays later on when the custody of specific Indian children is being decided by the court.

(10) Some commenters also objected to requesting a copy of any tribal ordinances or court rules establishing procedures for exercising child custody jurisdiction. Exercise of jurisdiction by a tribe that has not thought through how it is going to handle the cases that come to it cannot be said to be feasible. The most basic element of due process is the existence of a procedure on which the parties to a dispute can rely as the basis for their rights. Accordingly this requirement has been retained.

(11) A number of commenters objected to the requirement that the tribal court that is established be capable of deciding child custody matters in a manner that meets the requirements of the Indian Civil Rights Act. One commenter argued that after the Supreme Court's decision in *Santa Clara Pueblo* vs. *Martinez*, 436 U.S. 49 (1978), the question of how the Indian Civil Rights Act applies to tribal government activities should be left exclusively to the tribe. In footnote 22 the Court in *Martinez* specifically noted that it may be appropriate to consider Indian Civil Rights Act issues when the Department exercises its approval authority. This Department will not exercise its approval power in a manner that authorizes violations of civil rights. A plan that does not provide for exercise of jurisdiction in a manner that protects rights guaranteed under the Indian Civil Rights Act is not a feasible plan as required by the Indian Child Welfare Act.

(12) One commenter recommended that a tribe only be required to show that it is able to establish the necessary support services. This recommendation has not been adopted. Services should be available at least by the time reassumption occurs. Such services need not be organized in the same fashion as services from traditional social services agencies. Such services need not be funded or controlled by the tribe. All that is necessary is that they be available.

(13) One commenter recommended that reassumption of jurisdiction not be approved unless the tribe could show that it is in "the best interests of children" that jurisdiction would be reassumed. Such a standard is not authorized by the Act. The Act only requires that tribal jurisdiction be "feasible"—not that it necessarily be shown to be better for the children than state jurisdiction. Although the findings in the Act indicate that Congress believes tribal jurisdiction will, in most cases, be better for Indian children, it

did not require that each tribe reassuming jurisdiction prove that point. States are not deemed jurisdiction over child custody matters relating to their residents simply because a neighboring state could handle the cases better. Tribes should not be required to compete with neighboring jurisdictions any more than states are.

(14) A recommendation that paragraph (a)(3) be modified to define in precise terms what is meant by "the requirements of the Indian Civil Rights Act" has not been adopted because it would be virtually impossible to do so in sufficiently complete fashion. The most important requirement of that Act in this context is the due process provision, which requires that disputes be handled in a manner that is fair. An effort to define "fairness" in detail would tend to unnecessarily restrict tribal options. The Department will look for guidance on that issue to the existing body of caselaw defining what "due process" or "fairness" means in specific situations.

(15) One commenter objected to the requirement in § 13.14 for Federal Register publication of the fact that a petition has been received prior to taking action on the petition. The commenter argued that publication would place on tribes an undue burden of having to respond to adverse comments on their petitions. The purpose of publication is not to solicit comments but to give the public and affected officials and agencies some advance notice that a change in jurisdiction may be coming. Although comments will not be solicited, any that are volunteered will be considered and made available to the petitioning tribe or tribes. The primary author of this document is David Etheridge, Office of the Solicitor, Department of the Interior; (202) 343-6967.

Note.—The Department of the Interior has determined that this document is not a significant rule and does not require a regulatory analysis under Executive Order 12044 and 43 CFR Part 14.

Subchapter B, Chapter 1, of title 25 of the Code of Federal Regulations is amended by adding a new Part 13, reading as follows:

PART 13—TRIBAL REASSUMPTION OF JURISDICTION OVER CHILD CUSTODY PROCEEDINGS

Subpart A—Purpose

Sec.

Authority: 25 U.S.C. 1952.

Subpart A—Purpose

§ 13.1 Purpose.

(a) The regulations of this part establish the procedures by which an Indian tribe that occupies a reservation as defined in 25 U.S.C. § 1903(10) over which a state asserts any jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588) Pub. L. 83-280, or pursuant to any other federal law (including any special federal law applicable only to a tribe or tribes in Oklahoma), may reassume jurisdiction over Indian child custody proceedings as authorized by the Indian Child Welfare Act, Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. § 1918.

(b) On some reservations there are disputes concerning whether certain federal statutes have subjected Indian child custody proceedings to state jurisdiction or whether any such jurisdiction conferred on a state is exclusive of tribal jurisdiction. Tribes located on those reservations may wish to exercise exclusive jurisdiction or other jurisdiction currently exercised by the state without the necessity of engaging in protracted litigation. The procedures in this part also permit such tribes to secure unquestioned exclusive, concurrent or partial jurisdiction over Indian child custody matters without relinquishing their claim that no federal statute had ever deprived them of that jurisdiction.

(c) Some tribes may wish to join together in a consortium to establish a single entity that will exercise jurisdiction over all their members located on the reservations of tribes participating in the consortium. These regulations also provide a procedure by which tribes may reassume jurisdiction through such a consortium.

(d) These regulations also provide for limited reassumptions including jurisdiction restricted to cases transferred from state courts under 25 U.S.C. § 1911(b) and jurisdiction over limited geographical areas.

(e) Unless the petition for reassumption specifically states otherwise, where a tribe reassumes jurisdiction over the reservation it occupies, any land or community occupied by that tribe which subsequently acquires the status of reservation as defined in 25 U.S.C. § 1903(10) also becomes subject to tribal jurisdiction over Indian child custody matters.

Subpart B—Reassumption

§ 13.11 Contents of reassumption petitions.

(a) Each petition to reassume jurisdiction over Indian child custody proceedings and the accompanying plan shall contain, where available, the following information in sufficient detail to permit the Secretary to determine whether reassumption is feasible:

(1) Full name, address and telephone number of the petitioning tribe or tribes.

(2) A resolution by the tribal governing body supporting the petition and plan. If the territory involved is occupied by more than one tribe and jurisdiction is to be reassumed over all Indians residing in the territory, the governing body of each tribe involved must adopt such a resolution. A tribe that shares territory with another tribe or tribes may reassume jurisdiction only over its own members without obtaining the consent of the other tribe or tribes. Where a group of tribes form a consortium to reassume jurisdiction, the governing body of each participating tribe must submit a resolution.

(3) The proposed date on which jurisdiction would be reassumed.

(4) Estimated total number of members in the petitioning tribe or tribes, together with an explanation of how the number was estimated.

(5) Current criteria for membership in the tribe or tribes.

(6) Explanation of procedure by which a participant in an Indian child custody proceeding may determine whether a particular individual is a member of a petitioning tribe.

(7) Citation to provision in tribal constitution or similar governing document, if any, that authorizes the tribal governing body to exercise jurisdiction over Indian child custody matters.

(8) Description of the tribal court as defined in 25 U.S.C. § 1903(12) that has been or will be established to exercise jurisdiction over Indian child custody matters. The description shall include an organization chart and budget for the court. The source and amount of non-tribal funds that will be used to fund the court shall be identified. Funds that will become available only when the tribe reassumes jurisdiction may be included.

(9) Copy of any tribal ordinances or tribal court rules establishing procedures or rules for the exercise of jurisdiction over child custody matters.

(10) Description of child and family support services that will be available to the tribe or tribes when jurisdiction reassumed. Such services include any resource to maintain family stability or provide support for an Indian child in the absence of a family—regardless of whether or not they are the type of services traditionally employed by social services agencies. The description shall include not only those resources of the tribe itself, but also any state or federal resources that will continue to be available after reassumption of jurisdiction.

(11) Estimate of the number of child custody cases expected during a year together with an explanation of how the number was estimated.

(12) Copy of any tribal agreements with states, other tribes or non-Indian local governments relating to child custody matters.

(b) If the petition is for jurisdiction other than transferral jurisdiction under 25 U.S.C. 1911(b), the following information shall also be included in the petition and plan:

(1) Citation of the statute or statutes upon which the state has based its assertion of jurisdiction over Indian child custody matters.

(2) Clear and definite description of the territory over which jurisdiction will be reassumed together with a statement of the size of the territory in square miles.

(3) If a statute upon which the state bases its assertion of jurisdiction is a surplus land statute, a clear and definite description of the reservation boundaries that will be reestablished for purposes of the Indian Child Welfare Act.

(4) Estimated total number of Indian children residing in the affected territory together with an explanation of how the number was estimated.

§ 13.12 Criteria for approval of reassumption petitions.

(a) The Assistant Secretary—Indian Affairs shall approve a tribal petition to reassume jurisdiction over Indian child custody matters if:

(1) Any reservation, as defined in 25 U.S.C. 1903(10), presently affected by the petition is presently occupied by the petitioning tribe or tribes;

(2) The constitution or other governing document, if any, of the petitioning tribe or tribes authorizes the tribal governing body or bodies to exercise jurisdiction over Indian child custody matters;

(3) The information and documents required by § 13.11 of this part have been provided;

(4) A tribal court, as defined in 25 U.S.C. 1903(12), has been established or will be established before reassumption and that tribal court will be able to exercise jurisdiction over Indian child custody matters in a manner that meets the requirements of the Indian Civil Rights Act, 25 U.S.C. 1302;

(5) Child care services sufficient to meet the needs of most children the tribal court finds must be removed from parental custody are available or will be available at the time of reassumption of jurisdiction; and

(6) The tribe or tribes have established a procedure for clearly identifying persons who will be subject to the jurisdiction of the tribe or tribes upon reassumption of jurisdiction.

(b) If the technical assistance provided by the Bureau to the tribe to correct any deficiency which the Assistant Secretary—Indian Affairs has identified as a basis for disapproving a petition for reassumption of exclusive jurisdiction has proved unsuccessful in eliminating entirely such problem, the Bureau, at the request of the tribe, shall assist the tribe to assert whatever partial jurisdiction as provided in 25 U.S.C. 1918(b) that is feasible and desired by the tribe. In the alternative, the Bureau, if requested by the concerned tribe, shall assist the tribe to enter into agreements with a state or states regarding the care and custody of Indian children and jurisdiction over Indian child custody proceedings, including agreements which may provide for the orderly transfer of jurisdiction to the tribe on a case-by-case basis or agreements which provide for concurrent jurisdiction between the state and the Indian tribe.

§ 13.13 Technical assistance prior to petitioning.

(a) Upon the request of a tribe desiring to reassume jurisdiction over Indian child custody matters, Bureau agency and Area Offices shall provide technical assistance and make available any pertinent documents, records, maps or reports in the Bureau's possession to enable the tribe to meet the requirements for Secretarial approval of the petition.

(b) Upon the request of such a tribe, to the extent funds are available, the Bureau may provide funding under the procedures established under 25 CFR 23.22 to assist the tribe in developing the tribal court and child care services that will be needed when jurisdiction is reassumed.

§ 13.14 Secretarial review procedure.

(a) Upon receipt of the petition, the Assistant Secretary—Indian Affairs shall cause to be published in the Federal Register a notice stating that the petition has been received and is under review and that it may be inspected and copied at the Bureau agency office that serves the petitioning tribe or tribes.

(1) No final action shall be taken until 45 days after the petition has been received.

(2) Notice that a petition has been disapproved shall be published in the Federal Register no later than 75 days after the petition has been received.

(3) Notice that a petition has been approved shall be published on a date requested by the petitioning tribe or within 75 days after the petition has been received—whichever is later.

(b) Notice of approval shall include a clear and definite description of the territory presently subject to the reassumption of jurisdiction and shall state the date on which the reassumption becomes effective. A copy of the notice shall immediately be sent to the petitioning tribe and to the attorney general, governor and highest court of the affected state or states.

(c) Reasons for disapproval of a petition shall be sent immediately to the petitioning tribe or tribes.

(d) When a petition has been disapproved a tribe or tribes may repetition after taking action to overcome the deficiencies of the first petition.

§ 13.15 Administrative appeals.

The decision of the Assistant Secretary—Indian Affairs may be appealed under procedures established in 43 CFR 4.350-4.369.

§ 13.16 Technical assistance after disapproval.

If a petition is disapproved, the Bureau shall immediately offer technical assistance to the tribal governing body for the purpose of overcoming the defect in the petition or plan that resulted in the disapproval.

Forrest J. Gerard,

Assistant Secretary—Indian Affairs.

[FR Doc. 79-23400 Filed 7-30-79; 8:45 am]

BILLING CODE 4310-02-M

---

25 CFR Part 23

Indian Child Welfare Act; Implementation

July 24, 1979.

AGENCY: Bureau of Indian Affairs, Department of the Interior.

ACTION: Final rule.

SUMMARY: The Bureau of Indian Affairs hereby adds a new part to its regulations to implement the provisions of the Indian Child Welfare Act of 1978 (Pub. L. 95-608). The Indian Child Welfare Act seeks to protect the best interest of Indian children by promoting the stability and security of Indian families and tribes by preventing the unwarranted and arbitrary removal of indian children from their Indian homes; establishing procedures for transferring indian child custody proceedings from state courts to the appropriate tribal courts; setting forth criteria for placement of children voluntarily or involuntarily removed from their parents, guardians, or custodians; providing a system of intervention in state court proceedings by the child's parents, relatives or the child's tribe in involuntary removal and adoption matters of Indian children, and providing grants to indian tribes and organizations on or "near" reservations or off-reservations to plan, establish, operate and manage child placement and family service programs to carry out the intent of the Act. It is intended that these regulations will complement those related procedures published in 25 CFR 13, "Tribal Reassumption of Jurisdiction Over Child Custody Proceedings," and will also complement "Guidelines for State Courts" relative to Indian child custody proceedings to be published as a Federal Register Notice.

EFFECTIVE DATE: These new regulations will become effective August 30, 1979.

FOR FURTHER INFORMATION CONTACT: Raymond V. Butler, Chief, Division of Social Services, Bureau of Indian Affairs, 1951 Constitution Avenue, N.W., Washington, D.C. 20245 (703-235-2756).

SUPPLEMENTARY INFORMATION: On April 23, 1979 there were published in the Federal Register (44 FR 23993) proposed regulations for the Indian Child Welfare Act. Interested persons were given 30 days in which to submit written comments regarding the proposed regulations. Thorough and careful consideration was given to all comments received during this period. Many comments were subsequently adopted but certain others were not.

The function of regulations is to provide rules that the issuing agency will follow in carrying out the responsibilities assigned to it by an Act of Congress. Under the Indian Child Welfare Act, responsibility for the conduct of most aspects of Indian child custody proceedings remains with state and tribal courts. Where the responsibility lies with the state or the tribe, it is the state or tribe that has both the authority and the responsibility to establish rules or procedures to carry out those responsibilities.

The simple fact that a statute deals with indians does not authorize this Department to promulgate rules governing all aspects of its implementation. For example, 25 U.S.C. 194 governs the burden of proof in certain cases involving Indians, but does not authorize the Department to regulate the courts in such cases. An agency may not promulgate binding rules if the ultimate power to determine the content of the law covered by the rules is in the courts. *See generally*, Davis, *Administrative Law Treatise* § 5.03 (1958). By leaving with courts the jurisdiction to decide Indian child custody matters, Congress left to those courts the responsibility of determining how the Act applies to the cases before them.

Some portions of the Act do assign the interior Department certain responsibilities related to child custody proceedings. For example, the Department is to pay for appointed counsel in some cases, and is to be notified of child custody proceedings in certain instances. Regulations implementing those Departmental responsibilities can and do have some impact on court procedures.

Some commenters objected to publication of the guidelines for state courts as a notice rather than as a proposed rule. They fear that the guidelines will be invalidated by a court for failure to follow the rule-making procedures of the Administrative Procedures Act. The guidelines by themselves are not intended to have the force of law; consequently, no court should have occasion to rule on their validity. The guidelines will have the force of law only as they are adopted by individual states as legislation, regulations, or court rules. So long as proper state procedures are followed in adopting them, they will not be subject to challenge on procedural grounds.

A number of commenters apparently assume that all language in the statute must be repeated in the regulations if it is to have the force of law. The statute is fully effective without reference to the regulations. The purpose of the regulations is merely to provide rules for the Department to follow in carrying out its responsibilities under the Act. Statutory language is included at some points in the regulations to explain the context of the rules and to reduce the need to refer to the statute in order to understand the regulations. Repeating or omitting statutory language in the regulations has no effect on the validity of that statutory language.

A number of commenters also recommended that the regulations "correct" what they regarded as loopholes, mistakes, or bad policy contained in the statute. This Department does not have the authority to "correct" alleged mistakes of Congress through regulations. Where statutory language is either vague or ambiguous and an interpretation of that language is necessary for this Department to carry out its responsibilities, regulations may properly provide such an interpretation. Such interpretations, however, cannot be contrary to the plain meaning of the Act itself.

A. Changes Made Due to Comments Received

(1) Section 23.2(b)(5) is revised to read "a crime in the jurisdiction where the act occurred."

This additional language has been added to clarify that an offense allegedly committed by a child must be a crime if committed by an adult at the same place in order to exempt a child custody proceeding from the provisions of the Act. A new sentence has also been added stating that "status offenses" such as truancy and incorrigibility (which are not crimes adults can commit) are covered by the Act. This sentence simply states in positive terms the legal effect of the Act in excluding from coverage under the Act only those offenses which an adult can commit.

(2) Section 23.2(d) is revised to include subtitles after each subsection in order to highlight the variances in definitions. These subtitles are: (1) Jurisdictional Purposes; (2) Service Eligibility for Children and Family Service Programs On or Near Reservations; and (3) Service Eligibility for Off Reservation Children and Family Service Programs. In part (2) the Secretary of Health, Education, and Welfare is delineated for further clarification. An additional sentence is included to explain that tribal membership is based on tribal law, ordinance, or custom.

(3) Section 23.2(f), a cross reference to the "guidelines for State Courts" is made for further clarification.

(4) Section 23.2(g), an (s) is added to person to refer to the situation where more than one person is the custodian.

(5) Section 23.2(k), the definition of reservation is added as written in the Act for the purpose of clarification. Reference is frequently made to "the reservation," therefore the inclusion of

this definition in the regulations is necessary.

(6) Section 23.2(l), a definition of "state court" is added for clarification because of the frequent reference to this term.

The definition includes the District of Columbia and any territory or possession of the United States because this Department believes that definition to be consistent with the intent of Congress. Whether the term "state" includes the District of Columbia, territories and possessions depends on the purposes of Congress in enacting the specific legislation and the circumstances under which the words were employed. See e.g., *Examining Board* vs. *Flores de Otero*, 426, U.S. 572 (1976). In 25 U.S.C. 1902 Congress stated that its intent in passing the Indian Child Welfare Act was to establish minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes. In 25 U.S.C. 1901(4) Congress expressed its concern over the alarmingly high percentage of Indian families broken up by the removal of their children by non-tribal public and private agencies. The District of Columbia, U.S. possessions and territories also have non-tribal public agencies that place children within their jurisdiction. It seems unlikely that Congress intended to exclude any non-tribal government from the minimum federal standards.

The definition also includes government agencies authorized by law to make any placements covered by the Act regardless of whether they are called courts. This definition parallels the statutory definition of tribal court. 25 U.S.C. 1903(12).

(7) Section 23.2 (m) and (n) are renumbered due to the addition of the two previous definitions.

(8) Section 23.3 Policy, "preventative measures" is changed to "measures to prevent the breakup of Indian families" for the purposes of clarification.

(9) The addresses for sending notice to the Secretary are listed in § 23.11(b). The contents of the notice to the Secretary are set out in § 23.11(c). Additional information concerning rights under the Act that the Bureau will include in its notice to the tribes, parents and Indian custodians is listed in § 23.11(d). In response to a comment, this subsection also provides for asking tribal officials to handle in a confidential manner the information they receive concerning individual cases.

(10) Section 23.11(d). Notice may also be given by "personal service." This type of service is included to give an alternative form of service or "higher standard of protection to the rights of the parent," custodian or tribe as authorized in Section 111 of the Act.

(11) Several commenters expressed concern that the proposed rules in Section 23.11 could be construed as authorizing BIA officials to halt their efforts to identify a child's tribe or to locate the child's parents or indian custodians after only 15 days of effort. The deadline was included in the proposed regulations to assure prompt action by Bureau officials. Prompt action is needed since the court is free to begin its proceedings only 10 days after notice to the Secretary. Even if the court is willing to continue the case pending Bureau action, a long delay could be prejudicial to the child and other parties to the proceedings. There may be many instances, however, in which 15 days is simply not enough time to complete the search.

Two changes have been made in the regulations to resolve this problem. First, the Bureau is to attempt to complete the search and give notice within 10 days in order to conform with Section 102 of the Act, and so that those who are notified will be able to participate in a timely manner in the proceedings. Second, if the Bureau has not been able to complete its efforts in that time, it is to inform the court of that fact and let the court know how much more time will be needed. The court can then use that information to decide whether the proceedings should be further delayed. Regardless of what action the court takes, the BIA will complete its search efforts.

(12) One commenter suggested that the time problem could be alleviated to some extent if the BIA would be willing to undertake searches before a case is actually filed when asked to do so by someone who is contemplating filing such an action. This suggestion has been adopted in § 23.11(f).

(13) In Section 23.11(e) the terminology "has a relationship with an Indian tribe" is changed to "meets the criteria of an Indian child as defined in section (4) of the Act" for further clarification and to relate back to the legislative language.

(14) Section 23.12 is changed to enable any tribe to designate by resolution "or by such form as the tribal constitution or current practice requires" an agent for service of notice.

This change expands the methods by which an agent for notice may be designated. Some tribes do not issue resolutions, but grant authority for action by other methods.

(15) In Section 23.12 the sentence, "The Secretary shall publish the name and address of the designated agent for service of notice in the Federal Register," is changed by adding the following, "on an annual basis." A current listing of such agents will be maintained by the Secretary, and will be available through the Area Offices. These changes are made to more adequately handle the requests for information regarding agents for service, many of whom could change on a frequent basis.

(16) Section 23.21 is changed to delete the word "non-profit" from grant eligibility criteria. Profit-making indian organizations otherwise eligible for grants under this part may apply for said grants for non-profit-making programs. Comments suggested that there are several Indian organizations which have both profit and non-profit component programs. Section 23.21 is also changed to make clear that applicants may apply for a grant individually or as a consortium.

(17) Section 23.22 is changed to make clear that the examples of Indian child and family service programs provided therein are, in fact, just examples and do not limit or restrict the kinds of child and family service programs for which grants may be provided. Some renumbering of subsections is also done to make the overall section more readable.

(18) Section 23.25(a) is changed to recognize that statistical and other precise quantitative data are not always available to evaluate the need for Indian child and family service programs. Such data may henceforth be considered only insofar as practicable and may include estimated data as well as actual data. Section 23.25(a) is also changed to ensure that quality and relevance of service to Indian clientele be considered when determining Indian accessibility to existing child and family service programs.

(19) Section 23.25(b) is changed to emphasize that the governing body of a tribe may subgrant or subcontract its grant to an Indian organization if it desires to do so.

(20) Section 23.25(c) is changed to give preference for selection for off-reservation grants to off-reservation Indian organizations showing substantial rather than majority support from the community to be served. Section 23.25(c) is also changed to waive the substantial community support requirement for certain existing indian organizations.

(21) Section 23.27(c)(1) is changed to delete reference to distribution of grant

funds based upon ratio of number of Indian children under age 18 to be served under a proposal to number of Indian children under 18 nationally.

(22) Section 23.35(a). To facilitate administration of grants pursuant to 23.27(a), a change was made transferring the administration of grants from the Central Office to the Area Office level.

(23) Section 23.43(a) is changed to specifically reference funds under Titles IVB and XX of the Social Security Act as appropriate matching shares for grant funds provided under this part, because they were specifically referenced in the Act.

(24) Section 23.43(b) is changed to (c), and a new (b) is added to reference agreements between the Department of the Interior and the Department of Health, Education, and Welfare for use of funds under this part.

(25) Section 23.43(b) was added to emphasize section 203(a) of the Act. That section was not addressed in the proposed regulations.

(26) Many recommendations were received concerning design of a funding formula to ensure that all approved grant applicants receive a proportionately equitable share of funds and that small tribes and Indian organizations do not lose out to large tribes and Indian organizations when funds are distributed. These recommendations will be utilized insofar as possible in the formula design. The formula itself will be published at a later date as a Federal Register Notice.

(27) In Section 23.81(a), the address for transmittal of information to the Secretary shall be sent to the Chief Justice of the highest court of Appeal, "the Attorney General, and Governor" of each state. The Governor was added to insure wider distribution of this material among state agencies.

(28) Section 23.81(a)(1) is changed to "Name of the child, the tribal affiliation, and the quantum of Indian blood," to secure more information for the adult Indian individual who is adopted.

(29) Section 23.81(b), or, is inserted between "adoptive or foster parents" who may request information for an adopted Indian individual to correct an error, and comply with the language of the Act.

(30) Section 23.81(b), additional wording has been added to clarify what information will be disclosed for enrollment purposes, for determining rights or benefits and to whom it may be released. These limitations were added to stress not only the confidential nature of this information, but also the importance of enrollment.

(31) Sections 23.91, 23.92, and 23.93 were added to assist the tribes and courts in carrying out the purposes of the Act.

B. Changes Not Adopted

Certain other comments were received and duly considered, but have not been incorporated into the regulations. The following suggested changes were not adopted for the reasons given:

(1) A number of very forceful comments were received to the effect that the Bureau of Indian Affairs had disclaimed its responsibility insofar as would apply to proceedings in the state courts by publishing proposed "Guidelines for State Courts" rather than proposed regulations in Part 23. As many comments indicated, it was initially administratively planned to write the guidelines as regulations. Also, as a result of the public hearings, the National Congress of American Indians and the National Indian Court Judges Association proposed these guidelines as regulations. It is not administrative policy, but rather the strong legal position of the Office of the Solicitor, Department of the Interior, that the material be published as "Guidelines for State Courts." The Office of the Solicitor's legal position is set out at the beginning of this "Supplementary Information" section. Therefore, the "Guidelines for State Courts" are not included as regulations in Part 23 but will be published as a Federal Register Notice.

(2) Section 23.2. Comments were received in each of the following instances regarding the language employed in certain of the definitions of this section:

a (b) The phrase "child custody proceeding" was objected to as being too restrictive and as not encompassing juvenile delinquency proceedings;

b (b)(1) "Foster care placement" as defined was viewed as being too narrow in scope, and as not relating to institutional placements, voluntary placements, and to special circumstances which might be imposed as a result of divorce proceedings.

One commenter recommended that Section 23.2(b)(5) be changed to reflect the statement in the Senate Report on the Act at Page 16 that the definition of child placement includes "juveniles charged with minor misdemeanant behavior who would be covered by prohibitions against incarceration in secure facilities by the Juvenile Justice and Delinquency Prevention Act of 1974." The General Counsel's Office of the Law Enforcement Assistance Administration, however, has informed this Department that incarceration of juveniles charged with minor misdemeanors is permitted under that Act. For that reason, the definition has not been modified to include placements based on such offenses.

c (d) A respondent requested revision in this subsection to expand the definition of "Indian" to include non-Indian children of Indian parents;

d (d & e) Comment called for a more clearly-drawn division between the definitions of "Indian" and "Indian child." (A numbering and a title change were made, with no change being made in content;)

e (f) It was suggested that the proposed definition of "Indian child's tribe" should be reworded so as to deal more explicitly with those cases in which an Indian child is eligible for membership in more than one tribe. Further comment asked that this definition be expanded to make direct reference to Alaska Natives.

f (g) It was suggested that the definition of the term "Indian custodian" be expanded to include Indian social services agencies;

g (g) Usage of the term "transferred" was objected to;

h (i) Request was made that an expansion of the definition of "Indian tribe" be made to include Canadian tribes;

The language was not changed in any of the foregoing definitions because each of the definitions was taken directly from the Act. It cannot be the function of regulations to expand upon or to subtract from legislation as enacted by the Congress.

i (j) One commenter expressed doubt concerning the constitutionality of the definition of "parent" in both the regulations and the statute based on the recent Supreme Court decision in *Coban vs. Mohammed*, 47 U.S.L.W. 4462 (April 24, 1979). The court in that case held unconstitutional a statute permitting an unwed mother, but not an unwed father, to block an adoption by denying consent. Unlike the statute involved in that case, however, the Indian Child Welfare Act does not require a father to be married to have all the rights of a parent. The father need merely acknowledge paternity. This requirement imposes even less of a burden on the father than the "legitimation" requirement imposed by another statute that was upheld by the Supreme Court the same day it decided *Caban; Parham vs. Hughes*, 47 U.S.L.W. 4457 (April 24, 1979). Unlike marriage, neither legitimation nor acknowledgement requires the consent

of the mother. The reason such a requirement is permissible is well expressed in justice Powell's concurring opinion in *Parham*: "The marginally greater burden placed upon fathers is no more severe than is required by the marked difference between proving paternity and proving maternity." *Id.* at 4460.

(3) Two comments were received which requested that a definition for "tribal law or custom" be included in the regulations. Such a definition was written into the proposed guidelines, and it was deemed more appropriate for it to remain therein.

(4) Comments were received asking for definitions of "domicile" and "residence." Ultimate definition of the terminology in question must be in accordance with case law.

(5) Comment was received regarding the proposed definition of the term "parent" relative to its application to the unwed father and the minor unwed parent. No changes were made because (a) the existing definition is not in conflict with the Supreme Court decision rendered in the *Stanley* vs. *Illinois*, 405 U.S. 645 (1972) decision, and (b) the minority of an individual does not affect her or his relationship as a parent.

(6) One comment asserted that there was a need to define the standards of evidence addressed in Section 102 (e and f) of the Act. As these standards have been developed through case law, it was considered impractical to attempt to formulate definitions in connection with this particular Act.

(7) Another group of public comments requested that the designations "extended family" and "member of a tribe" be defined. Both of these terms are defined either by tribal law or by tribal custom. Consequently, no definitions are offered in the regulations.

(8) Section 23.11(5). One comment sought the inclusion of terminology relating to termination proceedings resulting from juvenile delinquency court actions. No additional wording was added to this section because under 25 U.S.C. 1903(1) only placements—not terminations—based on acts of delinquency are excluded from coverage of the Act.

(9) Section 23.11. A comment was received which asked that notice be made to the tribe in all voluntary proceedings. This suggested change was not adopted because the legislation does not, in regard to voluntary proceedings, authorize notice to the tribe; therefore, inclusion of such a regulation would be beyond the scope of the Act.

(10) Section 23.11. An additional comment contended that state courts should be required to give notice "with due diligence." A regulation was not developed for this purpose due to the fact that the Secretary of the Department of the Interior does not have the authority to promulgate regulations governing the conduct of state courts.

(11) Section 23.11. Two comments posed questions relating to the protection of the civil rights of Indian children, and identified a felt need for the imposition of a specified time limitation restricting the required notice procedure. Approval of changes regarding these issues was not warranted because (a) the Indian Civil Rights Act provides the necessary protections, and (b) due to exigencies of individual cases, a rigid and restrictive time limitation would be impossible to structure.

(12) Section 23.11. One comment called for the insertion in the notice provision of the phrase "reasonable cause to believe that the child was an Indian child." Such an addition is not acceptable because it is not within the scope of the Act as written in the legislation.

(13) Section 23.12. One comment proposed that the regulations be modified to allow tribal organizations to act as designated agents, or as coordinators of the duties and services associated with designated agents, for the serving of notice. No regulatory change was made in this instance, as doing so would expand the substance of this section beyond the scope of the Act.

(14) Section 23.12. A single comment was received requesting that membership criteria be published for each of the various tribes. This request will not be complied with because the details of membership requirements are readily available through tribal headquarters offices and Bureau Area Offices. Secondarily, the body of information requested is so extensive as to make its publication within the regulations unfeasible.

(15) A large number of comments received suggested a variety of changes to be made in § 23.12. These suggestions and the reasons they were not adopted are summarized as follows:

A number of comments were received urging that the Department pay any voucher certified to it by a state court without examining it to determine whether the court was correct in concluding that the Bureau should pay. Except with respect to the determination of indigency, this recommendation has not been adopted. Congress has directed that these payments be made from funds managed by the Interior Department. As manager of these funds, this Department is charged by Congress with the responsibility of assuring they are spent only for a Congressionally-authorized purpose. Since this Department is held accountable for the use of these funds, it must retain ultimate authority to refuse payment requests if it believes payment is not authorized by the statute.

Under 25 U.S.C. 1912(b), however, Congress has authorized payment when "the court determines indigency." Since the Congress has left this determination to the courts, this Department will not make its own determination of that issue. Consequently, the provision authorizing the Area Director to refuse payment if the court has abused its discretion in determining indigency has been deleted.

One commenter objected to the use of state standards and procedures for payment of counsel in juvenile delinquency proceedings as the criteria for reasonable fees to be paid counsel under the Indian Child Welfare Act. The Department did consider having vouchers submitted directly to the Department by the attorneys without requiring prior approval by the state court. If that approach had been adopted, the Department would have developed procedures and criteria based on those employed by states where appointed counsel is paid in non-juvenile delinquency child custody cases. Since state courts already have substantial experience in paying appointed counsel in juvenile proceedings (because appointed counsel is clearly required by the U.S. Constitution), the Department concluded the courts were better prepared to make the initial determination as to the reasonableness of the fees requested by appointed attorneys. For that reason, the regulations provide for vouchers to be approved first by the state court. Under the regulations the Department will pay the amount approved by the court unless the Department is prepared to say that the court abused its discretion.

The regulations could have asked the state courts to apply procedures and criteria relating specifically to dependency proceedings. Those procedures and criteria, of course, would have been new to the states involved since the Department is not authorized by Congress to make payments in states where state law authorizes payment in dependency proceedings. The Department concluded administration of the program would be more orderly if states could use the procedures and criteria they are already using in other cases rather than having to apply new rules. There are, of course, differences between juvenile

delinquency proceedings and dependency proceedings. But since delinquency proceedings more closely resemble the type of proceedings covered by the Act than do the proceedings for any other cases where all states pay appointed counsel, they were regarded as the best model.

Some commenters recommended that the deadline for the Area Director to act on the notice be reduced from 15 days to five days. The deadline has been reduced to ten days. This decision was based on a balancing of the need of attorneys to know promptly whether they are eligible to be paid and the Department's need for time to conduct a review to determine eligibility.

Some commenters recommended that income from indian claims, trust funds and certain other sources not be considered in determining indigency. Since this determination is the responsibility of the state court rather than the Department, that recommendation has not been adopted. For the same reason, the requirements in the proposed rules that indigency be determined on the same basis as is used in juvenile delinquency proceedings has been deleted. These issues may be dealt with in the guidelines, however.

Some commenters recommended that the regulations provide for tribal involvement in the appointment of counsel. This recommendation has not been adopted because under 25 U.S.C. 1912(b) it is the responsibility of the court to appoint counsel. This responsibility has not been assigned to either the Department or to tribes. The courts may, however, wish to seek the assistance of either the Department or the tribe in identifying attorneys with suitable expertise to take these cases. This matter may also be included in the guidelines.

In response to comments, the Bureau Area Office to which notices of appointments are sent has been changed from the office serving the Indian child's tribe to the office designated in § 23.11 for receipt of other notices. A particular Area Office is designated for each state (exceptions noted below). This approach will mean that, in most instances, a state court can send all materials to the same Bureau address. (Arizona, New Mexico, Oklahoma and Utah are exceptions noted in the regulations.)

One comment made the request that a provision be written into the regulations obligating the Bureau to pay an attorney who is found to be ineligible if the Bureau should fail to disapprove payment before the deadline. This comment has not been adopted. Congress has authorized payments only in certain types of cases for certain types of representation. The Bureau is not authorized to pay money merely as compensation for its slowness. A new subsection (g) has been added stating that a person aggrieved by the failure of the Area Director to act promptly may treat that failure as a denial for purposes of administrative appeal.

Another comment was that the Bureau pay for work done by an attorney on a case he or she, in good faith, believed was an eligible Indian child welfare case up to the time that the attorney is notified that he or she is not eligible for Bureau payments. This comment was also rejected because the Act does not authorize payments based on the good faith of the attorney. If the case is not one covered by the Act, the Bureau is not authorized to pay the attorney regardless of that attorney's good faith beliefs.

(16) Section 23.81. Two additional comments maintained that state courts should be mandated to share with tribal courts all information on final adoptive orders for indian children. This suggestion could not be incorporated into the regulations because, again, it calls for expansion of the content of the legislation beyond its intended scope.

(17) A comment was made that a central register be established under § 23.81(a) for the purpose of immediate collection and disclosure of information on adoptions. This suggestion extends beyond the scope of the intent of the Act.

(18) A comment was made calling for the identification of the tribal court involved with the child under section 23.81(a). This additional information appeared unnecessary considering the information already provided by the state court to the Secretary.

(19) One comment was made that the Bureau insure the provision of the remedial or rehabilitative services required under section 102(d) of the Act. For families located off-reservation, this can be interpreted as being beyond the authority of the Bureau in its provision of services to off-reservation Indians and is unrealistic due to staff and financial limitations.

(20) One comment was made that the Secretary conduct outreach activity to locate and identify prospective foster and adoptive homes in order to assist states in their efforts to comply with section 105(a) and (b) of the Act. This proposed change was not incorporated into the regulations, as doing so would constitute a duplication of services in that a number of special projects are already engaged in the active recruitment of Indian foster and adoptive families. Moreover, it should be noted that this issue is a responsibility of the states and must be met to fulfill the requirements of the Act.

(21) One comment was made that the Bureau publish in the Federal Register the various tribal placement preferences (refer to section 105(c) of the Act). This recommendation was not accepted because the Federal Register is not readily available to the population at large, and it is important that the tribes be contacted directly on these matters.

(22) Comments were received containing specific objections to Bureau of Indian Affairs involvement in regulating grants to be provided under Title II of Pub. L. 95–608. The responsibility for regulating these grants was given by the Act to the Secretary of the Interior who in turn has lawfully delegated that responsibility to the Assistant Secretary—Indian Affairs.

(23) A number of comments questioned use of the basic Pub. L. 93–638 Indian Self-Determination grant regulation format in relation to these Indian Child Welfare Act grant regulations. Related comments also questioned the various grant application review levels and time frames for Bureau action which generally conform to the Pub. L. 93–638 format. No changes were made in this regard since the Pub. L. 93–638 format, and its application review levels and time frames for Bureau an applicant actions, has proven administratively feasible for both Bureau and grant applicants.

(24) Some comments received from Tribal governing bodies recommended that tribes be routinely given a proportionately higher ratio of available grant funds than that given Indian organizations. This recommendation was not adopted as the Act does not provide for such an advantage to tribes.

(25) Some comments objected to § 23.22, Purpose of grants, in its entirety. The rationale presented was that a sovereign tribal entity should not be restricted in any way in its decision as to how Federal grant funds will be utilized. The recommendation that §23.22 be entirely deleted was not adopted. The Act is specific in its direction that grants will be made for the establishment and operation of Indian Child and family service programs with the objective being the prevention of the breakup of Indian families. Section 23.22 attempts to make that basic point and provides examples of such programs without restricting applicants to those examples.

(26) A few comments pertained to the application selection criteria in § 23.25 and recommended that Indian organizations which are not tribal governing bodies be able to apply for grants for on or "near" reservation programs. This change was not adopted as this Bureau is committed to working in a government-to-government relationship directly with and through tribal government relative to Bureau-funded programs on or "near" reservations. It is also noted that a tribal governing body may subgrant or subcontract its grant under this part to any Indian organization it wishes.

(27) A few comments pertained to funding available for grants under this part. One comment pointed out that subsidy programs for adopted children should take into account that adoptions are for life and that the grant regulations § 23.22(a)(5)) should provide for subsidies until the adopted child reaches majority. Another comment recommended that § 23.27(c) should delete reference to grant approvals being subject to availability of funds. No changes were made in this overall regard since the Bureau's appropriations are received from the Congress on an annual basis and the Bureau subsequently may only fund programs on a year-to-year basis dependent entirely upon funds appropriated by the Congress.

(28) One comment recommended that adoption subsidy grant programs, § 23.22(a)(5), be extended to legal guardians as well as to adoptive parents. This recommendation was not adopted as legal guardians can receive payments for foster care from established resources.

(29) One commenter suggested that § 23.81(b) be further clarified and expanded regarding the release of information and method of enrollment for eligible Indian adopted children. It was decided that the Chief Tribal Enrollment Officer only will certify to the tribe information necessary for enrollment where the parent has filed an affidavit of confidentiality. The reason for this change is to limit the number of people who might have access to this information, and to protect its confidential nature, as the Secretary is mandated to do under section 301 of this Act.

(30) Some comments recommended that grants for off reservation programs be provided only to governing bodies of Federally-recognized tribes. This recommendation was not adopted since it would unduly limit the specific role of off-reservation Indian organizations relative to implementation of the Act which specifically authorizes grants for these Indian Organizations.

(31) A comment was made pursuant to section 103(c) of the Act that the Bureau give notice to a parent that any adoption of a child for which the parent had voluntarily terminated parental rights can be invalidated within two years after the adoption if the parent can prove fraud or duress. This recommendation was not adopted because it was felt that this practice, on a general basis, would not be in the best interest of the children involved. If cases arise that warrant this type of assistance, such assistance may be provided on a case-by-case basis.

(32) A comment was made that under Section 105(e) of the Act, requirements should be established regarding the content of Indian child placement records maintained by the states. This recommended change was not adopted because the regulation of state social service agencies does not fall within the authority granted to the Secretary of the Interior.

The authority for issuing these regulations is contained in 5 U.S.C. 301 and sections 463 and 465 of the revised statutes (25 U.S.C. 2 and 9), and 209 DM 8. The primary authors of this document are Raymond V. Butler, Chief, Division of Social Services, Bureau of Indian Affairs, and David Etheridge, Office of the Solicitor, Department of the Interior.

Note.—The Department of the Interior has determined that this document is not a significant rule and does not require a regulatory analysis under Executive Order 12044 and 43 CFR Part 14.

Subchapter D, Chapter I, Title 25 of the Code of Federal Regulations is amended by adding a new Part 23, reading as follows:

PART 23—INDIAN CHILD WELFARE ACT

Subpart A—Purpose, Definitions and Policy

Subpart B—Notice of Involuntary Child Custody Proceedings and Payment for Appointed Counsel

Subpart C—Grants to Indian Tribes and Indian Organizations for Indian Child and Family Programs

Subpart D—General Grant Requirements

Subpart E—Grant Revision, Cancellation or Assumption

Subpart F—Hearings and Appeals

Subpart G—Administrative Requirements

Subpart H—Administrative Provisions

Subpart I—Assistance to State Courts

Authority: 5 U.S.C. 301; secs. 463 and 465 of the revised statutes (25 U.S.C. 2 and 9).

Subpart A—Purpose, Definitions, and Policy

§ 23.1 Purpose.

The purpose of the regulations in this Part is to govern the provision of administration and funding of the Indian Child Welfare Act of 1978 (Pub. L. 95–608, 92 Stat. 3069, 25 U.S.C. 1901–1952).

§ 23.2 Definitions.

(a) "Act" means the Indian Child Welfare Act, Pub. L. 95–608 (92 Stat. 3073), 25 U.S.C. 1901 *et seq.*

(b) "Child custody proceeding," which shall mean and include:

(1) "Foster care placement"—any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(2) "Termination of parental rights"—an action resulting in the termination of the parent-child relationship;

(3) "Preadoptive placement"—the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(4) "Adoptive placement"—the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

(5) Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime in the jurisdiction where the act occurred or upon an award, in a divorce proceeding, of custody to one of the parents. It does include status offenses, such as truancy, incorrigibility etc.

(c) "Extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

(d) "Indian" means: (1) *Jurisdictional Purposes:* For purposes of matters related to child custody proceedings any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 or the Alaska Native Claims Settlement Act (85 Stat. 688, 689).

(2) *Service eligibility for on or "near" reservation Children and Family Service Programs.* For purposes of indian child and family service programs under section 201 of the Indian Child Welfare Act (92 Stat. 3075), any person who is a member, or a one-fourth degree or more blood quantum descendant of a member of any Indian tribe.

(3) *Service eligibility for off-reservation Children and Family Service Programs:* For the purpose of Indian child and family programs under section 202 of the Indian Child Welfare Act (92 Stat. 3073) any person who is a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized now or in the future by the state in which they reside, or who is a descendent, in the first or second degree, of any such member, or is an Eskimo or Aleut or other Alaska Native, or is considered by the Secretary of the Interior to be an Indian for any purpose, or is determined to be an Indian under regulations promulgated by the Secretary of Health, Education, and Welfare. Membership status is to be determined by the tribal law, ordinance, or custom.

(e) "Indian child" means any unmarried person who is under age eighteen and is either (1) a member of an Indian tribe, or (2) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

(f) "Indian child's tribe" means (1) the Indian tribe in which an Indian child is a member or is eligible for membership or (2) in the case of an Indian child who is a member of or is eligible for membership in more than one tribe, the indian tribe with which the Indian child has the more significant contacts. (Refer to Guidelines for State Courts-Indian Child Custody Proceedings.)

(g) "Indian custodian" means any Indian person(s) who has legal custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody, and control has been transferred by the parent of such child.

(h) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians.

(i) "Indian tribe" means any Indian tribe, band, nation or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Aleska Native village as defined in section 3(c) of the Alaska Native Claims Settlement Act (85 Stat. 688, 689), as amended.

(j) "Parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established.

(k) "Reservation" means Indian country as defined in section 1151 of Title 18, United States Code, and any lands not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual subject to a restriction by the United States against alienation.

(l) "State Court" means any agent or agency of a State including the District of Columbia or any territory or possession of the United States or any political subdivisions empowered by law to terminate parental rights or to make foster care placements, preadoptive placements, or adoptive placements.

(m) "Tribal court" means a court with jurisdiction over child custody proceedings and which is either a court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

(n) For other applicable definitions refer to 25 CFR 20.1 and 271.2.

§ 23.3 Policy.

The policy of the Act and of these regulations is to protect Indian children from arbitrary removal from their families and tribal affiliations by establishing procedures to insure that measures to prevent the breakup of Indian families are followed in child custody proceedings. This will insure protection of the best interests of Indian children and Indian families by providing assistance and funding to Indian tribes and Indian organizations in the operation of child and family service programs which reflect the unique values of Indian culture and promote the stability and security of Indian families. In administering the grant authority for Indian Child and Family Programs it shall be Bureau policy to emphasize the design and funding of programs to promote the stability of Indian families.

Subpart B—Notice of Involuntary Child Custody Proceedings and Payment for Appointed Counsel

§ 23.11 Notice.

(a) If the identity or location of the parents, Indian custodians or the Indian child's tribe cannot be determined, notice of the pendency of any involuntary child custody proceeding involving an Indian child in a state court shall be sent by registered mail with return receipt requested to the appropriate address listed in paragraph (b) of this section.

(b)(1) For proceedings in Alabama, Connecticut, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York,

North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia or any territory or possession of the United States, notice should be sent to the following address: Eastern Area Director, Bureau of Indian Affairs, 1951 Constitution Avenue NW., Washington, D.C. 20245.

(2) For proceedings in Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio or Wisconsin, notice should be sent to the following address: Minneapolis Area Director, Bureau of Indian Affairs, 831-2nd Avenue, S., Minneapolis, Minnesota 55402.

(3) For proceedings in Nebraska, North Dakota, or South Dakota, notice should be sent to the following address: Aberdeen Area Director, Bureau of Indian Affairs, 115-4th Avenue, SE., Aberdeen, South Dakota 57401.

(4) For proceedings in Kansas, Texas, and the western Oklahoma counties of Alfalfa, Beaver, Beckman, Blain, Bryan, Caddo, Canadian, Cimarron, Cleveland, Comanche, Cotton, Custer, Dewey, Ellis, Garfield, Grant, Greer, Harmon, Harper, Jackson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Major, Noble, Oklahoma, Pawnee, Payne, Pottawatomie, Roger Mills, Texas, Tillman, Washita, Woods, and Woodward, notice should be sent to the following address: Anadarko Area Director, Bureau of Indian Affairs, P.O. Box 368, Anadarko, Oklahoma 73005.

(5) For proceedings in Montana or Wyoming notice should be sent to the following address: Billings Area Director, Bureau of Indian Affairs, 316 N. 26th Street, Billings, Montana 59101.

(6) For proceedings in Colorado or New Mexico, (exclusive of those New Mexico counties listed in paragraph (b)(9) below), notice should be sent to the following address: Albuquerque Area Director, Bureau of Indian Affairs, 5301 Central Avenue, NE., P.O. Box 8327, Albuquerque, New Mexico 87108.

(7) For proceedings in Alaska notice should be sent to the following address: Juneau Area Director, Bureau of Indian Affairs, P.O. Box 3-8000, Juneau, Alaska 99801.

(8) For proceedings in Arkansas, Missouri, and all Oklahoma counties not listed under paragraph (b)(4) above, notice should be sent to the following address: Muskogee Area Director, Bureau of Indian Affairs, Federal Building, Muskogee, Oklahoma 74401.

(9) For proceedings in the Arizona counties of Apache, Coconino, and Navajo; the New Mexico counties of McKinley, San juan, and Socorro; and the Utah county of San Juan, notice should be sent to the following address: Navajo Area Director, Bureau of Indian Affairs, Window Rock, Arizona 86515.

(10) For proceedings in Arizona (exclusive of those counties listed in paragraph (b)(9) above), Nevada, or Utah (exclusive of that county listed in paragraph (b)(9) above), notice should be sent to the following address: Phoenix Area Director, Bureau of Indian Affairs, P.O. Box 7007, Phoenix, Arizona 85011.

(11) For proceedings in Idaho, Oregon or Washington, notice should be sent to the following address: Portland Area Director, Bureau of Indian Affairs, 1425 N.E. Irving Street, Portland, Oregon 97208.

(12) For proceedings in California or Hawaii, notice should be sent to the following address: Sacramento Area Director, Bureau of Indian Affairs, Federal Office Building, 2800 Cottage Way, Sacramento, California 85011.

(c) Notice shall include the following information if known:

(1) Name of the indian child, birthdate, birthplace,

(2) Indian child's tribal affiliation,

(3) Names of Indian child's parents or Indian custodians, including birthdate, birthplace, and mother's maiden name, and

(4) A copy of the petition, complaint or other document by which the proceeding was initiated.

(d) Upon receipt of the notice, the Bureau shall make a diligent effort to locate and notify the indian child's tribe and the Indian child's parents or Indian custodians. Such notice may be by registered mail with return receipt requested or by personal service and shall include the information provided under subsection (c) of this section in addition to the following:

(1) A statement of the right of the biological parents, Indian custodians and the Indian tribe to intervene in the proceedings.

(2) A statement that if the parent(s) or Indian custodian(s) is unable to afford counsel, counsel will be appointed to represent them.

(3) A statement of the right of the parents, the indian custodians and the child's tribe to have, upon request, up to twenty additional days to prepare for the proceedings.

(4) The location, mailing address and telephone number of the court.

(5) A statement of the right of the parents, Indian custodians and the Indian child's tribe to petition the court for transfer of the proceeding to the child's tribal court, and their right to refuse to permit the case to be transferred.

(6) A statement of the potential legal consequences of the proceedings on the future custodial and parental rights of the parents or Indian custodians.

(7) A statement that, since child custody proceedings are usually conducted on a confidential basis, tribal officials should keep confidential the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not need the information in order to exercise the tribe s rights under the Act.

(e) The Bureau shall have ten days, after receipt of the notice from the persons initiating the proceedings, to notify the child's tribe and parents or Indian custodians and send a copy of the notice to the court. If within the ten-day time period the Bureau is unable to verify that the child is in fact an Indian, or meets the criteria of an Indian child as defined in section (4) of the Act, or is unable to locate the parents or Indian custodians, the Bureau shall so inform the court prior to initiation of the proceedings and state how much more time, if any, it will need to complete the search. The Bureau shall complete its search efforts even if those efforts cannot be completed before the child custody proceeding begins.

(f) Upon request from a potential participant in an anticipated Indian child custody proceeding, the Bureau shall attempt to identify and locate the Indian child's tribe, parents or indian custodians for the person making the request.

§ 23.12 Designated tribal agent for service of notice.

Any Indian tribe entitled to notice may designate by resolution, or by such other form as the tribal constitution or current practice requires, an agent for service of such notice other than the tribal chairman and send a copy of the designation to the Secretary. The Secretary shall publish the name and address of the designated agent in the Federal Register on an annual basis. A current listing of such agents will be maintained by the Secretary and will be available through the Area Offices.

§ 23.13 Payment for appointed counsel in state Indian child custody proceedings.

(a) When a state court appoints counsel for an indigent party in an Indian child custody proceeding, for which the appointment of counsel is not authorized under state law, the court shall send written notice of the appointment to the Bureau of Indian Affairs Area office designated for that state in § 23.11 of this part. The notice shall include the following:

(1) Name, address and telephone number of attorney who has been appointed.

(2) Name and address of client for whom counsel is appointed.

(3) Relationship of client to child.

(4) Name of Indian child's tribe.

(5) Copy of the petition or complaint.

(6) Certification by the court that state law makes no provision for appointment of counsel in such proceedings.

(7) Certification by the court that the client is indigent.

(b) The Area Director shall certify that the client is eligible to have his or her appointed counsel compensated by the Bureau of Indian Affairs unless:

(1) The litigation does not involve a child custody proceeding as defined in 25 U.S.C.1903(1);

(2) The child who is the subject of the litigation is not an Indian child as defined in 25 U.S.C. 1903(4);

(3) The client is neither the Indian child who is the subject of the litigation, the Indian child's parent as defined in 25 U.S.C. 1903(9), or the child's Indian custodian as defined in 25 U.S.C.1903(6);

(4) State law provides for appointment of counsel in such proceedings;

(5) The notice of the Area Director of appointment of counsel is incomplete; or

(6) No funds are available for such payments.

(c) No later than 10 days after receipt of the notice of appointment of counsel, the Area Director shall notify the court, the client and the attorney in writing whether the client has been certified as eligible to have his or her attorney fees and expenses paid by the Bureau of Indian Affairs. In the event that certification is denied, the notice shall include written reasons for that decision together with a statement that the Area Director's decision may be appealed to the Commissioner of Indian Affairs under the provisions of the 25 CFR Part 2.

(d) When determining attorney fees and expenses the court shall:

(1) Determine the amount of payments due appointed counsel by the same procedures and criteria it uses in determining the fees and expenses to be paid appointed counsel in juvenile delinquency proceedings.

(2) Submit approved vouchers to the Area Director who certified eligibility for Bureau payment together with the court's certification that the amount requested is reasonable under the state standards and considering the work actually performed in light of the criteria that apply in determining fees and expenses for appointed counsel in juvenile delinquency proceedings.

(e) The Area Director shall authorize the payment of attorney fees and expenses in the amount requested in the voucher approved by the court unless:

(1) The court has abused its discretion under state law in determining the amount of the fees and expenses; or

(2) The client has not been previously certified as eligible under paragraph (c) of this section.

(f) No later than 15 days after receipt of a payment voucher the Area Director shall send written notice to the court, the client and the attorney stating the amount of payment, if any, that has been authorized. If the payment has been denied or the amount authorized is less than the amount requested in the voucher approved by the court, the notice shall include a written statement of the reasons for the decision together with a statement that the decision of the Area Director may be appealed to the Commissioner under the procedures of 25 CFR Part 2.

(g) Failure of the Area Director to meet the deadlines specified in paragraphs (c) and (f) of this section may be treated as a denial for purposes of appeal under paragraphs (f) of this section.

Supart C—Grants to Indian Tribes and Indian Organizations for Indian Child and Family Programs

§ 23.21 Eligibility requirements.

The governing body of any tribe or tribes, or any Indian organization, including multi-service Indian centers, may apply individually or as a consortium for a grant under this part.

§ 23.22 Purpose of grants.

Grants are for the purpose of:

(a) Establishment and operation of Indian child and family service programs. Examples of such programs may include but are not limited to:

(1) Operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children.

(2) Family assistance (including homemaker and home counselors), day care, afterschool care recreational activities, respite care, and employment.

(3) Employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters.

(4) Education and training of Indians (including tribal court judges and staff) in skills relating to child and family assistance and service programs.

(5) Subsidy programs under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate state standards of support for maintenance and medical needs.

(6) Guidance, legal representation, and advice to Indian families involved in tribal, state, or Federal child custody proceedings.

(7) Home improvements programs.

(8) Preparation and implementation of child welfare codes. An example in this regard is establishment of a system for licensing or otherwise regulating Indian foster and adoptive homes.

(b) Providing matching shares for other Federal or non-Federal grant programs as prescribed in § 23.43.

§ 23.23 Obtaining application instructions and materials.

Application instructions and related application materials may be obtained from Superintendents, Area Directors or the Commissioner.

§ 23.24 Content of application.

Application for a grant under this part shall include:

(a) Name and address of Indian tribal governing body(s) or Indian organization applying for a grant,

(b) Descriptive name of project,

(c) Federal funding needed,

(d) Population directly benefiting from the project,

(e) Length of project,

(f) Beginning date,

(g) Project budget categories or items,

(h) Program narrative statement,

(i) Certification or evidence of request by Indian tribe or board of Indian organization,

(j) Name and address of Bureau office to which application is submitted,

(k) Date application is submitted to Bureau, and

(l) Additional information pertaining to grant applications for funds to be used as matching shares will be requested as prescribed in § 23.43.

§ 23.25 Application selection criteria.

(a) The Commissioner or designated representative shall select for grants under this part those proposals which will in his or her judgment best promote the purposes of title II of the Act taking into consideration insofar as practicable the following factors:

(1) The number of actual or estimated Indian child placements outside the home, the number of actual or estimated Indian family breakups, and the need for directly-related preventive programs, all as determined by analysis of relevant statistical and other data available from tribal and public court records and from

the records of tribal, Bureau, public and private social services agencies serving Indian children and their families.

(2) The relative accessibility which the Indian population to be served under a specific proposal already has to existing child and family service programs emphasizing prevention of Indian family breakup. Factors to be considered in determining relative accessibility include:

(i) Cultural barriers;

(ii) Discrimination against Indians;

(iii) Inability of potential Indian clientele to pay for services;

(iv) Lack of programs which provide free service to indigent families;

(v) Technical barriers created by existing public or private programs;

(vi) Availability of Transportation to existing programs;

(vii) Distance between the Indian community to be served under the proposal and the nearest existing program;

(viii) Quality of service provided to Indian clientele; and

(ix) Relevance of service provided to specific needs of Indian clientele.

(3) The extent to which the proposed program would duplicate any existing child and family service program emphasizing prevention of Indian family breakup, taking into consideration all factors listed in paragraphs (a) (1) and (2) above.

(b) Selection for grants under this part for on or "near" reservation programs shall be limited to the governing body of the tribe to be served by the grant. However, the governing body of the tribe may make a subgrant or subcontract with another organizational entity including but not limited to an Indian organization, subject to the provisions of § 23.36.

(c) Preference for selection for grants under this part for off-reservation programs shall be given to those off-reservation Indian organizations which show evidence of substantial support from the Indian community or communities to be served by the grant. However, the Indian organization may make a subgrant or subcontract subject to the provisions of § 23.36. Factors to be considered in determining substantial support include:

(1) Letters of support from individuals and families to be served;

(2) Local Indian community representation in and control over the Indian entity requesting the grant.

(3) The requirements of this subsection do not apply in the case of an existing multi-service Indian center or an off-reservation Indian organization of demonstrated ability which has operated and continues to operate an Indian child welfare or family assistance program.

§ 23.26 Request from tribal governing body or Indian organization.

(a) The Bureau shall only make a grant under this part for an on or "near" reservation program when officially requested to do so by a tribal governing body. This request may be in the form of a tribal resolution, an endorsement included in the grant application or such other forms as the tribal constitution or current practice requires.

(b) The Bureau shall only make a grant under this part for an off-reservation program when officially requested to do so by the governing body of an Indian organization. This request may be in one of the forms prescribed in (a) above and shall be further subject to the provisions of § 23.25(c) (1), (2), and (3) above.

§ 23.27 Grant approval limitation.

(a) *Area Office approval.* Authority for approval of a grant application under this part shall be with the Area Director when the intent, purpose and scope of the grant proposal pertains solely to an Indian tribe or tribes, or to an Indian organization representing an off-reservation community, located within that Area Director's administrative jurisdiction.

(b) *Central Office approval.* Authority for approval of a grant application under this part shall be with the Commissioner when the intent, purpose and scope of the grant proposal pertains to Indian tribes, off-reservation communities or Indian organizations representing different Area Office administrative jurisdictions but located within the Commissioner's overall jurisdiction.

(c) Grant approvals under this section shall be subject to availability of funds. These funds will include those which are:

(1) Directly appropriated for implementation of this Act. Distribution to approved applicants of these appropriated and available funds will be based upon a formula designed to ensure insofar as possible that all approved applicants receive a proportionately equitable share sufficient to fund an effective program. This formula will be published as a Federal Register Notice.

(2) Appropriated under other Acts for Bureau programs which are related to the purposes prescribed in § 23.22.

§ 23.28 Submitting application.

(a) *Agency Office.* An application for a grant under this part for an on or "near" reservation program shall be initially submitted to the appropriate Superintendent for review and recommendation as prescribed in § 23.29.

(b) *Area Office.* An application for a grant under this part for an off-reservation program shall be initially submitted to the appropriate Area Director for review and action as prescribed in § 23.31.

§ 23.29 Agency Office review and recommendation.

(a) Recommendation for approval or disapproval of a grant under this part shall be made by the Superintendent when the intent, purpose and scope of the grant proposal pertains to or involves an Indian tribe or tribes located within that Superintendent's administrative jurisdiction.

(b) Upon receipt of an application for a grant under this part, the Superintendent shall:

(1) Acknowledge receipt of the application in writing within 10 days of its arrival at the Agency Office.

(2) Review the application for completeness of information and promptly request any additional information which may be required to make a recommendation.

(3) Assess the completed application for appropriateness of purpose as prescribed in § 23.22, and for overall feasibility.

(4) Inform the applicant, in writing and before any final recommendation, of any special problems or impediments which may result in a recommendation for disapproval; offer any available technical assistance required to overcome such problems or impediments; and solicit the applicant's written response.

(5) Recommend approval or disapproval following full assessment of the completed application and forward the application and recommendation to the Area Director for further action.

(6) Promptly notify the applicant in writing as to the final recommendation. If the final recommendation is for disapproval, the Superintendent will include in the written notice to the applicant the specific reasons therefor.

(7) In instances where a joint application is made by tribes representing more than one Agency Office administrative jurisdiction, copies of the application shall be provided by the applicants to each involved Superintendent for review and recommendation as prescribed in this section.

§ 23.30 Deadline for agency office action.

Within 30 days of an application for a grant under this part, the Superintendent shall take action as prescribed in § 23.29. Extension of this deadline will require consultation with, and written consent of, the applicant.

§ 23.31 Area office review and action.

(a) Upon receipt of an application for a grant requiring Area Office approval, the Area Director shall:

(1) Review the application following applicable review procedures prescribed in § 23.29.

(2) Review the Superintendent's recommendation as it pertains to the application.

(3) Approve or disapprove the application.

(b) In instances where a joint application is made by tribes representing more than one Area Office administrative jurisdiction, the Area Director shall add his or her recommendation for approval or disapproval to that of the Superintendent and shall forward the application and recommendations to the Commissioner for further action.

(c) Upon taking action as prescribed in paragraphs (a) and (b) of this section, the Area Director shall promptly notify the applicant in writing as to the action taken. If the action taken is disapproval or recommendation for disapproval of the application, the Area Director will include in the written notice the specific reasons therefor.

§ 23.32 Deadline for Area Office action.

Within 30 days of receipt of an application for a grant under this part, the Area Director shall take action as prescribed in § 23.31. Extension of this deadline will require consultation with, and written consent of, the applicant.

§ 23.33 Central Office review and decision.

Upon receipt of an application for a grant requiring Central Office approval, the Commissioner shall:

(a) Review the application following the applicable review procedures prescribed in § 23.29.

(b) Review Agency and Area Office recommendations as they pertain to the application.

(c) Approve or disapprove the application.

(d) Promptly notify the applicant in writing as to the approval or disapproval of the application. If the application is disapproved, the Commissioner will include in the written notice the specific reasons therefor.

§ 23.34 Deadline for Central Office action.

Within 30 days of receipt of an application for a grant under this part the Commissioner shall take action as prescribed in § 23.33. Extension of this deadline will require consultation with a written consent of the applicant.

§ 23.35 Grant execution and administration.

(a) Grant approved pursuant to § 23.27(a) shall be executed and administered at the Area Office level.

(b) Grants approved pursuant to § 23.27(b) shall be executed and administered at the Central Office level provided that the Commissioner may designate an Area Office to execute or administer such a grant.

§ 23.36 Subgrants and subcontracts.

The grantee may make subgrants or subcontracts under this part provided that such subgrants or subcontracts are for the purpose for which the grant was made and that the grantee retains administrative and financial responsibility over the activity and the funds.

Subpart D—General Grant Requirements

§ 23.41 Applicability.

The general requirements for grant administration in this part are applicable to all Bureau grants provided to tribal governing bodies and to Indian organizations under this part, except to the extent inconsistent with an applicable Federal statute or regulation.

§ 23.42 Reports and availability of information to Indians.

Any tribal governing body or Indian organization receiving a grant under this part shall make information and reports concerning that grant available to the Indian people which it serves or represents. Access to these data shall be requested in writing and shall be made available within 10 days of receipt of that request, subject to any exceptions provided for in the Freedom of Information Act (5 U.S.C. 552), as amended by the Act of November 21, 1974 (Pub. L. 93-502; 88 Stat. 1561).

§ 23.43 Matching share.

(a) Specific Federal laws notwithstanding, grant funds provided under this part for on or "near" reservation programs may be used as non-Federal matching share in connection with funds provided under Titles IVB and XX of the Social Security Act or under any other Federal or non-Federal programs which contribute to the purposes specified in § 23.22.

(b) In the establishing, operating and funding of Indian child and family service programs both on, "near" or off-reservation, the Secretary of the Interior may enter into agreements with the Secretary of Health, Education, and Welfare for the use of funds appropriated for similar programs of the Department of Health, Education, and Welfare.

(c) Superintendents, Area Directors, and their designated representatives will, upon tribal or Indian organization request, assist in obtaining information concerning other Federal agencies with matching fund programs and will, upon request, provide technical assistance in developing applications for submission to those Federal agencies.

§ 23.44 Performing personal services.

Any grant provided under this part may include provisions for the performance of personal services which would otherwise be performed by Federal employees.

§ 23.45 Penalties.

If any officer, director, agent, employee of, or anyone connected with any recipient of a grant, subgrant, contract or subcontract under this part, does embezzle, willfully misapply, steal, or obtain by fraud any of the money, funds, assets, or property which are the subject of such a grant, subgrant, contract or subcontract, he or she may be subject to penalties as provided in 18 U.S.C. 1001.

§ 23.46 Fair and uniform services.

Any grant provided under this part shall include provisions to assure the fair and uniform provision by the grantee of services and assistance to all Indians included within or affected by the intent, purpose and scope of that grant.

Subpart E—Grant Revision, Cancellation or Assumption

§ 23.51 Revisions or amendments of grants.

(a) Request for budget revisions or amendments to grants awarded under this part shall be made as provided in § 276.14 of this Chapter.

(b) Requests for revisions or amendments to grants provided under this part, other than budget revisions referred to in paragraph (a) of this section, shall be made to the Bureau officer responsible for approving the grant in its original form. Upon receipt of a request for revisions or amendments to grants, the responsible Bureau officer shall follow precisely the same review procedures and time specified in § 23.29.

§ 23.52 Assumption.

(a) When the Bureau cancels a grant for cause as specified in § 276.15 of this Chapter, the Bureau may assume control or operation of the grant program, activity or service. However, the Bureau shall not assume a grant program, activity or service that it did not administer before tribal grantee control unless the tribal grantee and the Bureau agree to the assumption.

(b) When the Bureau assumes control or operation of a grant program cancelled for cause, the Bureau may decline to enter into a new grant agreement until satisfied that the cause for cancellation has been corrected.

Subpart F—Hearings and Appeals

§ 23.61 Hearings.

Hearings referred to in § 276.15 of this Chapter shall be conducted as follows:

(a) The grantee and the Indian tribe(s) affected shall be notified in writing, at least 10 days before the hearing. The notice should give the date, time, places, and purpose of the hearing.

(b) A written record of the hearing shall be made. The record shall include written statements submitted at the hearing or within 5 days following the hearing.

(c) The hearing will be conducted on as informal a basis as possible.

§ 23.62 Appeals from decision or action by Superintendent.

(a) A grantee may appeal any decision made or action taken by a Superintendent under this part. Such appeal shall be made to the Area Director as provided in Part 2 of this Chapter.

(b) The appellant shall provide its own attorney or other advocates to represent it during the appeal process.

§ 23.63 Appeals from decision or action by Area Director.

(a) A grantee may appeal any decision made or action taken by an Area Director under this part. Such appeal shall be made to the Commissioner as provided in Part 2 of this Chapter.

(b) The appellant shall provide its own attorney or other advocates to represent it during the appeal process.

§ 23.64 Appeals from decision or action by Commissioner.

(a) A grantee may appeal any decision made or action taken by the Commissioner under this part only as provided in Part 2 of this Chapter.

(b) The appellant shall provide its own attorney or other advocates to represent it during the appeal process.

§ 23.65 Failure of Agency or Area Office to act.

Whenever a Superintendent or Area Director fails to take action on a grant application within the time limits established in this part, the applicant may, at its option, request action by the next higher Bureau official who has approval authority as prescribed in this part. In such instances, the Superintendent or Area Director who failed to act shall immediately forward the application and all related materials to that next higher Bureau official.

Subpart G—Administrative Requirements

§ 23.71 Uniform administrative requirements for grants.

Administrative requirements for all grants provided under this part shall be those prescribed in Part 276 of this Chapter.

Subpart H—Administrative Provisions

§ 23.81 Recordkeeping and information availability.

(a) Any state court entering a final decree or adoptive order for any Indian child shall provide the Secretary of the Interior within 30 days a copy of said decree or order, together with any information necessary to show:

(1) Name of the child, the tribal affiliation of the child, and the Indian blood quantum of the child;

(2) Names and addresses of the biological parents and the adoptive parents;

(3) Identity of any agency having relevant information relating to said adoption placement.

To assure and maintain confidentiality where the biological parent(s) have by affidavit requested their identity remain confidential, a copy of such affidavit shall be provided the Secretary.

Such information, pursuant to Section 301(a) of the Act, shall not be subject to the Freedom of Information Act (5 U.S.C. 552) as amended. The Secretary shall insure that the confidentiality of such information is maintained.

The proper address for transmittal of information required by Section 301(a) of the Act is: Chief, Division of Social Services, Bureau of Indian Affairs, 1951 Constitution Avenue, N.W., Washington, D.C. 20245. The envelope containing all such information should be marked "Confidential." This address shall be sent to the highest court of Appeal, the Attorney General and Governor of each state. In some states, a state agency has been designated to be repository for all state court adoption information. Where such a system is operative, there is no objection to that agency assuming reporting responsibilities for the purpose of this Act.

(b) The Division of Social Services, Bureau of Indian Affairs is authorized to receive all information and to maintain a central file on all state Indian adoptions. This file shall be confidential and only designated persons shall have access to it. Upon the request of the adopted Indian individual over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Division of Social Services shall disclose such information as may be necessary for enrollment or determining any rights or benefits associated with membership, except the name of the biological parents where an affidavit of confidentiality has been filed, to those persons eligible to request such information under the Act. The Chief Tribal Enrollment officer of the Bureau of Indian Affairs is authorized to disclose enrollment information relating to an adopted Indian child where the biological parents have by affidavit requested anonymity. In such cases, the Chief Tribal Enrollment Officer shall certify to the child's tribe, where the information warrants, that the child's parentage and other circumstances entitle the child to enrollment consideration under the criteria established by said tribe.

Subpart I—Assistance to State Courts

§ 23.91 Assistance in identifying witnesses.

Upon the request of a party in an involuntary child custody proceeding or of a court the Secretary shall assist in identifying qualified expert witnesses. Such requests for assistance should be sent to the Area Director in the Area where the court proceedings are initiated. Refer to § 23.11(b).

§ 23.92 Assistance in identifying interpreters.

Upon the request of a party in any Indian child custody proceeding or of a court the Secretary shall assist in identifying interpreters. Such requests for assistance should be sent to the Area Director in the Area where the court proceedings are initiated. Refer to § 23.11(b).

§ 23.93 Assistance in locating biological parents of Indian child after termination of adoption.

Upon the request of a child placement agency, the court or an Indian tribe, the Secretary shall assist in locating the biological parents or prior Indian custodian of an Indian adopted child whose adoption has been terminated. Such requests for assistance should be sent to the Area Director in the Area where the court proceedings occur. Refer to § 23.11(b).

Forrest J. Gerard,
Assistant Secretary, Indian Affairs.

[FR Doc. 79-23481 Filed 7-30-79; 8:45 am]
BILLING CODE 4310-02-M

Senator MELCHER. Our first witness today is Theodore Krenzke, Acting Deputy Commissioner, Bureau of Indian Affairs.

Please proceed, Mr. Krenzke.

STATEMENT OF THEODORE KRENZKE, ACTING DEPUTY COMMISSIONER, BUREAU OF INDIAN AFFAIRS, WASHINGTON, D.C.; ACCOMPANIED BY: RAYMOND BUTLER, CHIEF, DIVISION OF SOCIAL SERVICES; AND LOUISE ZOKAN, CHILD WELFARE SPECIALIST, BUREAU OF INDIAN AFFAIRS

Mr. KRENZKE. Good morning, Mr. Chairman.

I am pleased to be here today to testify in behalf of the Department of the Interior at this oversight hearing on the Indian Child Welfare Act of 1978.

With me are Mr. Raymond Butler, Chief of the Bureau's Division of Social Services, and Ms. Louise Zokan, child wealfare specialist on our central office social services staff.

With your permission, I would like to highlight my statement which has been submitted for the record.

Senator MELCHER. Without objection, it will be included in the record at the end of your testimony.

Mr. KRENZKE. In particular, I am pleased to be here today because it was largely through the efforts of this committee that the Indian Child Welfare Act came into being. This fact is, in our judgment, truly a landmark piece of Indian legislation.

In brief, this legislation, in the first place, provides protection for Indian children and their families through the establishment of certain judicial requirements placed on State judicial systems and public and private child placement agencies in relation to the placement of Indian children. Second, it authorizes several options for Indian tribes to exercise certain authorities over Indian child custody proceedings. Finally, it further authorizes Indian tribes and Indian organizations to provide child welfare and family services programs to the Indian people.

All of these are aimed at helping Indian children to remain with their own families, if at all possible, and otherwise to remain within their own culture.

First, I would like to briefly focus on actions taken by the Department relative to the implementation of the act. In the first place, as prescribed by the law, copies of the act, the committee reports, and an explanation of the act were mailed in a timely fashion to all State attorneys general, Governors, chief justices, and State public welfare directors. Second, by January 30, 1979, a working draft of the regulations was widely distributed to all tribes, States, and Indian organizations. Third, during the month of March 1979, 12 public hearings were conducted throughout the country to elicit comments and suggestions for the proposed regulations. Fourth, the proposed regulations were then published for comment on April 23, 1979, and the final regulations were published on July 31, 1979.

Based on an Interior Department Solicitor's opinion, the judicial requirements imposed upon State courts were issued as guidelines rather than regulations. These were published in the Federal Register on November 26, 1979.

Although we lack solid data at this point, it appears from the number of notices received, from inquiries on Indian identification, and 223 adoption reports received from 26 States, that States generally have been well informed about the act and are conforming to its requirements.

From what we hear from the Indian country, we believe that the most important and critical issue pertaining to implementation of the act is the administration and funding of the title II Indian child and family services program.

In this first year, the Bureau had a total of $5.5 million available to implement the grant program. In contrast, it received 247 grant applications requesting nearly $20 million. Of these, 157 were approved as meeting the criteria of the act and the regulations, these having a total of $11.1 million in requested funds.

Of the approved applications, 74 percent were from Indian tribes, and 26 percent were from Indian organizations. Our written statement goes into more detail concerning the distribution of the grant funds. However, a few points relating to the grants are worthy of special mention.

First, the grant process was a competitive one, and through this process 90 applications were disapproved; 22 of those disapproved appealed this action, thus adding to a delay in getting the funds out to the approved applicants.

Second, it should also be noted that under the act the Bureau has accepted responsibility for a new service population: those served by Indian organizations in urban communities.

Additionally, under the act a number of tribes will be reassuming jurisdiction over child custody proceedings. Two have already been approved for this purpose, and three more will be approved by the Department shortly.

Third, under the formula distribution method, 42 percent did receive the amounts requested in their proposal, indicating a realistic understanding by them of this process. The Bureau recognizes that in future years the formula distribution will undoubtedly need to be adjusted. It is certainly our intent to seek to improve the formula in order to provide the best possible level of service to the most Indian children and families in need of such services within available funds.

In conclusion, one other point I would like to make is that we recognize that Congress envisioned close cooperation between the Bureau of Indian Affairs and the Department of Health and Human Services to assure maximum use and benefits from all available resources.

This concludes my testimony, and I will be happy to respond to any questions that you might have.

Senator MELCHER. Fiscal years 1980 and 1981 show a unit cost per child per month during fiscal 1979 and fiscal 1980 at $343, but decreasing in fiscal 1981 to $282. The Department of Education and HEW apparently picked up $2.4 million of costs for handicapped children, but the decrease in unit costs does not look realistic. What happened?

Mr. KRENZKE. These child welfare service funds, that are being referred to, relate to the cost of care for Indian children who are either institutionalized or in individual foster homes, and in this case a number of those children were handicapped children who had, in previous years, the total amount of their care in institutions paid by

the social services funding within the Bureau of Indian Affairs. As a result of the relatively new Education for the Handicapped Act, the educational costs of their care are now being picked up, not by HEW, but by the Office of Indian Education Services within the Bureau of Indian Affairs.

So, a proportion that was formerly relating to the education of the handicapped is not reflected in that figure for fiscal year 1980.

I just might add one additional thing on that. This does not relate to the $5.5 million in any way that is being used to fund the Indian Child Welfare Act; this is another aspect of the Bureau's child welfare activities.

Senator MELCHER. I do not think I have gotten an answer to my question at all. My question relates to the figure in fiscal 1979 and 1980 being $343 and a few pennies; and then in fiscal 1981 it went down to $282 and a few pennies; and you have said, "Well, we are taking out the handicapped portion of it." My question is right to the point, I think. If you do not understand my point, I will keep going after it.

Education costs are rising. You have a base figure here that remained constant in 2 fiscal years, which is entirely beyond my understanding because I know educational costs were rising between those 2 fiscal years. The child support costs were rising between those 2 fiscal years, but now you have them reduced, and you have said it is just because of the handicapped funds. I think you are locked into a base figure, and you are not changing it even though the costs are changing.

Mr. KRENZKE. Maybe I have missed the point, but I certainly agree with you that the total cost of care of children in institutions, both the handicapped and the nonhandicapped, has risen. The only point that we are making in relation to this is that our per-unit costs have decreased because a portion of those costs no longer show up in Indian services, but a portion of those costs is also reflected in the education.

We certainly have no disagreement with you, that the total cost has risen. If these had been separated out in previous years, this would certainly reflect that. We certainly do agree with you, but we do not feel that we are locked into a number and that our appropriations requests have continued to reflect the increasing cost of care, particularly in institutional types of situations. We are endeavoring to provide a service that meets the specific needs of the handicapped.

Senator MELCHER. Taking the 1979 figure and separating out whatever could have been charged against the handicapped, how much difference is this $282 for fiscal 1981?

Mr. BUTLER. Mr. Chairman, in 1979 the cost of the education portion for the handicapped Indian students who were in institutional care was about $1.8 million.

Senator MELCHER. How much per capita? How much of the $343 was represented by that $1.8 million, when you divided it out?

Mr. BUTLER. That would represent approximately $50 per child.

Senator MELCHER. Subtract $50 from $343, and you come down to $293.

Mr. BUTLER. For 1981 it is estimated to be around $61.

Senator MELCHER. So you are still using the base figure.

If you are not meeting these costs, just tell me. That is the point of my question.

Mr. KRENZKE. OK. I think the answer to that is that we are meeting the costs of children who require either group placement in institutions and group homes or in individual foster care. I am not aware of any children needing foster or institutional care who have been turned down by the Bureau for lack of funds.

Senator MELCHER. I am going to refresh your memory. When you gave Congress the figures in 1979 for fiscal 1980, you were estimating $401.52 instead of $343.18; that was for fiscal 1980. You did not get it; you did not clear that through OMB; it did not show up in your budget request. So what happened? The costs did not go down; the cost continued to rise.

If you are just telling me what the administration's position is, I can understand; but if you are just trying to tell me that the costs did not go up and that you are meeting everything that you planned to meet, I cannot understand it.

Mr. KRENZKE. I think the basic response to your question is that we have received the funding that is necessary to provide for the care of children needing placement outside of their own homes and to provide the kind of care that these children need.

I admit that I am somewhat confused by some of those numbers there; and if you would permit us, we would be pleased to provide some additional detailed information on that.[1]

Senator MELCHER. I am referring to the Bureau's statement to the Congress. It was a budget request for fiscal year 1980. Obviously, it was made in 1979, but I do not have what date that was. It showed that $401.52 was the estimated amount that you needed. That did not show up in your budget request for 1980. This is just what you provided for Congress as an estimate and you could not clear it through OMB because when your budget came up it was still based on $343.18 for fiscal year 1980. Is that not correct?

Mr. BUTLER. Yes, sir, for the fiscal 1980–81 request.

Senator MELCHER. What do you mean, "for the fiscal 1980–81 request"?

Mr. BUTLER. In the fiscal year 1981 budget request, the unit cost for fiscal year 1980 is reflected as $343.

Senator MELCHER. That is right. But just exactly a year before that, your estimate for fiscal year——

Mr. BUTLER. 1981 was going to be $401.

Senator MELCHER. No; do not misunderstand me. I am reading off this, and this is your estimate for your request in fiscal year 1980. This is what you said in 1979. It was going to be $401.52 for this fiscal year, but when you got the budget for this fiscal year, it was $343.18.

Mr. BUTLER. And the reason for that, Mr. Chairman, is that in the House report we were cut $7.5 million in our welfare grants. The Senate report restored $2.5 million of the House cut and left us with a $5 million reduction in welfare assistance grants over that which was originally requested.

Senator MELCHER. Then when you came up for your request for fiscal year 1981, you went back to $343.

[1] Not received at time of printing.

Mr. BUTLER. That was in accordance with the funds that were actually appropriated to us by the Congress for fiscal year 1980.

Senator MELCHER. Yes; and your request was for the same thing for fiscal year 1981.

Mr. BUTLER. That is correct, Mr. Chairman.

Senator MELCHER. The point that I am trying to arrive at is, that does not reflect the increase. Were you going to use that figure only because that became the position of OMB and the administration?

Mr. BUTLER. That is basically correct, Mr. Chairman.

Senator MELCHER. Thank you.

We come across this in every Department. If it is not really what you think you need, we have to know that, despite what OMB's and the administration's position is. We need to have some guidance on what it is, and we are skeptical that what we have now for fiscal year 1982 is really going to be adequate. We will go over that very carefully because we think that is still based on the $285—or whatever it is—the $343 less handicapped costs.

The formula grant allocation you used to distribute the fiscal year 1980 grant money really looks like it favored the very small units: the villages in Alaska and some of the tribal units in California. I am not denying that they probably needed it, but what about the bigger tribes? They probably have more problems.

Can you justify the grant awards for California and Alaska? I think you can probably justify any of them, but can you justify a system that seems to treat the minority of native communities, that are really tiny in their units, better than the bigger reservations.

Mr. KRENZKE. I would like to ask Mr. Butler if he would go into some detail, as he has spent a great deal of time working on that, but I would like to say this at the outset.

The basic intent of it was to the effect that all tribes should have an opportunity to apply for it, and a further factor was that it was recognized that there needed to be a kind of bottom to the grant funding for any given individual tribe if they were to be able to provide a basic level of service. But let me ask Mr. Butler to go into detail on that.

Mr. BUTLER. Mr. Chairman, there is no question about that. The basic initial formula was designed for this, the first year of the grants, with the basic purpose in mind that as many of the Indian tribes and Indian organizations who desired to do so could at least get into the grant system.

In the hearings that were held in March 1979 in regard to the development of the regulations, there were several comments received, many of which were received from the smaller tribes saying that the larger tribes get the lion's share of the money and we always get left out.

There was, likewise, considerable testimony at those hearings from the urban Indian organizations who were very fearful that the Indian tribes were going to get all the money and that they were going to be left out.

Therefore, the purpose in mind in designing this formula distribution system in the first year was to afford as many of those groups an opportunity to compete and be awarded grants as possible.

It is very true, Mr. Chairman, that, for example, in the State of California the Bureau of Indian Affairs has had no child welfare

services program. This is the first year. There are a number of those small groups in California. The same is true in Alaska.

Senator MELCHER. I think we understand that point, and I appreciate your bringing up that point for both Alaska and California because they were not organized as a tribe and the setup just did not fit. They did not get anything.

Now the question is: What are you going to do after this first year? How do we blend this out?

Mr. BUTLER. I would also comment, Mr. Chairman, that with respect to some of the larger tribes, a number of them did have some funding under our previously existing 1978 congressionally mandated $3.8 million ongoing child welfare program funding.

A good example of that, Mr. Chairman, was the Navajo Tribe which was receiving 25 percent of those available funds already.

But certainly it is our judgment that the formula distribution system, as the Indian tribes and the Indian organizations develop their programs, introduce specific programs that we will be going to in consultation with them—a unit cost type of formula distribution. In other words, a determination will be made, for example, of what is the average unit cost of daycare. If a tribe or Indian ogranization provides a daycare program for their working families, we will then have a cost designed for that type of program.

The same will be true, Mr. Chairman, if some of the court systems that will undoubtedly be desired by a number of the Indian tribes, develop a cost formula based on the actual costs of delivering the type of service that they deem desirable to meet the needs of their people.

Senator MELCHER. I am sure that the testimony we are going to get from the tribes themselves will help in arriving at this. I understand you have been discussing how best to formulate a plan with the committee staff during the past several weeks; is that correct?

Mr. BUTLER. Yes, sir.

Senator MELCHER. Most of the $15,000 grant awards were for purposes of developing child welfare programs. In light of the budget request for fiscal 1981, it does not appear that any of these grant recipients are going to be able to institute the programs they have planned during this next budget cycle.

As thin as grant money is spread, it appears questionable just what can be achieved in fiscal 1981. That, of course, begins pretty promptly on October 1. It is questionable what can be achieved during that period, other than more planning grants. Can you comment on that?

Mr. BUTLER. Mr. Chairman, I think we only need to reflect back on the applications that were received this year—in the first year. As Mr. Krenzke testified, 247 applications totaling $20 million were received.

There is no question, Mr. Chairman, but that in 1981, as the Indian tribes and Indian organizations develop their programs which will be more costly, that with the limited funding available they will become more competitive. There is no question about it.

Given the interest in this—and my boss may chastise me for saying this, but I will say it anyway—and given the cost of services and inflationary rates alone, I would suggest to the committee that a more realistic figure for 1981 would be in the neighborhood of $14 or $15 million to adequately fulfill them. Now, you may have to protect me for saying that, Mr. Chairman, but I am being realistic.

Senator MELCHER. I do not think you need to be protected. That is the kind of answer we want, because we have to know whether we are talking realistically. If we just put a little bit of money for grants for planning, however, necessary that is, and we are not moving beyond that to really implement the plans that are acceptable, then we are not really accomplishing the purpose of the act.

We appreciate that. We will have to struggle with that and see where we can dig up the money. We would like to know that we are not just passing legislation that gets on paper. We like to know that we are implementing that legislation and then carrying out the intent of that legislation; and it does take some money. So we are very appreciative of that answer.

Mr. KRENZKE. I would just like to add one comment to what Mr. Butler has indicated. That is that the leadership of the Bureau of Indian Affairs in the Assistant Secretary's office has been aware of this. It has been one of those struggles that we have from time to time. This came down at a point when there was particular effort relative to fiscal controls.

Senator MELCHER. Yes, budget cutting.

In Congress, each individual—435 Members in the House and 100 Senators—has to bite that bullet. We all say we want a balanced budget. It is necessary. Then, after having bitten that bullet, we have to figure out what programs we are really going to back. I think this is one we really need to back.

We are going to have to be realistic about it. We want a balanced budget, but we cannot end all of the programs that are so necessary if we are going to help people. This is one that I think is very necessary to help Indian people, and, in this case, children.

So, we have to know what the minimum amount is to carry out the purposes, and I think you have given us the right answer. This committee will be very vigorous in supporting that and attempting to find funds for it, which means we have to crimp some other funds so we can have the funds for this one. But we must have our priorities, and this is a priority which this committee feels should come very high.

Thank you, gentlemen, for your testimony.

[The prepared statement of Mr. Krenzke follows:]

PREPARED STATEMENT OF THEODORE C. KRENZKE, ACTING DEPUTY COMMISSIONER, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. Chairman and Members of the Committee, I am pleased to appear before you because it was largely through the efforts of this Committee that we have the Indian Child Welfare Act which is the subject of our discussion today. The Indian Child Welfare Act, enacted into law on November 8, 1978, is, in our judgment, truly a landmark piece of legislation in the field of Indian Affairs. It provides protection for Indian children and their families through the establishment of certain judicial requirements imposed upon the state judicial system, and establishes certain placement and service requirements upon the public and private child placement and family service agencies. The Act also provides several options for the Indian tribes to exercise certain authorities over child custody proceedings, and authorizes Indian tribes and Indian organizations to provide Indian child and family services programs for their people.

Let me first speak to the implementation stages of the Act. The requirements of section 402 were met on December 6, 1978, in which copies of the Act, Committee reports and an explanation of the Act were mailed by Secretary Andrus to all state Attorneys General, Governors, Chief Justices, and State Public Welfare Directors. An initial working draft of regulations was widely distributed to

all tribes, states, and Indian organizations on January 30, 1979. During the month of March 1979 a series of 12 public hearings were held throughout the country by the National Congress of American Indians and the National American Indian Court Judges Association, under contract with the Bureau, to solicit comments and suggestions for the development of proposed regulations. The proposed regulations were published for comment on April 23, 1979, and the final regulations were published on July 31, 1979.

There was some controversy over the issue of whether the Department could promulgate regulations mandating how state courts would implement the requirements placed on them by the Act. The Department determined that the Act did not authorize the Bureau of Indian Affairs to regulate state courts except in a few limited areas where the Act gave specific responsibilities to the Department (such as keeping adoption records supplied by the state courts).

Therefore, only regulations that governed how the Department would carry out the responsibilities specifically assigned to it under the Act were published as mandatory regulations. The Department also published Guidelines for State Courts on November 26, 1979, setting forth the Department's interpretations of the statutory requirements imposed on state courts.

Although we have no solid data, based on the number of notices received, inquiries on Indian identification, and 223 adoption reports received from 26 states as required by Title III, it appears that the states have been well informed and are conforming to the requirements of the Act.

Now, let me turn to what we consider, and what we hear from the Indian tribes and Indian organizations to be the most critical and important issue related to the full implementation of the Act, namely the administration and funding of the Title II Indian Child and Family Services Programs. In this first year, 1980, we received carryover authority of fiscal year 1979 monies of $3 million and $2.5 million in new money, for a $5.5 million grant program. In addition, $3.8 million is available in 1980 from on-going child welfare programs. We received 247 grant applications totaling $19,827,033 in funding requests.

Grants were funded on a formula basis which allocated for approved grants a base of $15,000, plus an add-on in relationship to the percentage of the total Indian client population to be served by the applicant, multiplied by the remaining funds available after all approved grants received their initial base. Thirty-eight percent of the applications were for grants under $25,000 and 71 percent of these grants were funded at the level they requested. The smallest grant funded was from the Phoenix Area for $8,666. The largest grant was a consortium of 41 villages from the Juneau Area at a cost of $634,227. Both grant applicants received the level of funding requested. It should further be noted that twenty consortia consisting of 198 tribes made grant applications, and were approved for funding.

As you may have discerned from my earlier statements, 90 grant applications were disapproved by our Area Offices. This grant process was a competitive process—due to the large number of applications. There were twenty-two appeals from disapproved grant applicants, which was the primary reason for the delay in the funding to applicants during this initial period.

The Congress, in enacting this legislation, realized that full implementation of the Indian Child Welfare Act would be dependent upon a close cooperation between the Bureau of Indian Affairs and the Department of Health and Human Services. Therefore, concerted efforts are being made at the administrative levels of the Bureau and Health and Human Services to ensure that Indian people receive maximum benefit from, and utilization of, all available resources.

This concludes my prepared statement, and I will be pleased to respond to any questions the Committee may have.

Senator MELCHER. I would now like to call on our next witness: Bobby George, director of social welfare, Navajo Nation, Window Rock, Ariz.

STATEMENT OF ANSLEM ROANHORSE, SUPERVISORY SOCIAL WORKER, BISTATE PROJECT DEPARTMENT, DIVISION OF SOCIAL WELFARE, NAVAJO NATION; ACCOMPANIED BY PATRICIA MARKS

Mr. ROANHORSE. Good morning, Mr. Chairman.

Senator MELCHER. Good morning.

Before you give us your statement, is it my understanding that Chairman MacDonald and the Navajo Nation support the Navajo-Hopi bill as it is, lying on the President's desk.

Mr. ROANHORSE. Mr. Chairman, I am not fully aware of the bill.

Senator MELCHER. You are not fully aware of it?

Mr. ROANHORSE. No, sir.

Senator MELCHER. Could you get an answer for me by noon?

Mr. ROANHORSE. Yes, sir.

Senator MELCHER. If you are not fully aware of it, we have been fully aware of it on this committee for about 5 years now. Of course, this committee has not been in existence for 5 years, but going back to when it was in the Senate Interior Committee and going back to when I served on the House Subcommittee on Indian Affairs, I have been very much aware of the Navajo-Hopi issue. We have been spending an awful lot of time on this committee over the past year trying to make that acceptable to the Navajo Nation.

I thought it was acceptable when we had the bill in front of us, and it is now on the President's desk. If the Navajo Nation has some problem with it, I want to know personally, directly, myself.

Please proceed.

Mr. ROANHORSE. Thank you, Mr. Chairman.

My name is Anslem Roanhorse, and I am here representing Mr. Bobby George and will present testimony on the Indian Child Welfare Act on behalf of the Navajo Tribe of Window Rock, Ariz. With me is Ms. Patty Marks.

Senator MELCHER. Could we get those names again, please, because they are substituted for Bobby George?

Mr. ROANHORSE. I am Anslem Roanhorse.

Ms. MARKS. I am Patricia Marks.

Senator MELCHER. Thank you very much. Please continue.

Mr. ROANHORSE. The passage of the Indian Child Welfare Act, Public Law 95–608, was welcomed and supported by Indian tribes throughout the country including the Navajo Tribe. Since the passage of this legislation several States have reported and referred Indian child welfare cases to the Navajo Tribe, and subsequently some families have been reunited, and some are in the process of being reunited, or other arrangements are being made in light of the best interests of the Indian child.

Nonetheless, as the Indian tribes proceed with the implementation of the act, some ambiguities begin to emerge, such as the amount of funding, mechanism, or regard for tribal priority and authority in child welfare.

The Navajo Tribe is concerned about the incorporation of ongoing child welfare moneys with funds authorized under title II of the Indian Child Welfare Act. Our understanding is that the two program funding sources should be administered under one process; namely, the permanently authorized grant process of Public Law 95–608. However, the fact of the matter is that the ongoing child welfare funds will be transferred from tribal programs already in operation.

Apparently the Navajo Area Bureau of Indian Affairs officials and Navajo tribal leaders were not consulted before the Bureau of Indian Affairs officials at the Washington level made a decision to transfer ongoing child welfare moneys into title II of the Indian Child Welfare

Act. This decision undoubtedly affects some ongoing child welfare related programs. The consideration and respect for tribal priorities, policies, and defined needs are essential if the intent of the Indian Child Welfare Act is to be fully carried out.

The new application and grant process of Public Law 95–608 also allows for competition between Indian tribes and Indian organizations from off-reservation settings. The increased number of applications for very limited funds only decreased possible appropriations to Indians in reservation settings where the majority of the Indian children are, where the needs most exist, and where the greatest challenge and responsibility lie for the fullest implementation of the Indian Child Welfare Act. The intent to protect the best interest of Indian children and to promote the stability of Indian tribes and families is minimized when the availability of funds to Indian tribes is reduced.

The procedure and regulations for awarding grants should be revised to allow for more Public Law 93–638 contracting mechanism which will assure tribal priority and authority in child welfare.

The grant formula, as developed by the central office of the Bureau of Indian Affairs to insure that approved applicants receive a proportionally equitable share efficient to fund an effective program, does not and will not truly reflect the needs, especially on reservations. The formula as developed does not take into account the total population to be served and the high cost of various services associated with Indian child welfare such as legal services, transportation costs, foster care, day care, medical costs, et cetera.

The $47,005 that the Navajo Tribe received under the Indian Child Welfare Act title II grant is not enough for a population that numbers over 130,000 people, where the number of children aged under 18 exceeds 70,000, and where the land base covers 125,000 square miles. The Navajo Tribe's initial request amounted to $2.7 million. The allocation of $47,005 is not sufficient for the Navajo Tribe to even use this allocation as the non-Federal matching share for title XX of the Social Security Act, as provided for in the Indian Child Welfare Act.

Presently, the Navajo Tribal Bi-State Social Services Department contracts for title XX services from the States of Arizona and New Mexico, and any financial assistance pursuant to the act will further the role and responsibility for Navajo Tribal Bi-State Social Services activities in child welfare. Several other programs from the Navajo Nation, which submitted applications to provide needed child welfare services and other services to prevent family breakups, may not be considered for funding under Public Law 95–608 grants if additional funds are not made available.

Further, many State and private agencies are still not fully aware of the intent of Public Law 95–608. In order to expedite full implementation of the legislation, we ask the Congress to mandate Federal and State agencies to become fully aware of the legislation and, where feasible, encourage financial and technical assistance to Indian tribes and organizations.

In closing, we ask that the Congress of the United States give its complete support and assistance to the Indian tribes and Indian organizations in making sufficient resources available.

Thank you.

Senator MELCHER. Thank you.

Without objection, we are now going to insert in the record the June 27, 1980, letter signed by Frank E. Paul, vice chairman, Navajo Tribal Council, along with correspondence from the Inter-Tribal Council of Arizona, the Department of the Interior, and the Navajo Nation.

[The material follows. Testimony resumes on p. 75.]

THE NAVAJO NATION
WINDOW ROCK, NAVAJO NATION (ARIZONA) 86515

JUN 27 1980

PETER MacDONALD
CHAIRMAN, NAVAJO TRIBAL COUNCIL

FRANK E. PAUL
VICE CHAIRMAN, NAVAJO TRIBAL COUNCIL

Senate Select Committee of Indian Affairs
Senate Office Building
Washington, D. C. 20510

Gentlemen:

Passage of the Indian Child Welfare Act came as a welcomed support to the Navajo Tribe, its children and families. There have already been many heartwarming success stories about the reunification of Navajo families. The testimony today, regarding some of these incidents, will show how family members are directly affected and how tribal social workers and frequently social workers from the various states have worked together cooperatively under the Act to reunite families.

There is one primary concern - that the Indian Child Welfare Act, through its application and funding processes not undermine the goals of the Indian Self-Determination Act.

While the Indian Child Welfare Act serves to strengthen the Navajo family, and grants authority to the Tribe to regain jurisdiction over its members -- the Navajo child, the funding application process for Indian Child Welfare grants does not utilize any 93-638 procedures. While these procedures are not applicable to the off-reservation organizations, they should remain applicable on the reservation.

I hope that your review of the Act and its regulations will include changes in these areas.

Frank E. Paul
Vice Chairman
Navajo Tribal Council

69-083 O - 80 - 4

18 TRIBES

INTER TRIBAL COUNCIL of ARIZONA

May 16, 1980

GOVERNING BOARD
AK CHIN COMMUNITY
CAMP VERDE TRIBE
COCOPAH TRIBE
COLORADO RIVER TRIBES
WHITE MT APACHE TRIBE
FORT MCDOWELL TRIBE
FORT MOHAVE
GILA RIVER TRIBE
HAVASUPAI TRIBE
HOPI TRIBE
HUALAPAI TRIBE
KAIBAB PAIUTE TRIBE
PAPAGO TRIBE
PAYSON, TONTO APACHE
QUECHAN TRIBE
SALT RIVER TRIBE
SAN CARLOS APACHE TRIBE
YAVAPAI PRESCOTT COMMUNITY

Senator Dennis DeConcini
4104 Dirken Senate Office Bldg.
Washington, D.C. 20515

Dear Senator Deconcini,

Recent directives issued by the national office of the Bureau of Indian Affairs will, if implemented, undermine tribal efforts to strengthen tribal courts and to prepare in other ways to carry out the intent of the Indian Child Welfare Act.

We attach for your information a letter of protest written to Commissioner Hallett, a copy of the letter sent to tribes by the BIA, and a brief summary of the effects the Bureau's directives will have on tribes in the Phoenix Area.

Please assist us in preventing implementation of this ill-considered directive.

Sincerely yours,

Ned Anderson

Ned Anderson
President, Inter-Tribal
Council of Arizona/
Chairman, San Carlos
Apache Tribe

Enclosures

18 TRIBES

INTER TRIBAL COUNCIL of ARIZONA

May 15, 1980

GOVERNING BOARD
AK CHIN COMMUNITY
CAMP VERDE TRIBE
COCOPAH TRIBE
COLORADO RIVER TRIBES
WHITE MT APACHE TRIBE
FORT MCDOWELL TRIBE
FORT MOHAVE
GILA RIVER TRIBE
HAVASUPAI TRIBE
HOPI TRIBE
HUALAPAI TRIBE
KAIBAB PAIUTE TRIBE
PAPAGO TRIBE
PAYSON, TONTO APACHE
QUECHAN TRIBE
SALT RIVER TRIBE
SAN CARLOS APACHE TRIBE
YAVAPAI PRESCOTT COMMUNITY

Commissioner William Hallet
U.S. Department of Interior
Bureau of Indian Affairs
1951 Constitution Ave., N.W.
Washington, D.C. 20245

Dear Commissioner Hallet:

We are writing to protest recent actions of the B.I.A. Washington office that will have serious adverse effects on tribally operated child welfare programs on Indian Reservations.

Without consulting B.I.A. Area office personnel or tribal leaders about the possible effects of the change, your Washington office has announced that 3.8 million dollars of "ongoing child welfare" funds will be transferred from tribal programs already in operation to a grant award program under Title II of the Indian Child Welfare Act, effective October 1, 1980.

The action clearly subverts the intent of Congress expressed in the Act: "to promote the security and stability of Indian tribes and families":

--by preventing unwarranted removal of Indian children from their Indian homes;
--by mandating recognition of the authority of tribal courts; and
--by establishing standards for the placement of Indian children in foster or adoptive homes. It undermines the development of tribal courts and of family support services that tribal governments must be able to sustain if they are to assume greater responsibility for preventing the break-up of Indian families.

We are attaching a fact sheet that illustrates the effect that the Bureau directive will have on tribally operated child welfare programs in the Phoenix Area.

Commissioner William Hallet
May 15, 1980
Page Two

We urge you to rescind the recent Bureau action affecting child welfare services; and we urge you to consult tribal leaders and your own field staff before proceeding further to implement Title II of the Indian Child Welfare Act.

Sincerely yours,

Ned Anderson

Ned Anderson
President

cc: President Carter
Secretary of Interior
Congressional Delegations of Arizona,
Nevada, Utah, and California

FACTS AND TRIBAL ISSUES ON BIA
DISCONTINUANCE OF ON-GOING CHILD WELFARE FUNDING

Child Welfare Programs Under "Ongoing Child Welfare" Funds

In 1977, at the insistence of the Congress, the Washington office of the Bureau of Indian Affairs set aside $3,800,000 to be used for "ongoing child welfare" programs on Indian reservations. The "ongoing child welfare" funds were not drawn from new appropriations, but were transferred from existing BIA programs, such as General Assistance.

BIA Area social service offices were instructed to encourage tribes to develop their own child welfare programs, emphasizing family support services, delinquency prevention programs and programs of support to tribal courts in the disposition of child custody and child protection cases. All parties were led to believe that the funds for tribal programs would be available on an "ongoing" basis, hence the term "ongoing child welfare" funds.

In the Phoenix Area, the following programs were established:

Delinquency Prevention

Fort McDowell - Year-round Youth Support Program
Gila River - Year-round Youth Recreation Program
Fort Mohave) - Summertime Delinquency
Uintah & Ouray Ute Tribe) Prevention Programs

Family Support

White Mountain Apache - Crisis Intervention and Protective Services for Families at Risk
Salt River Pima-Maricopa - Parent Training Program
Hualapai - Quadrupled a small amount of "ongoing child welfare" money by using it as match for Title XX funds for a family support program.

Court Support

Salt River Pima-Maricopa - Foster Home Recruitment, Training and Supervision; Counselor for the Youth Home
San Carlos Apache - Indian Court Services, emphasizing support for the Juvenile Court.
Cocopah - Tribal Court Coordinator
Nevada Inter-Tribal Council - Indian Court Services and Community Organization

Grants under Title II of the Indian Child Welfare Act

When an announcement was issued of grants to be made under Title II of the Indian Child Welfare Act, many Phoenix area tribes submitted applications for programs designed to enhance or strengthen those already

established with "ongoing child welfare" funds. In the Phoenix Area, 28 applications were submitted. Phoenix BIA Area Office and Phoenix Area tribes were not informed that the "ongoing child welfare" funds would be transferred to the grant program under Title II of the Indian Child Welfare Act. Tribes assumed they would be competing for new money.

In a letter dated March 25, 1980 and received by tribes around April 7, 1980, tribes were informed by the Bureau of Indian Affairs that beginning in Fiscal Year 1981, "ongoing child welfare" funds will no longer be available. Funds for programs of family support, delinquency prevention, or court support services will have to be obtained in competition with other tribes and with off-reservation organizations under Title II of the Indian Child Welfare Act. The Title II grant award competition is already over for 1981. Phoenix Area tribes will be faced with scrapping innovative programs that are already being operated successfully.

What does the recent directive mean for Child Welfare Services on Indian Reservations?

Indian Child Welfare Act

The Washington Office of BIA has set up a competitive grant award program with:

$2,000,000 - New money
$3,800,000 - Taken from existing "Ongoing Child Welfare" programs
$3,200,000 - Transferred from General Assistance and other existing BIA programs

Effect on Phoenix Area

Phoenix Area tribes now receive $660,000 in "ongoing child welfare funds."

In 1981, nine Phoenix Area tribes and two Indian organizations will receive less than $300,000 for programs under the Indian Child Welfare Act. The other 17 applications for Indian Child Welfare funds (or 60% of the total) were rejected.

Phoenix Area BIA will return to paying only for out-of-home placement of Indian children. Family support, delinquency prevention, and court support services can no longer be encouraged. Tribes that used their "ongoing child welfare" funds as match for other social service funds will lose both resources.

ITCA, Inc.
14MAY80

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
PHOENIX AREA OFFICE
P.O. Box 7007
Phoenix, Arizona 85011

IN REPLY REFER TO:

March 25, 1980

Memorandum

To: Agency Superintendents, Phoenix Area
Attention: Social Services

From: Area Director

Subject: Discontinuance of On-Going Child Welfare Funding - FY 1981

Information has been received from the Commissioner's Office advising us that FY-80 is the last year for On-Going Child Welfare funding. In FY-81, these funds will be incorporated with the P.L. 95-608 Indian Child Welfare Act grant funds.

This change will have a direct impact on a number of P.L. 93-638 contracts now operating with on-going child welfare funds as all or part of their funding source. We do not know when additional directives on this matter will be issued from the Commissioner's Office. However, there are some initial actions to be undertaken without delay.

Your immediate attention shall be given to the following actions:

1. Notify all tribal governing bodies within your area of jurisdiction that we have been informed that there will be no on-going child welfare funds for allocation by tribe or agency for FY-81. This includes special accounting components 2269 through 2277.

2. Remind all tribal governing bodies that Indian Child Welfare grant funds are awarded on a competitive basis. They are not allocated on the same basis as banded funds.

3. Advise the tribes that there is no guarantee that programs currently operated with on-going child welfare funds will be refunded for operation in FY-81.