

In the Supreme Court of the State of California

W.B., a Person Coming Under the Juvenile Court.

Case No. S181638

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

W.B., a minor,

Defendant and Appellant.

**SUPREME COURT
FILED**

DEC 20 2010

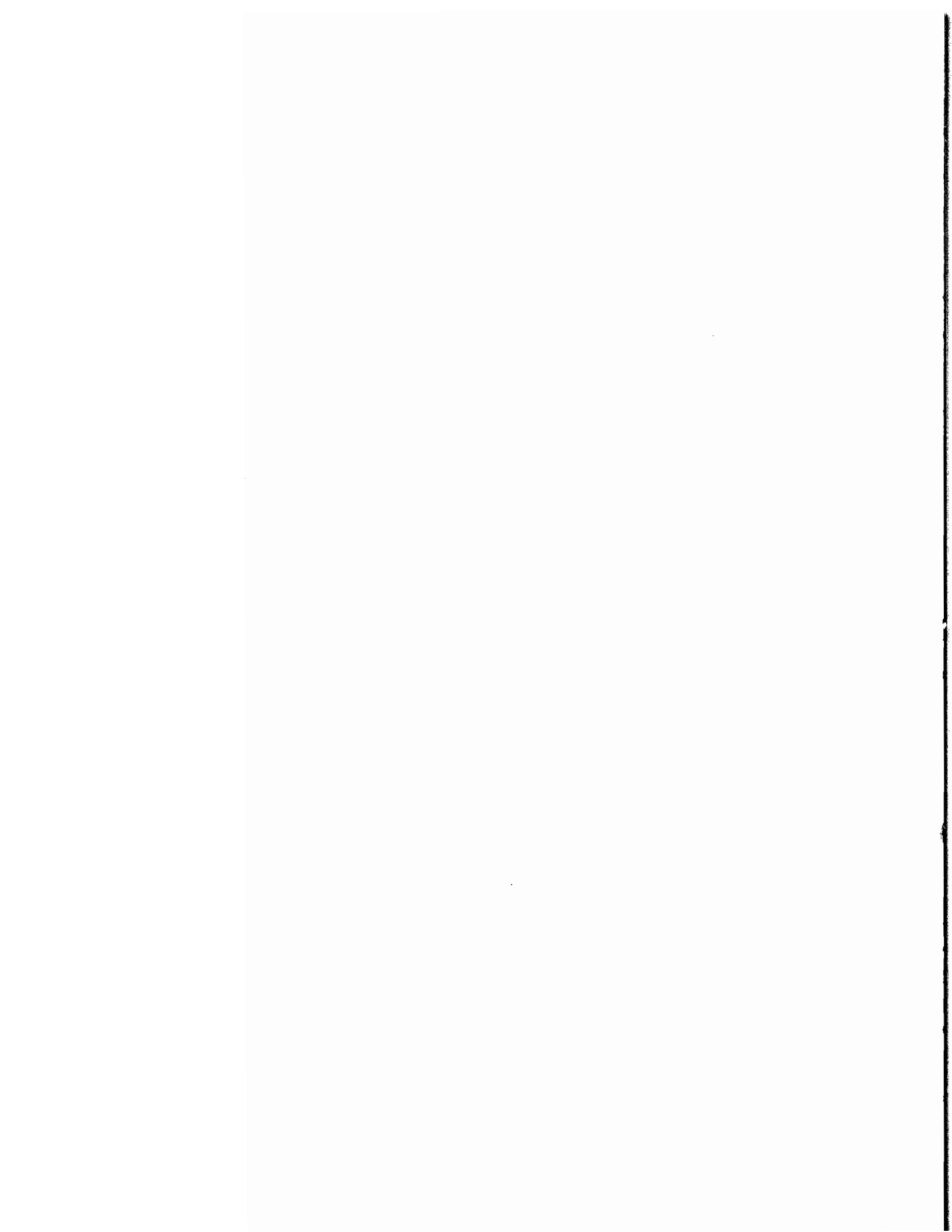
Frederick K. Ohlrich Clerk

Deputy

Fourth Appellate District, Division Two, Case No. E047368
Riverside County Superior Court, Case No. RIJ114127
The Honorable Christian F. Thierbach, Judge

RESPONDENT'S MOTION FOR JUDICIAL NOTICE

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TO THE HONORABLE CHIEF JUSTICE RONALD GEORGE
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF
CALIFORNIA:

Respondent respectfully moves this Court, pursuant to Evidence Code sections 452 and 459 and California Rules of Court, rules 22 and 29.1(g), to take judicial notice of the relevant legislative history of the Indian Child Welfare Act.

These relevant documents, which are appended to this motion, include the following: the House Report on the Indian Child Welfare Act (H.R. Rep. No. 1386-95, 2d Sess., (1978)) (Ex. A) and the Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings (44 Fed. Reg. 67584-67595 (Nov. 26, 1979)) (Ex. B). In addition, appellant requested judicial notice of the Senate Committee on the Judiciary Briefing Notes on Senate Bill 678 (2005-2006 Reg. Sess.). Respondent joins in appellant's motion and likewise requests this Court take judicial notice of Senate Committee on the Judiciary Briefing Notes on Senate Bill 678. This document was included in appellant's Request for Judicial Notice filed on September 23, 2010, as "Exhibit B."

Each of the attached exhibits is the proper subject of judicial notice under Evidence Code section 452. Subdivision (c) of that provision provides that judicial notice may be taken of "Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States."

Pursuant to this authority, it is appropriate to take judicial notice of Congressional reports and executive department guidelines such as Exhibits A and B. (*People v. Cruz* (1996) 13 Cal.4th 764, 780 [judicial notice of legislative staff analysis]; *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 63 [Court may take judicial notice of federal regulations and guidelines].)

CONCLUSION

For the reasons stated above, respondent respectfully requests that this Court take judicial notice of the documents attached in Exhibits A and B.

**DECLARATION OF MEREDITH A. STRONG IN SUPPORT OF
RESPONDENT'S MOTION FOR JUDICIAL NOTICE**

I, Meredith A. Strong, declare as follows:

1. I am a deputy attorney general for the State of California and the primary attorney responsible for the appeal in this case.

2. I am informed and believe that Exhibits A and B, which are attached to Respondent's Motion for Judicial Notice are true and accurate copies of the House Report on the Indian Child Welfare Act (H.R. Rep. No. 1386-95, 2d Sess., (1978)) (Ex. A) and the Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings (44 Fed. Reg. 67584-67595 (Nov. 26, 1979)) (Ex. B).

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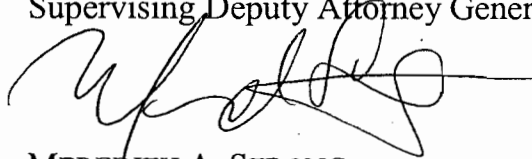
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 17th day of December, 2010, at San Diego, California.

Dated: December 17, 2010

Respectfully submitted,

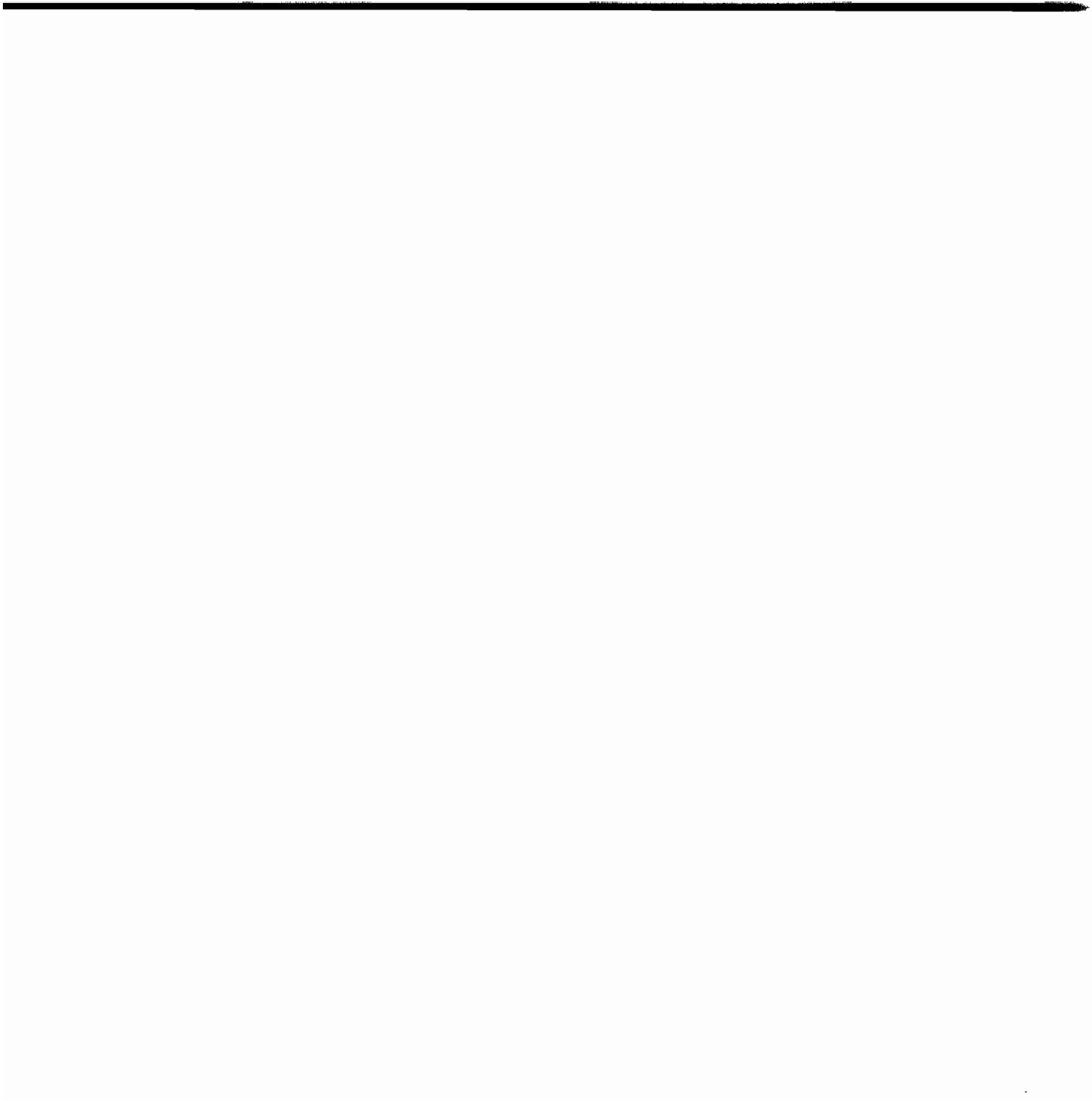
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EXHIBIT A



ESTABLISHING STANDARDS FOR THE PLACEMENT OF INDIAN CHILDREN IN FOSTER OR ADOPTIVE HOMES, TO PREVENT THE BREAKUP OF INDIAN FAMILIES, AND FOR OTHER PURPOSES

JULY 24, 1978.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. UDALL, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 12533]

[Including the cost estimate of the Congressional Budget Office]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 12533) 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, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Page 1, beginning on line 3, strike out all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Indian Child Welfare Act of 1978".

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—

(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;

(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.

Sec. 3. The Congress hereby declares that it is the policy of this Nation, in fulfillment of its special responsibility and legal obligations to the American Indian people, 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.

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 where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
 - (ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;
 - (iii) "irrevocable 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 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;

(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 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, 697), as amended;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptees 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. In any case where it has been judicially determined that a reservation has been diminished or the boundaries disestablished, the term shall include the lands within the last recognized boundaries of such diminished reservation prior to enactment of the statute which resulted in the diminishment or disestablishment;

(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 of 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

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.

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, 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.

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.

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

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 paragraph (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.

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.

(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.

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.

Sec. 108. (a) Any Indian tribe which became subject to State jurisdiction pursuant to the provision of the Act of August 15, 1953 (67 Stat. 588), as amended by the Act of April 11, 1968 (82 Stat. 79), 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 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 resumption 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 on homogeneous communities or geographic areas; and
- (iv) the feasibility of the plan in cases of multi-tribal 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.

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.

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.

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.

Sec. 112. Nothing in this title shall be construed to prevent the emergency removal of an Indian child 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 continues only for a reasonable time 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.

Sec. 113. None of the provisions of this title, except section 101(a), 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 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

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 construction, 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, after-school 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 are provided the same support as Indian foster children; and
- (8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

(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.

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 are provided the same support as Indian foster children;
- (2) the construction, 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, after-school care, and employment, recreational activities, and respite care; and
- (4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

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.

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).

TITLE III—RECORDKEEPING, INFORMATION AVAILABILITY, AND TIMETABLES

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 (50 Stat. 381).

(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.

Sec. 302.(a)(1) Within six months from the date of this Act, the Secretary shall consult with Indian tribes, Indian organizations, and Indian interest groups in the consideration and formulation of rules and regulations to implement the provisions of this Act.

(2) Within seven months from the date of this Act, the Secretary shall present the proposed rules and regulations 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.

(3) Within eight months from the date of this Act, the Secretary shall publish proposed rules and regulations in the Federal Register for the purpose of receiving comments from interested parties.

(4) Within ten months from the date of this Act, the Secretary shall promulgate rules and regulations to implement the provisions of this Act.

(b) The Secretary is authorized to revise and amend any rules and regulations promulgated pursuant to this section: *Provided*, That prior to any revisions or amendments to such rules and regulations, the Secretary shall present the proposed revision or amendment 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 and shall, to the extent practicable, consult with tribes, organizations, and groups specified in subsection (b)(1) of this section, and shall publish any proposed revisions or amendments in the Federal Register not less than sixty days prior to the effective date of such rules and regulations in order to provide adequate notice to, and to receive comments from, other interested parties.

TITLE IV.—PLACEMENT PREVENTION STUDY

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.

(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 provisions of educational facilities for children in the elementary grades.

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.

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.

PURPOSE

The purpose of the bill (H.R. 12533), introduced by Mr. Udall et al., is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes or institutions which will reflect the unique values of Indian culture and by providing for assistance to Indian tribes and organizations in the operation of child and family service programs.

BACKGROUND

* * * I can remember (the welfare worker) coming and taking some of my cousins and friends. I didn't know why and I didn't question it. It was just done and it had always been done * * *.

¹ H.R. 12533 was introduced by Representatives Udall, Roncallo, Bancus, Bingham, Blanton, Parris of California, Phillip Burton, Carr, Dellums, Fraser, Miller of California, Risenhoover, Selbeck, Stark, Teague, Vento, and Weaver. A similar bill, S. 1214, has been approved by the Senate.
² Testimony of Valancia Thacker before Task Force 4 of the American Indian Policy Review Commission.

The wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today.

Surveys of States with large Indian populations conducted by the Association on American Indian Affairs (AAIA) in 1969 and again in 1974 indicate that approximately 25-35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions. In some States the problem is getting worse: in Minnesota, one in every eight Indian children under 18 years of age is living in an adoptive home; and, in 1971-72, nearly one in every four Indian children under 1 year of age was adopted.

The disparity in placement rates for Indians and non-Indians is shocking. In Minnesota, Indian children are placed in foster care or in adoptive homes at a per capita rate five times greater than non-Indian children. In Montana, the ratio of Indian foster-care placement is at least 13 times greater. In South Dakota, 40 percent of all adoptions made by the State's Department of Public Welfare since 1967-68 are of Indian children, yet Indians make up only 7 percent of the juvenile population. The number of South Dakota Indian children living in foster homes is per capita, nearly 16 times greater than the non-Indian rate. In the State of Washington, the Indian adoption rate is 19 times greater and the foster care rate 10 times greater. In Wisconsin, the risk run by Indian children of being separated from their parents is nearly 1,600 percent greater than it is for non-Indian children. Just as Indian children are exposed to these great hazards, their parents are too.

The Federal boarding school and dormitory programs also contribute to the destruction of Indian family and community life. The Bureau of Indian Affairs (BIA), in its school census for 1971, indicates that 34,538 children live in its institutional facilities rather than at home. This represents more than 17 percent of the Indian school age population of federally-recognized reservations and 60 percent of the children enrolled in BIA schools. On the Navajo Reservation, about 20,000 children or 90 percent of the BIA school population in grades K-12, live at boarding schools. A number of Indian children are also institutionalized in mission schools, training schools, etc.

In addition to the trauma of separation from their families, most Indian children in placement or in institutions have to cope with the problems of adjusting to a social and cultural environment much different than their own. In 16 States surveyed in 1969, approximately 85 percent of all Indian children in foster care were living in non-Indian homes. In Minnesota today, according to State figures, more than 90 percent of nonrelated adoptions of Indian children are made by non-Indian couples. Few States keep as careful or complete child welfare statistics as Minnesota does, but informed estimates by welfare officials elsewhere suggest that this rate is the norm. In most Federal and mission boarding schools, a majority of the personnel is non-Indian.

It is clear then that the Indian child welfare crisis is of massive proportions and that Indian families face vastly greater risks of involuntary separation than are typical of our society as a whole.

Standards

The Indian child welfare crisis will continue until the standards for defining mistreatment are revised. Very few Indian children are removed from their families on the grounds of physical abuse. One study of a North Dakota reservation showed that these grounds were advanced in only 1 percent of the cases. Another study of a tribe in the Northwest showed the same incidence. The remaining 99 percent of the cases were argued on such vague grounds as "neglect" or "social deprivation" and on allegations of the emotional damage the children were subjected to by living with their parents. Indian communities are often shocked to learn that parents they regard as excellent caregivers have been judged unfit by non-Indian social workers.

In judging the fitness of a particular family, many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.

For example, the dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights.

Because in some communities the social workers have, in a sense, become a part of the extended family, parents will sometimes turn to the welfare department for temporary care of their children, failing to realize that their action is perceived quite differently by non-Indians.

Indian child-rearing practices are also misinterpreted in evaluating a child's behavior and that the parents do not care. What is labelled "permissiveness" may often, in fact, simply be a different but effective way of disciplining children. BIA boarding schools are full of children with such spurious "behavioral problems."

One of the grounds most frequently advanced for taking Indian children from their parents is the abuse of alcohol. However, this standard is applied unequally. In areas where rates of problem drinking among Indians and non-Indians are the same, it is rarely applied against non-Indian parents. Once again, cultural biases frequently affect decisionmaking. The late Dr. Edward P. Dozier of Santa Clara Pueblo and other observers have argued that there are important cultural differences in the use of alcohol. Yet, by and large, non-Indian social workers draw conclusions about the meaning of acts or conduct in ignorance of these distinctions.

The courts tend to rely on the testimony of social workers who often lack the training and insights necessary to measure the emotional risk the child is running at home. In a number of cases, the AAIA has obtained evidence from competent psychiatrists who, after examining the defendants, have been able to contradict the allegations offered by the social workers. Rejecting the notion that poverty and cultural differences constitute social deprivation and psychological abuse, the Association argues that the State must prove that there is actual physical or emotional harm resulting from the acts of the parents.

The abusive actions of social workers would largely be nullified if more judges were themselves knowledgeable about Indian life and required a sharper definition of the standards of child abuse and neglect.

Discriminatory standards have made it virtually impossible for most Indian couples to qualify as foster or adoptive parents, since they are based on middle-class values. Recognizing that in some instances it is necessary to remove children from their homes, community leaders argue that there are Indian families within the tribe who could provide excellent care, although they are of modest means. While some progress is being made here and there, the figures cited above indicate that non-Indian parents continue to furnish almost all the foster and adoptive care for Indian children.

Due process

The decision to take Indian children from their natural homes is, in most cases, carried out without due process of law. For example, it is rare for either Indian children or their parents to be represented by counsel to or have the supporting testimony of expert witnesses.

Many cases do not go through an adjudicatory process at all, since the voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children. Because of the availability of the waivers and because a great number of Indian parents depend on welfare payments for survival, they are exposed to the sometimes coercive arguments of welfare departments. In a recent South Dakota entrapment case, an Indian parent in a time of trouble was persuaded to sign a waiver granting temporary custody to the State, only to find that this is now being advanced as evidence of neglect and grounds for the permanent termination of parental rights. It is an unfortunate fact of life for many Indian parents that the primary service agency to which they must turn for financial help also exercises police powers over their family life and is, most frequently, the agency that initiates custody proceedings.

The conflict between Indian and non-Indian social systems operates to defeat due process. The extended family provides an example. By sharing the responsibility of child rearing, the extended family tends to strengthen the community's commitment to the child. At the same time, however, it diminishes the possibility that the nuclear family will be able to mobilize itself quickly enough when an outside agency acts to assume custody. Because it is not unusual for Indian children to spend considerable time away with other relatives, there is no immediate realization of what is happening—possibly not until the opportunity for due process has slipped away.

Economic incentives

In some instances, financial considerations contribute to the crisis. For example, agencies established to place children have an incentive to find children to place.

Indian community leaders charge that federally-subsidized foster care programs encourage some non-Indian families to start "baby farms" in order to supplement their meager farm income with foster care payments and to obtain extra hands for farmwork. The disparity between the ratio of Indian children in foster care versus the number of Indian children that are adopted seems to bear this out. For example,

in Wyoming in 1969, Indians accounted for 70 percent of foster care placements but only 8 percent of adoptive placements. Foster care payments usually cease when a child is adopted.

In addition, there are economic disincentives. It will cost the Federal and State Governments a great deal of money to provide Indian communities with the means to remedy their situation. But over the long run, it will cost a great deal more money not to. At the very least, as a first step, we should find new and more effective ways to spend present funds.

Social conditions

Low-income, joblessness, poor health, substandard housing, and low educational attainment—these are the reasons most often cited for the disintegration of Indian family life. It is not that clear-cut. Not all impoverished societies, whether Indian or non-Indian, suffer from catastrophically high rates of family breakdown.

Cultural disorientation, a person's sense of powerlessness, his loss of self-esteem—these may be the most potent forces at work. They arise, in large measure, from our national attitudes as reflected in long-established Federal policy and from arbitrary acts of Government.

One of the effects of our national paternalism has been to so alienate some Indian parents from their society that they abandon their children at hospitals or to welfare departments rather than entrust them to the care of relatives in the extended family. Another expression of it is the involuntary, arbitrary, and unwarranted separation of families.

It has already been noted that the harsh living conditions in many Indian communities may prompt a welfare department to make unwarranted placements and that they make it difficult for Indian people to qualify as foster or adoptive parents. Additionally, because these conditions are often viewed as the primary cause of family breakdown and because generally there is no end to Indian poverty in sight, agencies of government often fail to recognize immediate, practical means to reduce the incidence of neglect or separation.

As surely as poverty imposes severe strains on the ability of families to function—sometimes the extra burden that is too much to bear—so too family breakdown contributes to the cycle of poverty.

CONSTITUTIONALITY

The Department of Justice, in its reports to the committee of February 9 and May 23, 1978, raises questions regarding the constitutionality of certain of the provisions of the legislation. While the committee did not agree with the Department on these issues, certain changes were made in the legislation which will meet some of the Department's concerns. Other issues remain, however. In view of the constitutional doubts of the Department, the committee feels compelled to respond.

Supremacy clause

Clause 2 of article VI of the U.S. Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the

United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

When Congress legislates pursuant to its delegated powers, conflicting State law and policy must yield, *Gibbons v. Ogden*, 22 U.S. 1 (1824); *Hill v. Florida ex rel. Watson*, 325 U.S. 538 (1945); *Nash v. Florida Industrial Comm.*, 389 U.S. 235 (1967); *Lee v. Florida*, 392 U.S. 378 (1968); *Perez v. Campbell*, 402 U.S. 637 (1971).

The Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws, and constitution. Their obligation "is imperative upon the State judges, in their official and not merely in their private capacities. From the very nature of their judicial duties, they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or constitution of the State, but according to the laws and treaties of the United States—the supreme law of the land." *Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816); State courts have both the power and duty to enforce obligations arising under Federal law. *Claffin v. Housenman*, 93 U.S. 130 (1876); *Second Employers' Liability Cases*, 225 U.S. 1 (1912); *Testa v. Katt*, 330 U.S. 386 (1947).

Plenary power of Congress over Indian affairs

The question is: then: "Does Congress have power to legislate as proposed in the bill?" Clause 3, section 8, article I of the Constitution provides:

The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

In an unbroken line of Supreme Court decisions, beginning with Chief Justice John Marshall's decision in *Worcester v. Georgia*, 31 U.S. 515 (1832):

(The Constitution) confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They (Congress) are not limited by any restrictions on their free actions.

And ending with *United States v. Wheeler*—U.S.—(March 22, 1978):

(There is an) undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government.

The Supreme Court has, time and again, upheld the sweeping power of Congress over Indian matters. The cases are far too numerous to cite, but two cases will serve to exemplify this position. In *U.S. v. Kagama*, 118 U.S. 375 (1886) the Court said:

These Indian tribes are wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political

rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

And in *United States v. Nice*, 241 U.S. 591 (1916), the Court held:

The power of Congress to regulate or prohibit traffic with tribal Indians within a State whether upon or off an Indian reservation is well settled * * *. Its source is twofold; first, the clause of the Constitution expressly investing Congress with authority "to regulate Commerce * * * with the Indian tribes"; and, second, the dependent relation of such tribes to the United States.

It cannot be questioned that Congress has broad, unique powers with respect to Indian tribes and affairs. There is only one caveat: While those powers may be plenary, the exercise may not be arbitrary. For example, Congress may not take Indian property without just compensation nor may it establish a religion for Indian tribes.

Plenary power and child welfare

The question then is: "Is the regulation of child custody proceedings and the imposition of minimum Federal standards an appropriate exercise of Congress plenary power over Indian affairs?"

We need only cite three cases to lay the foundation for the power of Congress to legislate in this area. In *U.S. v. Holliday*, 70 U.S. 407 (1866), the Court said:

Commerce with foreign Nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments as individuals. And so commerce with Indians tribes means commerce with the individuals composing these tribes.

In *Dick v. U.S.*, 208 U.S. 340 (1908), the Court held:

As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the Government, Congress has power to say with whom, and on what terms, they shall deal * * *

Knoepfer; in *Legal Status of American Indian & His Property* (1922), 7 Ia. L.B. 232, stated: "Commerce with the Indian tribes has been construed to mean practically every sort of intercourse with the Indians either in the tribes or as individuals."

Finally, the Maryland Court of Appeals, in a case involving the attempted adoption of an Indian child (*Wakefield v. Little Light*, 276 Md. 333, 347 A. 2d 228 (1975)), stated:

We think it plain that child-rearing is an "essential tribal relation" within * * * (the test of) *Williams v. Lee* (358 U.S. 217 (1959)).

And again:

* * * (C)onsidering that there can be no greater threat to 'essential tribal relations' and no greater infringement on the right of the * * * tribe to govern themselves than to interfere with tribal control over the custody of their children, we agree with the conclusion expressed in *Wisconsin Potowatomies (Wisconsin Potowatomies v. Houston*, 393 F. Supp. 719 (1973)) that in determining subject matter jurisdiction in such circumstances, the only rational approach is to determine the domicile of the Indian child. By using the Indian child's domicile as the State's jurisdictional basis, the Indian tribe is afforded significant protection from losing its essential rights of child-rearing and maintenance of tribal identity.

Even this State court recognized that a tribe's children are vital to its integrity and future. Since the United States has the responsibility to protect the integrity of the tribes, we can say with the *Kagama* court, " * * * there arises the duty of protection, and with it the power."

Geographic scope of plenary power

Is the Congress limited to Indian lands or to the reservation in the exercise of its plenary power over Indian affairs? The answer is clearly, "No". Again, we need only cite one or two cases to support this conclusion.

In *U.S. v. Holliday*, supra, the Court said:

If commerce, or traffic, or intercourse is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress; although within the limits of a State. The locality of the traffic can have nothing to do with the power. (Emphasis added.) The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or the member of the tribe with whom it is carried on.

In *Perrin v. U.S.*, 232 U.S. 487 (1914), the Court held:

We come, then, to the objection that the prohibition in the act of 1894 confers an unnecessarily extensive territory and is not limited in duration, and so transcends the power of Congress. As the power is incident only to the presence of the Indians and their status as wards of the Government, it must be conceded that it does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis. * * * On the other hand, it must also be conceded that, in determining what is reasonably essential to the protection of the Indians Congress is invested with a wide discretion and its action, unless purely arbitrary, must be accepted and given full effect by the courts.

We cite again *U.S. v. Nice*, supra: "The power of Congress to regulate or prohibit traffic with tribal Indians within a State whether upon or off an Indian reservation is well settled * * *." (Emphasis added.)

Membership and plenary power

The question occurs, as raised by the Department of Justice in its report: "Is the power of Congress limited, constitutionally, to only those individuals who are formally enrolled as members of an Indian tribe?" Again, the answer is negative.

In 1934, Congress enacted the Indian Reorganization Act of June 18, 1934 (48 Stat. 988). Section 19 defined "Indians" as:

* * * all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

Categories two and three of this definition are clearly not enrolled members of a tribe, by definition; yet Congress conferred the rights and benefits of the act upon this class of Indians, including the right to preference in Federal employment in the Bureau of Indian Affairs and the Indian Health Service. When the Supreme Court was called upon to construe the constitutionality of the Indian preference section of the Indian Reorganization Act in the case of *Morton v. Mancari*, 417 U.S. 535 (1974), it was aware that Indians who were not enrolled members of a tribe were made eligible for this preference by act of Congress, but did not strike the law down as invidiously discriminatory.

The reason it did not was because it was aware of its own past decisions with respect to congressional power over Indians not members of a tribe, Congress may disregard the existing membership rolls and direct that per capita distributions be made upon the basis of a new roll, even though such act may modify prior legislation, treaties, or agreements with the tribe. *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899). Thus, the Supreme Court in the case of *Sizemore v. Brady*, 235 U.S. 441 (1914), said:

* * * Like other tribal Indians, the Creeks were wards of the United States, which possessed full power, if it deemed such a course wise, to assume full control over them and their affairs, to ascertain who were members of the tribe * * *

In *Federal Indian Law*, at page 45 in note 10, it is said:

It has been held that Congress is not bound by the tribal rule regarding membership and may determine for itself whether a person is an Indian from the standpoint of a Federal criminal statute. *United States v. Rogers*, 4 How. 567 (1846).

In the very recent case of *United States v. Antelope*, 45 U.S.L.W. 4361 (April 19, 1977), the Supreme Court said:

It should be noted, however, that enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction. * * *

Federal District Court Judge Battin, in *Dillon v. Montana*, (1978), ordered:

2. That for purposes of applying this (Federal) exemption, the class of "Indian persons," * * * shall include persons possessing the following qualifications:

(a) that the person possess some quantum of Indian blood;

(b) that the person be recognized as an Indian by the community in which he or she lives, and that the putative taxpayer's wardship status has not been terminated by the government;

(c) that the person be an enrolled member of a federally recognized Indian tribe or otherwise eligible to be recognized as an Indian ward by the Federal Government. (Emphasis added.)

If the courts have found that Congress has the power to act with respect to nonenrolled Indians in the foregoing kinds of circumstances, how much more is its power to act to protect the valuable rights of a minor Indian who is eligible for enrollment in a tribe? This minor, perhaps infant, Indian does not have the capacity to initiate the formal, mechanical procedure necessary to become enrolled in his tribe to take advantage of the very valuable cultural and property benefits flowing therefrom. Obviously, Congress has power to act for their protection. The constitutional and plenary power of Congress over Indians and Indian tribes and affairs cannot be made to hinge upon the cranking into operation of a mechanical process established under tribal law, particularly with respect to Indian children who, because of their minority, cannot make a reasoned decision about their tribal and Indian identity.

Supremacy clause versus States' rights

From the foregoing, it is clear that Congress has full power to enact laws to protect and preserve the future and integrity of Indian tribes by providing minimal safeguards with respect to State proceedings for Indian child custody. The final question is, paraphrasing the Department of Justice: "Does Congress have power to control the incidents of child custody litigation involving nonreservation Indian children and parents pursuant to the Indian commerce clause sufficient to override the significant State interest in regulating the procedure to be followed by its courts in exercising jurisdiction over what is traditionally a State matter?"

First, let it be said that the provisions of the bill do not oust the State from the exercise of its legitimate police powers in regulating domestic relations.

The decisions of the Supreme Court will set to rest the principal objection. It is appropriate to begin with the landmark case of *McCulloch v. Maryland*, 17 U.S. 316 (1819), where the Court stated:

Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.

In *Brown v. Western Ry. Co.*, 338 U.S. 294 (1949), the Court said:

The argument is that while state courts are without power to detract from "substantive rights" granted by Congress * * * they are free to follow their own rules of "practice" and "procedure" * * *. A long series of cases previously decided, from which we see no reason to depart,

makes it our duty to construe the allegations of this complaint ourselves in order to determine whether petitioner has been denied a right of trial granted him by Congress. This federal right cannot be defeated by forms of local practice. * * * Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by Federal laws.

In *Dice v. Akron, C.Y.Y. R.R. Co.*, 342 U.S. 359 (1952), the Court held:

Congress * * * granted petitioner a right. * * * State laws are not controlling in determining what the incidents of this Federal right shall be."

Chief Justice Holmes, in *Davis v. Wechsler*, 263 U.S. 22 (1923), put it succinctly:

Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.

We will quote merely two other cases to support the proposition that Congress may, constitutionally, impose certain procedural burdens upon State courts in order to protect the substantive rights of Indian children, Indian parents, and Indian tribes in State court proceedings for child custody.

The Court, in *American Railway Express Co. v. Lowe*, 263 U.S. 19 (1923), held that:

The laws of the United States cannot be evaded by the forms of local practice * * *. The local rules applied as to the burden of proof narrowed the protection that the defendant had secured (under Federal law), and therefore contravened the law.

And finally, in an extensive quote from the landmark decision of the Court in *Second Employers' Liability Cases*, 223 U.S. 1 (1912), we examine the duty of State courts, otherwise having jurisdiction over the subject matter, to enforce Federal substantive rights:

We come next to consider whether rights arising from congressional act may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local law, is adequate to the occasion. * * *. (The State court was of the opinion that it could decline to enforce the Federal right because * * * it would be inconvenient and confusing for the same court, in dealing with cases of the same general class, to apply in some the standard of right established by congressional act and in others the different standards recognized by the laws of the State. * * * It never has been supposed that courts are at liberty to decline cognizance of cases merely because the rules of law to be applied in their adjudication are unlike those applied in other cases.

We conclude that rights arising under the (Federal) act in question may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local law, is adequate to the occasion.

Conclusion

Under the rules of the House, this committee has been charged with the initial responsibility in implementing the plenary power over, and responsibility to, the Indians and Indian tribes. In the exercise of that responsibility, the committee has noted a growing crisis with respect to the breakup of Indian families and the placement of Indian children, at an alarming rate, with non-Indian foster or adoptive homes. Contributing to this problem has been the failure of State officials, agencies, and procedures to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future.

While the committee does not feel that it is necessary or desirable to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits, it does feel the need to establish minimum Federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe.

SECTION-BY-SECTION ANALYSIS

As amended by the committee, the legislation completely rewrites S. 1214 as passed by the Senate. In addition, the amendment in the nature of a substitute for H.R. 12533, as further amended, differs significantly from H.R. 12533 as introduced. The following is a section-by-section analysis of the bill as reported with appropriate explanations.

Section 1

Section 1 provides that the bill may be cited as the "Indian Child Welfare Act of 1978".

Section 2

Section 2 contains congressional findings. As amended, it lays the foundations for the power and responsibility of the Congress to legislate in the field of Indian child welfare.

Section 3

Section 3 contains a congressional declaration of policy. As amended, the section makes clear that the underlying principle of the bill is in the best interest of the Indian child. However, the committee notes that this legal principle is vague, at best. In a footnote on page 835 in the decision of *Smith v. OFFER*, 431 U.S. 820 (1977), the Supreme Court stated:

Moreover, judges too may find it difficult, in utilizing vague standards like "the best interests of the child", to avoid decisions resting on subjective values."

SECTION 4

Section 4 defines various terms used in the bill.

Paragraph (1) defines the term "child custody placement" by defining four discrete legal proceedings included within the term. S. 1214 and H.R. 12533, as introduced, used the term "placement" which proved to be ambiguous with respect to the various provisions

of the bill. The terms may not be current in the legal lexicon of domestic relations and might have some different or overlapping meaning in normal usage. The terms are intended to have the meaning given to them in the paragraph.

Paragraph (2) defines the term "extended family member". The concept of the extended family maintains its vitality and strength in the Indian community. By custom and tradition, if not necessity, members of the extended family have definite responsibilities and duties in assisting in childrearing. Yet, many non-Indian public and private agencies have tended to view custody of an Indian child by a member of the extended family as prima facie evidence of parental neglect. It should be noted that the concept was not unknown in the non-Indian world. Justice Brennan, in his concurring opinion in *Moore v. East Cleveland*, 431 U.S. 494, 508 (1977), noted:

In today's America, the "nuclear family" is the pattern so often found in much of white suburbia. * * * The Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us white suburbia's preference in patterns of family living. The "extended family," * * * remains not merely still a pervasive living pattern, but under goad of brutal economic necessity, a prominent pattern—virtually a means of survival—for large numbers of the poor and deprived minorities of our society.

Paragraph (3) defines "Indian" as any person who is a member of an Indian tribe.

Paragraph (4) defines "Indian child." The committee rejects the use of the term "merely" by the Department of Justice to qualify the eligibility of an Indian to be a member of an Indian tribe, particularly with respect to a minor. Blood relationship is the very touchstone of a person's right to share in the cultural and property benefits of an Indian tribe. We do note that, for an adult Indian, there is an absolute right of expatriation from one's tribe. *U.S. ex rel. Standing Bear v. Crook*, 25 Fed. Cas. No. 14891 (1879). However, this right has no relevance to an Indian child who, because of his minority, does not have the capacity to make a reasoned decision about exercising his right to enroll in his tribe.

Paragraph (5) defines "Indian child's tribe." It is assumed that the appropriate official can make a reasonable judgment about which Indian tribe the Indian child has the more significant contacts in cases where the child is eligible for membership in more than one tribe.

Paragraph (6) defines "Indian custodian." Where the custody of an Indian child is lodged with someone other than the parents under formal custom or law of the tribe or under State law, no problem arises. But, because of the extended family concept in the Indian community, parents often transfer physical custody of the Indian child to such extended family member on an informal basis, often for extended periods of time and at great distances from the parents. While such a custodian may not have rights under State law, they do have rights under Indian custom which this bill seeks to protect, including the right to protect the parental interests of the parents.

Paragraph (7) defines "Indian organization".

Paragraph (8) defines "Indian tribe".

Paragraph (9) defines "parent". It should be noted that the last sentence is not meant to conflict with the decision of the Supreme Court in *Stanley v. Illinois*, 405 U.S. 645 (1972).

Paragraph (10) defines the term "reservation". For the limited purpose of jurisdiction over Indian child custody proceedings, the last sentence of the paragraph addresses and varies the holding in cases such as *DeCoteau v. District Court*, 420 U.S. 425 (1975), and *Rosebud v. Kneip*, 97 S. Ct. 1361 (1977).

Paragraph (11) defines "Secretary" as the Secretary of the Interior.

Paragraph (12) defines "tribal court".

Section 101

Subsection (a) provides that an Indian tribe shall have exclusive jurisdiction over child custody proceedings where the Indian child is residing or domiciled on the reservation, unless Federal law has vested that jurisdiction in the State. It further provides that the domicile of an Indian child who is the ward of a tribal court is deemed to be that of the court, which is generally in accord with existing law. The provisions on exclusive tribal jurisdiction confirms the developing Federal and State case law holding that the tribe has exclusive jurisdiction when the child is residing or domiciled on the reservation. *Wisconsin Potowatomies v. Houston*, 393 F. Supp. 719 (1973); *Wakefield v. Little Light*, 276 Md. 333 (1975); *In re Matter of Greybull*, 543 P. 2d 1079 (1975); *Duckhead v. Anderson et al.*, Wash. Sup. Ct., November 4, 1976.

Subsection (b) directs a State court, having jurisdiction over an Indian child custody proceeding to transfer such proceeding, absent good cause to the contrary, to the appropriate tribal court upon the petition of the parents or the Indian tribe. Either parent is given the right to veto such transfer. The subsection is intended to permit a State court to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected.

Subsection (c), for purposes of State proceedings for foster care placement or termination of parental rights, confers a right of intervention upon the Indian custodian and the Indian child's tribe. The committee is advised that the parents would have this right in any event.

Subsection (d) provides that the public acts, records, and judicial proceedings of an Indian tribe with respect to child custody proceedings shall be given full faith and credit by other jurisdictions to the same extent that such jurisdictions extend full faith and credit in other circumstances.

Section 102

Subsection (a) requires that, in an involuntary proceeding in State courts with respect to an Indian child, the moving party must provide certain notices to the parent or Indian custodian and the tribe. In lieu of notice to the Secretary of the Interior is provided in cases where the location of the individual or tribe cannot reasonably be determined. The committee expects that the Secretary would make diligent efforts to relay such notice to the parent, custodian, and/or tribe. The subsection was amended to provide that the court would require such notice where it had actual or constructive knowledge of the Indian affiliation of the child.

Subsection (b) provides that an indigent parent or Indian custodian shall have a right to court-appointed counsel in any involuntary State proceeding for foster care placement or termination of parental rights. Where State law makes no provision for such appointment, the Secretary is authorized, subject to the availability of funds, to pay reasonable expenses and fees of such counsel. In adopting this amendment, the committee notes with approval the decision of the U.S. District Court for the Southern District of Florida in *Davis v. Page*, 442 F. Supp. 258 (1977), wherein the court held:

Without benefit of counsel, Hilary Davis was little more than a spectator in the adjudicatory proceeding. She was ignorant of the law of evidence, and of the substantive law governing dependency proceedings. She sat silently through most of the hearing, and fearful of antagonizing the social workers, reluctantly consented to what she believed would be the placement of her child with the state for a few weeks. (p. 260.)

The right to the integrity of the family is among the most fundamental rights under the Fourteenth Amendment. (p. 261.)

The parent's interest in the custody and companionship of his child and the grievous nature of the loss which accompanies interference with that interest suffice to mandate the provision of counsel under a balance of interest test without further inquiry * * *. (The right to counsel inevitably emerges as an element of procedural due process. (p. 263.)

Subsection (c) provides that each party to a State court proceeding for foster care or termination of parental rights shall have a right to examine relevant documents filed with the court upon which it may base its decision. The committee was advised that, in many cases, Indian parents or custodians have been, practically, denied the right.

Subsection (d) provides that a party seeking foster care placement or termination of parental rights involving an Indian child must satisfy the court that active efforts have been made to provide assistance designed to prevent the breakup of Indian families. The committee is advised that most State laws require public or private agencies involved in child placements to resort to remedial measures prior to initiating placement or termination proceedings, but that these services are rarely provided. This subsection imposes a Federal requirement in that regard with respect to Indian children and families. Subsections (e) and (f) establish evidentiary standards for foster care placement or termination of parental rights. As introduced, H.R. 12533 required a "beyond a reasonable doubt" standard for both actions. While the committee feels that the removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty, it amended the bill to reduce the standard to "clear and convincing" in the case of foster care where parental rights are not terminated. The phrase "qualified expert witnesses" is meant to apply to expertise beyond the normal social worker qualifications.

Section 103

Subsection (a) provides that consent to foster care placement or termination of parental rights must be executed in writing before a judge of a court of competent jurisdiction and that the judge must be satisfied the consequences of such consent was fully understood by the parent or custodian. Where the judge determines the parent or custodian does not have a sufficient command of the English language, it should be interpreted into a language such person does understand. The committee does not intend that the execution of the consent need be in open court where confidentiality is requested or indicated.

Subsection (b) permits a parent or Indian custodian to withdraw consent to a foster care placement at any time.

Subsection (c) authorizes a parent or Indian custodian to withdraw consent to termination of parental rights or adoptive placement of an Indian child at any time prior to the entry of a final decree.

Subsection (d) authorizes the setting aside of a final decree of adoption of an Indian child upon petition of the parent upon grounds that consent thereto was obtained through fraud or duress. This right is limited to 2 years after entry of the decree, unless a longer period is provided under State law. With respect to subsections (b), (c), and (d), the committee notes that nothing in those subsections prevents an appropriate party or agency from instituting an involuntary proceeding, subject to section 102, to prevent the return of the child, but does not wish to be understood as routinely inviting such actions.

Section 104

Section 104 authorizes the child, parent, or Indian custodian, or the tribe to move to set aside any foster care placement or termination of parental rights on the grounds that the rights secured under sections 101, 102, or 103 were violated.

Section 105

Section 105, as a whole, contemplates those instances where the parental rights of the Indian parent has already been terminated. The section seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.

Subsection (a) provides that, in the absence of good cause to the contrary, a preference shall be given to adoptive placement of an Indian child with the extended family; a member of the child's tribe; or another Indian family. This subsection and subsection (b) establish a Federal policy that, where possible, an Indian child should remain in the Indian community, but is not to be read as precluding the placement of an Indian child with a non-Indian family.

Subsection (b) establishes a similar preference for foster care or preadoptive placements of an Indian child. The language was amended to conform to language in H.R. 7200 of this Congress relative to foster care and adoptive placements in the least-restrictive settings.

Subsection (c) provides that the tribe may establish a different order of preference which will be followed in lieu of the Federal standards as long as such order is consistent with the least restrictive setting standard in subsection (b). Where appropriate, the preference

of the child or parent shall be considered and a request for anonymity of a consenting parent shall be given weight in applying the preferences. While the request for anonymity should be given weight in determining if a preference should be applied, it is not meant to outweigh the basic right of the child as an Indian.

Subsection (d) provides that the standards to be used in meeting the preference shall be those prevailing in the relevant Indian community. All too often, State public and private agencies, in determining whether or not an Indian family is fit for foster care or adoptive placement of an Indian child, apply a white, middle-class standard which, in many cases, forecloses placement with the Indian family.

Subsection (e) requires the State to maintain records showing what efforts have been made to comply with the preference standards of this section and to make such records available to the tribe and Secretary.

Section 106

Subsection (a) authorizes a biological parent of an Indian child to petition for the return of the child when a previous adoption of such child fails. The child shall be returned to the parent upon such petition, unless there is a showing, in a proceeding subject to the provisions of section 102, that such return would not be in the best interests of the child.

Subsection (b) provides that when an Indian child is being removed from a foster care home for purposes of further foster care placement, preadoptive placement, or adoptive placement, such further placement shall be subject to the provisions of this act, unless the child is being returned to the parent or Indian custodian.

Section 107

Section 107 confers a right upon an adult Indian, who was the subject of adoption, to secure necessary information from the court which entered the decree to enable the person to protect and secure any rights he may have from his tribal affiliation. There appears to be a growing trend in State law, supported by developing psychology, that an adopted individual has an inherent right to know his genealogical background. However, this section and section 301 are not aimed at that right. These provisions are aimed at different, but no less valuable rights. One, these provisions will help protect the valuable rights an individual has as a member or potential member of an Indian tribe and any collateral benefits which may flow from the Federal Government because of such membership. Two, these provisions will help protect the rights and interests of an Indian tribe in having its children remain with or become a part of the tribe.

Section 108

Subsection (a) authorizes an Indian tribe, which became subject to State jurisdiction under Public Law 83-280 or any other Federal law, to reassume jurisdiction over child custody proceedings upon petition to the Secretary of the Interior including a suitable plan.

Subsection (b) authorizes the Secretary, in considering a petition for reassumption, to take into consideration various factors affecting the exercise of such jurisdiction, including membership rolls, size of reservation or former reservation, and population base. Depending on

such circumstances, the Secretary is given the flexibility to authorize partial retrocession based upon the referral authority under section 101(b) or to limit the geographic scope of the full exercise of 101(a) jurisdiction. The subsection was adopted as an amendment in order to take into consideration special circumstances, such as those occurring in Alaska and Oklahoma.

Subsection (c) provides for publication of notice of reassumption by the Secretary in the Federal Register and for the effective date of such reassumption.

Subsection (d) provides that reassumption shall not affect ongoing proceedings at the time of reassumption unless provided for in an agreement under section 109.

Section 109

Section 109 authorizes Indian tribes and States to enter into mutual agreements or compacts with respect to jurisdiction over Indian child custody proceedings and related matters. It also provides for revocation of such agreements by the parties.

Section 110

Section 110 establishes a "clean hands" doctrine with respect to petitions in State court for the custody of an Indian child by a person who improperly has such child in physical custody. It is aimed at those persons who improperly secure or improperly retain custody of the child without the consent of the parent or Indian custodian and without the sanction of law. It is intended to bar such person from taking advantage of their wrongful conduct in a subsequent petition for custody. The child is to be returned to the parent or Indian custodian by the court unless such return would result in substantial and immediate physical danger or threat of physical danger to the child. It is not intended that any such showing be by or on behalf of the wrongful petitioner.

Section 111

Section 111 provides that, where State law affords a higher degree of protection of the rights of the parent or Indian custodian, such standard will be applied by the State court in lieu of the related provision of this title. The section was amended by the committee to include any relevant protection or standard established under Federal law.

Section 112

Section 112 would permit, under applicable State law, the emergency removal of an Indian child from his parent or Indian custodian or emergency placement of such child in order to prevent imminent physical harm to the child notwithstanding the provisions of this title. Such emergency removal and/or placement is to continue only for a reasonable length of time and the committee expects that the appropriate State official or authority would take expeditious action to return the child to the parent or custodian; transfer jurisdiction to the appropriate tribe; or institute a proceeding subject to the provisions of this title.

Section 113

Section 113 provides for the orderly phasing in of the effect of the provisions of this title. As amended, it provides that none of the pro-

visions of this title, except section 101(a), would apply to any State action for foster care placement; for termination of parental rights; for preadoptive placement; or for adoptive placement which was initiated or completed prior to enactment of this act. However, it is intended that the provisions would apply to any subsequent discrete phase of the same matter or with respect to the same child initiated after enactment. For instance, if the foster care placement of an Indian child was initiated or completed prior to enactment and then, subsequent to enactment, the child was replaced for foster care, or an action for termination of parental rights was initiated, or the child was placed in a preadoptive situation, or he was placed for adoption, the provisions of the act would be applicable to those subsequent actions.

Section 201

Section 201 authorizes the Secretary to make grants to Indian tribes and organizations to fund Indian child and family service programs on or near the reservation and lists nonexclusionary services to be provided in such programs.

Section 202 permits tribes and organizations to use such grant money for non-Federal matching share with respect to titles IV-B and XX of the Social Security Act or other similar Federal programs. It would also recognize the licensing or approval of foster or adoptive homes or institutions by Indian tribes as equivalent to State licensing or approval.

Section 202

Section 202 authorizes the Secretary to make similar grants to Indian organizations for off-reservation programs.

Section 203

Section 203 authorizes the Secretary of the Interior and the Secretary of Health, Education, and Welfare to enter into joint funding agreements with respect to Indian child and family service programs, to the extent that funds are made available by appropriation acts for such purposes. The authority of the Snyder Act of November 2, 1921 (42 Stat. 208) is made available for the appropriation of funds for grants to tribes and organizations.

Section 204

Section 204 provides that, solely with respect to sections 202 and 203 of this act, "Indian" shall have the meaning assigned to it in section 4(c) of the Indian Health Care Improvement Act of 1976 (90 Stat. 1400, 1401).

Section 301

Section 301 provides that any State court entering a final decree of adoption of an Indian child after the date of enactment of this act shall provide a copy of such decree together with certain other basic information to the Secretary, including any affidavit of a parent requesting anonymity. The Secretary is required to maintain such information and records and to insure that such information is kept confidential. The subsection provides that such information shall not be subject to the Freedom of Information Act.

Subsection (b) provides that, upon request of an adopted Indian child over age 18; an adoptive or foster parent of an Indian child; or an Indian child's tribe, the Secretary shall release such information affecting the rights of the child or for otherwise protecting the rights of the child as an Indian. Where the biological parent has requested anonymity, the Secretary is authorized to certify to an Indian tribe the eligibility of an Indian child under the tribe's membership criteria without disclosing the identity of the parents, if such certification is acceptable to the tribe.

Section 302

Section 302 establishes timetables and consulting requirements for the secretarial promulgation of regulations implementing this act.

Section 401

Section 401 directs the Secretary to submit a report to the Congress on the feasibility of providing Indian children with schools located near their homes. The committee was informed of the devastating impact of the Federal boarding school system on Indian family life and on Indian children, particularly those children in the elementary grades and considers that it is in the best interests of Indian children that they be afforded the opportunity to live at home while attending school. It is noted that more than 10,000 Navajo children in grades 1 to 8 are boarded.

Section 402

Section 402 requires the Secretary, within 60 days after enactment, to provide appropriate notice and information about this act and its provisions to appropriate State officials.

Section 403

Section 403 provides that if any provision of this act is held invalid, the remaining provisions shall not be affected thereby.

LEGISLATIVE HISTORY

The Indian child welfare legislation is the outgrowth of hearings and investigations conducted in the 93d, 94th, and 95th Congress. In 1974, the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, at the urging of the Senate Committee organizations, conducted oversight hearings on the removal of Indian children from their families and the placement of such children in foster and adoptive homes. Testimony was taken from a wide spectrum of public and private witnesses which tended to confirm reports of abuses of the rights of Indian tribes, parents, and children in the process.

During the 94th Congress, Task Force IV of the American Indian Policy Review Commission, established by the act of January 2, 1975 (88 Stat. 1910), addressed the issue of Indian child placements. After a series of hearings, the task force report and findings supported the findings of the Senate oversight hearings. In the latter part of 1976 and early 1977, the Commission considered the findings and recommendations of the task force on Indian child welfare matters. In its final report to the Congress, the Commission made a number of recommendations on the issue, many of which have been included in H.R. 12533.

On April 1, 1977, Senator Abourezk introduced S. 1214 which was referred to the Senate Select Committee on Indian Affairs. On August 4, 1977, the Senate committee held hearings on the bill, again, taking testimony from the broad spectrum of concerned parties, public and private, Indian and non-Indian. The committee adopted an amendment in the nature of a substitute and reported the amended bill to the Senate on November 3, 1977 (S. Rept. No. 95-597). The bill passed the Senate on November 4, 1977.

In the House, S. 1214 was referred to the Committee on Interior and Insular Affairs. On February 9 and March 9, 1978, the Subcommittee on Indian Affairs and Public Lands held hearings on the bill, hearing 8 hours of testimony from 34 witnesses. The subcommittee received comments on S. 1214, either by oral testimony or written communication, from 3 executive departments; 20 States; 22 non-Indian private organizations; 35 Indian organizations; and 38 Indian tribes.

On April 18, 1978, the subcommittee marked up S. 1214 and adopted an amendment in the nature of a substitute. This substitute was subsequently introduced by Mr. Udall et al. as a clean bill, H.R. 12533. On June 21, 1978, the full committee took up consideration of the legislation and proceeded to the markup of H.R. 12533 in lieu of a substitute to H.R. 12533 which was further amended. H.R. 12533, as amended, was reported from the committee favorably, by voice vote.

COST AND BUDGET ACT COMPLAINT

Title II of the bill directs the Secretary of the Interior to institute programs for child and family service assistance. These programs include authority to construct centers on and off reservations and to provide a variety of assistance programs directed toward the stability and integrity of the Indian family. CBO has projected a cost of approximately \$125 million over the next 5 fiscal years. The committee feels that this estimate is high and is based upon assumptions which are probably not valid, but it agrees that the costs will not exceed a total of \$125 million. For instance, it assumes construction of family service centers in every case in which an Indian reservation or urban area might be eligible for such center. In fact, existing facilities, both on the reservation and in the urban areas, would probably be used to house the various programs contemplated in the bill. The analysis of H.R. 12533 by the Congressional Budget Office follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., July 11, 1978.

HON. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for H.R. 12533, the Indian Child Welfare Act of 1978.

Should the committee so desire, we would be pleased to provide further details on the attached cost estimate.

Sincerely,

ALICE M. RIVLIN,
Director.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

JULY 11, 1978.

1. Bill No.: H.R. 12533.
2. Bill title: Indian Child Welfare Act of 1978.
3. Bill status: As ordered reported from the House Committee on Interior and Insular Affairs, June 21, 1978.
4. Bill purpose: The purpose of this bill is to establish standards for placement of Indian children in foster or adoptive homes and to establish grants to Indian tribes and Indian organizations for the construction and operation of Indian family development centers. H.R. 12533 does not request any additional authorizations for the purposes of this bill. Rather, the act states that the new programs will be authorized under the act of November 2, 1921 (the Snyder Act). The Snyder Act provides permanent and open ended authorization for Indian programs. This bill is subject to subsequent appropriation action.
5. Cost estimate:

| | Millions |
|------------------------------------|----------|
| Fiscal year 1979: | |
| Estimated additional authorization | ----- |
| Estimated costs | ----- |
| Fiscal year 1980: | |
| Estimated additional authorization | ----- |
| Estimated costs | ----- |
| Fiscal year 1981: | |
| Estimated additional authorization | ----- |
| Estimated costs | ----- |
| Fiscal year 1982: | |
| Estimated additional authorization | ----- |
| Estimated costs | ----- |
| Fiscal year 1983: | |
| Estimated additional authorization | ----- |
| Estimated costs | ----- |
| | 27.6 |
| | 6.8 |
| | 32.3 |
| | 30.4 |
| | 42.2 |
| | 38.2 |
| | 52.4 |
| | 45.0 |

The costs of this bill falls within budget function 500.

6. Basis for estimate: The projected cost for H.R. 12533 is based on programmatic information and assumptions supplied by the Bureau of Indian Affairs (BIA). Below are the specific assumptions for this estimate.

- (1) There are 150 potential locations both on and off the reservations that would be eligible to build and operate a child development center as described in the bill. It was assumed by BIA that a maximum of 30 centers would be constructed annually at a cost in fiscal year 1980 of \$658,000 per center.
- (2) Once built, each center would be operated by a professional and support staff of 15. The first full year costs (fiscal year 1981) covering operating expenses for 30 centers is estimated to be \$7.9 million.
- (3) The building costs were inflated by the CBO projection for cost increases in the residential building industry. The other expenses were inflated by the CBO projection for increases in the CPI.
- (4) The spendout on construction for the development center is spread over 3 years, while the spendout for operating expenses is spread over a 2-year period. The fiscal year 1980 spendout is relatively low reflecting a lagtime for planning and development of the centers.
- (5) This cost estimate assumes an enactment for this bill of October 1978 with appropriation action completed and regulations issued by October 1979.

vide for transfer of such a proceeding from a State court to a tribal court if the parent or Indian custodian so petitions or if the Indian tribe so petitions, and if neither of the parents nor the custodian objects. Requirements dealing with notice to tribes and parents and consent to child placements are also a major element of the bill. Testimony on the problems with present Indian child placement proceedings repeatedly pointed out the lack of informed consent on the part of many Indian parents who have lost their children.

Title I would also impose on State courts evidentiary standards which would have to be met before an Indian child could be ordered removed from the custody of his parents or Indian custodian. Court-appointed counsel would be available to the parent or custodian upon a finding of indigency by the court.

State courts would also be required, under the provisions of H.R. 12533, to apply preference standards set forth in section 105 in the placing of an Indian child. These preferences would strengthen the chances of the Indian child staying within the Indian community and growing up with a consistent set of cultural values.

Title II of H.R. 12533, entitled "Indian Child and Family Programs," would authorize the Secretary of the Interior to make grants to Indian tribes and organizations for the establishment of Indian family service programs both on and off the reservation. Section 204 would authorize \$26 million for that purpose.

Title III of H.R. 12533, entitled "Recordkeeping, Information Availability, and Timetables," would direct the Secretary of the Interior to maintain records, in a single central location, of all Indian child placements affected by the act. Those records would not be open, but information from them could be made available to an Indian child over age 18, to his adoptive or foster parent, or to an Indian tribe, for the purpose of assisting in the enrollment of that child in an Indian tribe.

Title IV of H.R. 12533, entitled "Placement Prevention Study," would direct the Secretary of the Interior to prepare and submit to Congress a plan, including a cost analysis statement, for the provision to Indian children of schools located near their homes.

Although we support the concept of promoting the welfare of Indian children, we urge that the bill be amended in the following ways.

Section 4(9) defines the term "placement." This definition is crucial to the carrying out of the provisions of title I. We believe that custody proceedings held pursuant to a divorce decree and delinquency proceedings where the act committed would be a crime if committed by an adult should be excepted from the definition of the term "placement." We believe that the protections provided by this act are not needed in proceedings between parents. We also believe that the standards and preferences have no relevance in the context of a delinquency proceeding.

Section 101(a) would grant to Indian tribes exclusive jurisdiction over Indian child placement proceedings. We believe that section 101(a) should be amended to make explicit that an Indian tribe has exclusive jurisdiction only if the Indian child is residing on the reservation with a parent or custodian who has legal custody. The bill does not address the situation where two parental views are involved. Therefore, the definition of domicile is inadequate and the use of the word "parent" as defined does not articulate the responsibilities of the courts to both parents.

7. Estimate comparison: None.
8. Previous CBO estimate: On November 2, 1977, CBO prepared an estimate on S. 1214, the Indian Child Welfare Act of 1977. The Senate bill is essentially the same as H.R. 12533. However, S. 1214 did not assume the use of Snyder Act authorization and included additional authorization language to cover the provision of the bill setting an authorization level of \$26 million for fiscal year 1979.

9. Estimate prepared by Deborah Kalcevic.
10. Estimate approved by James L. Blum, Assistant Director for Budget Analysis.

INFLATIONARY IMPACT STATEMENT

At the level of funding estimated by the Congressional Budget Office, enactment of this legislation would have some minimal inflationary impact. This impact is lessened since the cost will be spread out over 5 fiscal years.

OVERSIGHT STATEMENT

Other than normal oversight responsibilities exercised in conjunction with these legislative operations, the committee conducted no specific oversight hearings and no recommendations were submitted to the committee pursuant to rule X, clause 2(b)2.

COMMITTEE RECOMMENDATION

The Committee on Interior and Insular Affairs, by a voice vote, recommends that the bill, as amended, be enacted.

DEPARTMENTAL REPORTS

The report of the Department of the Interior, dated June 6, 1978, and the reports of the Department of Justice, dated February 9, 1978, and May 23, 1978, are as follows:

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., June 6, 1978.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This Department would like to make its views known on H.R. 12533, the Indian Child Welfare Act of 1978, and urges the committee to make the recommended changes during markup of the bill. We understand the Department of Justice has communicated its concerns with the bill to the committee, and we urge the committee to amend the bill to address those concerns.

If H.R. 12533 is amended as detailed herein and as recommended by the Department of Justice's letter of May 23, 1978, we would recommend that the bill be enacted.

Title I of H.R. 12533 would establish nationwide procedures for the handling of Indian child placements. The bill would vest in tribal courts their already acknowledged right to exclusive jurisdiction over Indian child placements within their reservations. It would also pro-

We believe that reservations located in States subject to Public Law 83-280 should be specifically excluded from section 101(a), since the provisions of section 108, regarding retrocession of jurisdiction, deal with the reassertion of tribal jurisdiction in those States.

Section 101(b) should be amended to prohibit clearly the transfer of a child placement proceeding to a tribal court when any parent or child over the age of 12 objects to the transfer.

Section 101(c), regarding full faith and credit to tribal orders, should be amended to make clear that the full faith and credit intended is that which States presently give to other States.

Section 102(a) would provide that no placement hearing be held until at least 30 days after the parent and the tribe receive notice. We believe that in many cases 30 days is too long to delay the commencement of such a proceeding. We suggest that the section be amended to allow the proceeding to begin 10 days after such notice with a provision allowing the tribe or parent to request up to 20 additional days to prepare a case. This would allow cases where the parents or tribe do not wish a full 30 days' notice to be adjudicated quickly, while still affording time to the parent or tribe who needs that time to prepare a case. We also suggest that the section be amended to require the Secretary to make a good faith effort to locate the parent as quickly as possible and to provide for situations in which the parent or Indian custodian cannot be located.

We also believe that there is a need for specific emergency removal provisions in H.R. 12533. A section should be added allowing the removal of a child from the home without a court order when the physical or emotional well-being of the child is seriously and immediately threatened. That removal should not exceed 72 hours without an order from a court of competent jurisdiction.

Section 102(b) would provide the parent or Indian custodian of an Indian child the right to court-appointed counsel if the court determines that he or she is indigent.

We are opposed to the enactment of this section. We do not believe that there has been a significant demonstration of need for such a provision to justify the financial burden such a requirement would be to both the States and the Federal Government.

Section 102(c) would allow all parties to a placement to examine all documents and files upon which any decision with respect to that placement may be based. This provision conflicts with the Federal Child Abuse and Neglect Treatment Act, Public Law 93-247, which provides confidentiality for certain records in child abuse and neglect cases. We believe that such a broad opening of records would lead to less reporting of child abuse and neglect. However, we do recognize the right of the parent to confront and be given an opportunity to refute any evidence which the court may use in deciding the outcome of a child placement proceeding. We recommend that the Indian Child Welfare Act conform with the provisions of Public Law 93-247.

Section 102(e) of H.R. 12533 would require the State court to find beyond a reasonable doubt, before ordering the removal of the child from the home, that continued custody on the part of the parent or custodian will result in serious emotional or physical damage to the child. We believe that the burden of proof is too high. We would support the language found in section 101(b) of the Senate-passed

S. 1214, which would impose a burden of clear and convincing evidence and would set down certain social conditions which could not be considered by the court as prima facie evidence of neglect or abuse. We also believe that the language "will result" in serious damage to the child should be amended to read "is likely to result" in such damage. It is almost impossible to prove at such a high burden of proof that an act will definitely happen.

Section 105 of H.R. 12533 would impose on State courts certain preferences in placing an Indian child. Subsection (c) would substitute the preference list of the Indian child's tribe where the tribe has established a different order of preference by resolution.

Language should be included in that subsection which would require that resolution to be published in the Federal Register and later included in the Code of Federal Regulations. This would allow the State court easy access to the preferences of the various tribes.

It is also unclear what the last sentence in subsection (c) means in allowing the preference of the Indian child or parent to be considered "where appropriate". We believe that the preference of the child and the parent should be given due consideration by the court regardless of whether that court is following the preferences set forth in section 105(a) or 105(b), or whether it is following a preference list established by an Indian tribe. Therefore, we recommend that a separate subsection be added to section 105 stating that the preferences of the Indian child and of the parent be given due consideration by the court whenever an Indian child is being placed.

Section 106 deals with failed placements and requires that, whenever an Indian child is removed from a foster home or institution in which the child was placed for the purpose of further placement, such removal shall be considered a placement for purposes of the act. We see no reason for requiring a full proceeding every time a child is moved from one form of foster care to another. We do, however, recognize the need for notification of the parents and the tribe of such move and for applying the preferences set forth in section 105. Therefore, we recommend that subsection (b) of section 106 be amended to require the notice and preference provisions to apply when a child is moved from one form of foster care to another and to require the removal to be considered as a new placement only in the case where termination of parental rights is at issue.

Section 107 deals with the right of an Indian who has reached age 18 and who has been the subject of a placement to learn of his or her tribal affiliation. We believe that rather than apply to the court for such information, the individual involved should apply to the Secretary of the Interior. Under the provisions of title III, the Secretary would maintain a central file with the name and tribal affiliation of each child subject to the provisions of the act. Therefore, the Secretary would be more likely than the State court to have the information needed to protect any rights of the individual involved which may flow from his or her tribal affiliation.

Finally, with respect to title I, we believe that a section should be added which would state that the provisions of the act should apply only with respect to placement proceedings which begin 6 months after the date of the enactment of the act. This would allow States some time to familiarize themselves with the provisions of the act and

would thus avoid the chance of having large numbers of placements invalidated because of failure to follow the procedures of the act.

Such a section should also state that the intent of the act is not the pre-emption by the Federal Government of the whole area of Indian child welfare and placement. In any case where a state has laws which are more protective than the requirements of this act, e.g. with regard to notice and enforcement, those laws should apply.

We believe that many of the authorities granted by title II of the bill are unnecessary because they duplicate authorities in present law, and therefore, we recommend the deletion of title II.

We find especially objectionable in title II the following:

The authorization for an unlimited subsidy program for Indian adoptive children. We believe that any such program should be limited to hard-to-place children or children who are or would be eligible for foster care support from the Bureau of Indian Affairs. We also believe that the amount of any such support would have to be limited to the prevalent State foster care rate for maintenance and medical needs.

The authorization for grants to establish and operate off-reservation Indian child and family service programs.

The new separate authorization of \$26 million in section 203(b) of title II.

The provisions of section 201(c) which would authorize every Indian tribe to construct, operate, and maintain family service facilities regardless of the size of the tribe or the availability of existing services and facilities.

The authorization for the use of Federal funds appropriated under title II to be used as the non-Federal matching share in connection with other Federal funds.

However, we believe that the last sentence of section 201(b), providing that licensing or approval by an Indian tribe should be deemed equivalent to that done by a State, should remain in the bill under title I as a separate section.

We have no objection to section 301 of title III of H.R. 12533. We believe that requiring the Secretary to maintain a central file on Indian child placements will better enable the Secretary to carry out his trust responsibility, especially when judgment funds are to be distributed.

However, we object to the provisions of section 302(c), which would require the Secretary to present any proposed revision or amendment of rules and regulations promulgated under that section to both Houses of Congress. Any such proposed revision or amendment would be published in the Federal Register and we believe that placing this additional responsibility on the Secretary is both burdensome and unnecessary.

We believe that section 401 of Title IV should be amended to read as follows:

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.

(b) The Secretary is authorized and directed to prepare and submit to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs

of the U.S. House of Representatives within 1 year from the date of this act, a report on the feasibility of providing Indian children with schools located near their homes. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the administration's program, and that enactment of the House subcommittee's present version of H.R. 12533 would not be consistent with the administration's objectives.

Sincerely,

FORREST J. GERARD,
Assistant Secretary.

DEPARTMENT OF JUSTICE,
Washington, D.C., February 9, 1978.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is to bring to your attention several areas where the Department of Justice perceives potential problems with S. 1214, a bill 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. In our view, certain provisions of the bill raise serious constitutional problems because they provide for differing treatment of certain classes of persons based solely on race. S. 1214 was passed by the Senate on November 4, 1977 and is now pending in the Interior and Insular Affairs Subcommittee on Indian Affairs and Public Lands.

This Department has not been involved in the hearings relating to the bill. Our comments therefore are based on a reading of the text of the bill rather than on a review of the testimony and legislative history which necessarily would be considered by a court which had to interpret its provisions and determine its constitutional validity.

As you may be aware, the courts have consistently recognized that tribal governments have exclusive jurisdiction over the domestic relationships of tribal members located on reservations, unless a State has assumed concurrent jurisdiction pursuant to Federal legislation such as Public Law 83-289. It is our understanding that this legal principle is often ignored by local welfare organizations and foster homes in cases where they believe Indian children have been neglected, and that S. 1214 is designed to remedy this, and to define the Indian rights in such cases.

The bill would appear to subject family relations matters of certain classes of persons to the jurisdiction of tribal courts which are presently adjudicated in State courts. The bill would accomplish this result with regard to three distinct categories of persons, all possessing the common trait of having enough Indian blood to qualify for membership in a tribe. One class would be members of a tribe. Another class would be nontribal members living on reservations, and a third would be nonmembers living off reservations. These three classes would be

denied access to State courts for the adjudication of certain family relations matters unless "good cause" is shown under section 102(c) of the bill.

The general constitutional question raised by S. 1214 is whether the denial of access to State courts constitutes invidious racial discrimination violative of the fifth amendment. See *Bowling v. Sharp*, 347 U.S. 497 (1954). This question is most properly addressed by focusing on each of the three classes described above and contrasting each class with a similarly situated class of persons whose access to State courts is not affected by the bill.

The class of persons whose rights under the bill may, in our opinion, constitutionally be circumscribed by this legislation are the members of a tribe, whether living on or near a reservation. In *Fisher v. District Court*, 424 U.S. 382 (1976), the Supreme Court addressed an argument made by members of the Northern Cheyenne Tribe that denial to them of access to the Montana State courts to pursue an adoption did not involve impermissible racial discrimination. In that case, both the persons seeking to pursue adoption of the child in question and the natural mother of the child who contested the right of the Montana court to entertain the adoption proceeding were residents of the reservation and members of the tribe. The Court stated that:

The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under Federal law. Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government. *Morton v. Mancari*, 417 U.S. 535, 551-555 (1974). 424 U.S., at 390-91.

In *Fisher*, the class to which the Court was apparently referring consisted of members of the Northern Cheyenne Tribe. This is so because of the Court's citation to *Morton v. Mancari*, in which the Court had upheld preferential treatment of Indians in certain employment situations by reasoning that the "preference, as applied, is granted to Indians not as a discrete racial group, but rather, as members of quasi-sovereign tribal entities * * *" 417 U.S., at 554.

More recently, the Court has reiterated this thicket in *United States v. Antelope*, 45 U.S.L.W. 4361 (U.S. April 19, 1977). In that case, enrolled Coeur d'Alene Indians contended that their Federal convictions for murder of a non-Indian on the Coeur d'Alene Reservations were products of invidious racial discrimination because a non-Indian participating in the same crime would have been tried in State court and would have had certain substantial advantages regarding the elements required to be proved for conviction.¹ The Court, in rejecting this claim, held that the Coeur d'Alene Indians "were not subjected to Federal criminal jurisdiction [under 18 U.S.C. § 1153] because they are of the Indian race but because they were enrolled members of the Coeur d'Alene Tribe." *Id.*, at 4363.

¹ Specifically, the State of Idaho, in which the crime occurred, did not have a felony murder rule so that, in order to be convicted of first-degree murder, the State would have had to prove certain elements that were not required to be proven in the Federal trial because a felony-murder rule was in effect in the latter court.

We believe that *Mancari*, *Fisher*, and *Antelope* directly support the constitutionality of this bill as it affects the access of tribal members to State courts. At the same time, these cases do not resolve the constitutionality of S. 1214 as it would affect the rights of nontribal members living either on or off reservations. Indeed, they can be read to suggest that, absent tribal membership, Congress' freedom to treat differently persons having Indian blood is diminished.

With regard to nonmembers living on a reservation, a footnote in the *Antelope* case would appear indirectly to address, but not resolve, the question presented by this bill:

"It should be noted, however, that enrollment in an official tribe has not been held to be an absolute requirement for Federal jurisdiction, at least where the Indian defendant lived on the reservation and maintained tribal relations with the Indians thereon." *Ex Parte Pero*, 99 F. 2d 28, 30 (CA 7 1938). See also *United States v. Ives*, 504 F. 2d 935, 953 (CA 9 1974) (dicta). Since respondents are enrolled tribal members, we are not called on to decide whether nonenrolled tribal members are subject to [Federal criminal jurisdiction] and we therefore intimate no views on the matter."

In *Ex parte Pero*, *supra*, the seventh circuit affirmed the grant of a writ of habeas corpus to a nonenrolled Indian, who had been convicted of murder in a State court, holding that the Indian could only be tried in Federal court by virtue of what was then 18 U.S.C. § 548, the predecessor of 18 U.S.C. § 1153. The court appeared to base its holding on the fact that the Indian was the "child of one Indian mother and half-blood father, where both parents are recognized as Indians and maintain tribal relations, who himself lives on the reservation and maintains tribal relations and is recognized as an Indian * * *." *Id.*, at 31.

With regard to nonmembers who are otherwise eligible for tribal membership who live on reservations, *Pero* at least stands for the proposition that the federal interest in the "guardian-ward relationship" is sufficient to secure to a nonenrolled Indian the protection of a Federal criminal proceeding as opposed to trial by a State court. *Pero* is, however, predicated on a Federal interest which would appear to us to differ in kind from the Federal interest identified in *Mancari*, *Fisher*, and *Antelope*. In those latter cases, the Federal interest in promoting Indian self-government was specifically identified as a touchstone of the Court's opinions. In our view, this weighty interest is present in S. 1214 in a more attenuated form with regard to nontribal members, even those living on reservations. An eligible Indian who has chosen, for whatever reasons, not to enroll in a tribe would be in a position to argue that depriving him of access to the State courts on matters related to family life would be invidious. Such an Indian presumably has, under the first amendment, the same right of association as do all citizens, and indeed would appear to be in no different situation from a non-Indian living on a reservation who, under S. 1214, would have access to State courts. The only difference between them would, in fact, be the racial characteristics of the former.

We also think that even *Pero* only marginally supports the constitutionality of this bill as applied to nonmembers living on reserva-

tions. In *Pero*, the focus of the Court's inquiry was on the contacts between the convicted Indian and the Indian tribe and reservation. In S. 1214, the inquiry would appear to be solely directed to contacts between the Indian child and the Indian tribe, whereas the persons whose rights are most directly affected by the bill are the parents or guardians of the child.³ Thus, there is little support for the constitutionality of this bill as applied to nontribal members living on reservations and the rationale applied by the Court in *Mancari*, *Fisher*, and *Andeoye* would not save the bill. The simple fact is that the parents of an Indian child may find their substantive rights altered by virtue of their Indian blood and the simple fact of residence on a reservation. The Court has never sanctioned such a racial classification which denied substantive rights, and we are unable to find any persuasive reason to suggest that it would do so.

Our conclusion with regard to nonmembers living on reservations is even more certain in the context of nonmembers living off reservations. In such a situation, we are firmly convinced that the Indian or possible non-Indian parent may not be invidiously discriminated against under the fifth amendment and that the provisions of this bill would do so. Assuming a compelling governmental interest would otherwise justify this discrimination, we are unable to suggest what such an interest might be.

For reasons stated above, we consider that part of S. 1214 restricting access to State courts to be constitutional as applied to tribal members. However, we think that S. 1214 is of doubtful constitutionality as applied to nontribal members living on reservations and would almost certainly be held to be unconstitutional as applied to nonmembers living off reservations.⁴

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely,

PATRICIA M. WALD,
Assistant Attorney General.

DEPARTMENT OF JUSTICE,
Washington, D.C., May 23, 1978.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: We would like to take this opportunity to comment on the House Subcommittee on Indian Affairs version of S. 1214, the Indian Child Welfare Act of 1978.

³ As we understand the bill, this denial of access to State courts would be predicated on the existence of "significant contacts" between the Indian child and an Indian tribe and that this issue would be an issue of fact to be determined by the court on the basis of such considerations as: Membership in a tribe, family ties within the tribe, prior statements of the parent or nonparent of the child, reservation domicile, the statements of the child, and other elements which reflect continuing tribal affiliation.

⁴ The bill is unclear as to whether this determination would be made by a tribal court or State court. We also note our concern with the language used in sections 2 and 3 of the bill regarding "the Federal responsibility for the care of the Indian people" and the "special responsibilities and legal obligations to American Indian people." The use of such language has been used by at least one court to hold the Federal Government responsible for the financial support of Indians even though Congress had not appropriated any money for such purposes. *White v. Califano*, et al., Civ. No. 76-5031, USDC, S. Dak. (September 12, 1977). We fear the language in this bill could be used by a court to hold the United States liable for the financial support of Indian families far in excess of the provisions of title II of the bill and the intent of Congress.

As you know, the Department presented at some length its views on one constitutional issue raised by S. 1214 as it passed the Senate in a letter to you dated February 9, 1978. Briefly, that constitutional issue concerned the fact that S. 1214 would have deprived parents of Indian children as defined by that bill of access to State courts for the adjudication of child custody and related matters based, at bottom, on the racial characteristics of the Indian child. We express in that letter our belief that such racial classification was suspect under the fifth amendment and that we saw no compelling reason which might justify its use in these circumstances. This problem has been, for the most part, eliminated in the subcommittee draft, which defines "Indian child" as "any unmarried person who is under age 18 and is either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."

We are still concerned, however, that exclusive tribal jurisdiction based on the "(b)" portion of the definition of "Indian child" may constitute racial discrimination. So long as a parent who is a tribal member has legal custody of a child who is merely eligible for membership at the time of a proceeding, no constitutional problem arises. Where, however, legal custody of a child who is merely eligible for membership is lodged exclusively with nontribal members, exclusive tribal jurisdiction cannot be justified because no one directly affected by the adjudication is an actual tribal member. We do not think that the blood connection between the child and a biological but noncustodial parent is a sufficient basis upon which to deny the present parents and the child access to State courts. This problem could be resolved either by limiting the definition of Indian child to children who are actually tribal members or by modifying the "(b)" portion to read, "eligible for membership in an Indian tribe and is in the custody of a parent who is a member of an Indian tribe."

A second constitutional question may be raised by § 101(e) of the House draft. That section could, in our view, be read to require Federal, State, and other courts to give "full faith and credit" to the "public acts, records and judicial proceedings of any Indian tribe applicable to Indian child placements" even though such proceedings might not be "final" under the terms of this bill itself. So read, the provision might well raise constitutional questions under several Supreme Court decisions. E.g., *Habeby v. Habeby*, 330 U.S. 610 (1947). We think that problem can be resolved by amending that provision to make clear that the full faith and credit to be given to tribal court orders is no greater than the full faith and credit one State is required to give to the court orders of a sister State.

A third and more serious constitutional question is, we think, raised by section 102 of the House draft. That section, taken together with sections 103 and 104, deals generally with the handling of custody proceedings involving Indian children by State courts. Section 102 establishes a fairly detailed set of procedures and substantive standards which State courts would be required to follow in adjudicating the placement of an Indian child as defined by section 4(4) of the House draft.

¹ The views expressed in that letter were subsequently presented to the Subcommittee on Indian Affairs and Public Lands of your House committee in testimony by this Department on Mar. 9, 1978.

As we understand section 102, it would, for example, impose these detailed procedures on a New York State court sitting in Manhattan where that court was adjudicating the custody of an Indian child and even though the procedures otherwise applicable in this State-court proceeding were constitutionally sufficient. While we think that Congress might impose such requirements on State courts exercising jurisdiction over reservation Indians pursuant to Public Law 83-280, we are not convinced that Congress' power to control the incidents of such litigation involving nonreservation Indian children and parents pursuant to the Indian commerce clause is sufficient to override the significant State interest in regulating the procedure to be followed by its courts in exercising State jurisdiction over what is a traditionally State matter. It seems to us that the Federal interest in the off-reservation context is so attenuated that the 10th Amendment and general principles of federalism preclude the wholesale invasion of State power contemplated by section 102. See Hart, "The Relations Between State and Federal Law," 54 Colum. L. Rev. 489, 508 (1954).²

Finally, we think that section 101(b) of the House draft should be revised to permit any parent or custodian of an Indian child or the child himself, if found competent by the State court, to object to transfer of a placement proceeding to a tribal court. Although the balancing of interests between parents, custodian, Indian children, and tribes is not an easy one, it is our view that the constitutional power of Congress to force any of the persons described above who are not in fact tribal members to have such matters heard before tribal courts is questionable under our analysis of section 102 above and the views discussed above in regard to section 4(4).

II. NONCONSTITUTIONAL PROBLEMS

There are, in addition, a number of drafting deficiencies in the House draft. First, we are concerned about some language used in sections 2 and 3 regarding "the Federal responsibility for the care of the Indian people" and the "special responsibilities and legal obligations to American Indian people." The use of such language has been relied on by at least one court to hold the Federal Government responsible for the financial support of Indians even though Congress has not appropriated any money for such purposes. *White v. Califano*, 437 F. Supp. 543 (D.S.D. 1977). We fear the language in this bill could be used by a court to hold the United States liable for the financial support of Indian families far in excess of the provisions of title II of the bill and the apparent intent of the drafters.

Second, section 101(a) of the House draft, if read literally, would appear to displace any existing State court jurisdiction over these matters based on Public Law 83-280. We doubt that is the intent of the draft because, inter alia, there may not be in existence tribal courts to assume such State-court jurisdiction as would apparently be obliterated by this provision.

² We note that we are aware of no congressional findings which would indicate the inadequacy of existing State-court procedures utilized in these custody cases, even assuming that such findings would strengthen Congress' hand in this particular matter. As a policy matter, it is clear to us that the views of the States should be solicited before Congress attempted to override State power. In this fashion, a position this Department took in testimony before the Senate Select Committee on Indian Affairs on Senate Joint Resolution 102 on Feb. 27, 1978.

Third, the apparent intent of section 4(10) is, in effect, to reestablish the diminished or disestablished boundaries of Indian reservations for the limited purpose of tribal jurisdiction over Indian child placements. We think that such reestablishment, in order to avoid potential constitutional problems, should be done in a straightforward manner after the reservations potentially affected are identified and Congress has taken into account both the impact on the residents of the area to be affected and any other factors Congress may deem appropriate.

The Office of Management and Budget has advised that there is no objection to the presentation of this letter and that enactment of the House Subcommittee on Indian Affairs version of S. 1214 would not be consistent with the administration's objectives.

Sincerely,

PATRICIA M. WALD,
Assistant Attorney General.

For example the Justice Department in a letter dated May 23, 1978, for Assistant Attorney General Patricia Wald to the committee chairman expressed numerous practical and constitutional concerns with the language in S. 1214. While some of those problems may have been alleviated in H.R. 12533, I am unaware of any further review by the Justice Department. In that letter, discussing the House version, Ms. Wald raised some serious questions: (1) Whether the bill under *White v. California* might hold the Federal Government responsible for the financial support of Indians even though no money had been appropriated, (2) whether the bill might displace any existing State court jurisdiction on Indian child welfare matters in Public Law 280 States even where tribal courts did not exist, and (3) whether the bill might have the effect of reestablishing diminished or disestablished boundaries of Indian reservations for the limited purpose of tribal jurisdiction over Indian child placements.

In regard to (3) she wrote:

We think that such reestablishment, in order to avoid potential constitutional problems, should be done in a straightforward manner after the reservations potentially affected are identified and Congress has taken into account both the impact on the residents of the area to be affected and any other factors Congress may deem appropriate.

To my knowledge this issue was never discussed.

The Department of Interior, in a seven-page letter dated June 6, 1978 from Assistant Secretary Forrest J. Gerard, raised numerous questions about H.R. 12533. Among other considerations Mr. Gerard said:

We believe that many of the authorities granted by title II of the bill are unnecessary because they duplicate authorities in present law, and therefore, we recommend the deletion of title II.

I would point out that title II remains in the bill largely as drafted and that it even provides payment to adoptive parents of Indian children. In addition, it provides for construction of Indian family service facilities off of reservations regardless of the size of the tribe or the availability of existing services and facilities.

It should be noted that many of the concerns expressed by Mr. Gerard, who is a strong advocate of Indian, were not, in my opinion, properly addressed.

In a memorandum dated June 19, 1978, from the Congressional Research Service, additional points were raised which I believe should have been considered more thoroughly.

Aside from the above Federal concerns, I am even more distressed by objections raised by officials in my State of Montana after I forwarded a copy of the bill for review.

On June 20, 1978, the following telegram was received by the committee from Gov. Thomas L. Judge, of Montana.

It has come to my attention that you have scheduled the markup on H.R. 12533, the Indian Child Welfare Act. This legislation identifies some real problems and we are in agreement with the intent of the bill. However, there may be some

DISSENTING VIEWS:

H.R. 12533 should be sent back to the Subcommittee on Indian Affairs and Public Lands for additional consideration, because of major defects in the bill and because of inadequate opportunity for affected States and agencies to testify on the bill.

I feel a special responsibility to the House of Representatives to submit this dissenting opinion because I was the only Member expressing grave concerns about many of the bill's provisions.

Largely because of my concerns about legal protection for the Indian child, the natural parents, and the adoptive parents, many changes were made at a staff level to improve the bill. These changes were many and substantive and much improvement was made in this regard. Amendments also helped improve the bill but major defects remain.

Among these numerous issues are the cost to the States to enforce the provisions, new layers of programs for Indian tribes, and basic constitutional issues like State-Indian jurisdiction. These were not carefully enough considered during markup.

I call these problems to the attention of my colleagues and urge that the bill be rejected until those issues can more carefully be discussed by both the Congress and the public. Below I detail the problems.

HISTORY OF H.R. 12533

H. R. 12533 is the outgrowth of S. 1214 which was passed by the Senate and assigned to the House Subcommittee on Indian Affairs and Public Lands. This bill was the markup vehicle in the subcommittee and was reported with very little discussion or participation by members.

Subsequent to the subcommittee markup, the subcommittee staff, apparently noting the major defects of S. 1214, drafted an entirely new bill, H. R. 12533, and circulated it as the markup vehicle for the full Interior and Insular Affairs Committee.

Markup was scheduled for 2 or 3 weeks during which time I raised objection and numerous questions which resulted in many of the changes being made to improve the legal protections now contained in the bill.

To my knowledge the new bill, H. R. 12533 and the subsequent drafts were never generally circulated to the States, juvenile judges, public and private welfare agencies, or even to the Indian tribes.

The bill should have been circulated for comment in light of the major revisions made and being considered.

MANY GROUPS SOUGHT ADDITIONAL TIME

It should be pointed out that many groups, including the Departments of Interior and Justice, expressed the need for either major changes or additional time to study the bill and comment.

Indian child or family. This office believes that in all cases in which an Indian tribal court exercises jurisdiction the financial burden for providing social services should fall exclusively upon the tribe and the Federal Government.

In addition, it appears that tribal courts may pick and choose those Indian children over which they will exercise jurisdiction, however State courts are allowed no choice. One potential result, of course, is that tribal courts will waive jurisdiction in all difficult or expensive cases while State courts and, hence, the State agencies administering title IV and title XX will have no choice but to accept those cases. Such a situation is clearly inequitable.

As can be seen from these comments the Indian Child Welfare Act leaves many issues unresolved. Although quick action on the bill may be politically expedient, the Montana Department of Social and Rehabilitation Services strongly recommends that full and deliberate consideration be given to all aspects of the bill.

If we can provide further assistance to you, please feel free to contact us.

Sincerely yours,

RICHARD A. WEBER,
Staff Attorney, Office of Legal Affairs,
Montana Department of Social and
Rehabilitation Services.

With regard to the above letter, Members will note the concern expressed about the possible financial burden. I need not remind my colleagues that one of the major costs of local and State governments are the courts. And in light of the Proposition 13 attitude across this country I question the wisdom of passing legislation which may have significant impact on State and county budgets without one iota of evidence in the record as to what that cost might be. On this issue alone the bill ought to be rejected and returned to committee for additional hearings.

It should be noted, in fairness, that many church groups urged passage of the bill. However, the National Conference of Catholic Charities raised many substantive questions. While many of those were resolved in the redrafting of the bill and the amendment process, others remain outstanding.

But perhaps one of the strongest arguments for defeating the bill came in a letter of June 12, 1978, from the National Council of State Public Welfare Administrators. The concluding paragraph of that letter said:

The National Council of State Public Welfare Administrators believes that H.R. 12533 should not be enacted prior to a much broader consultation than has thus far been achieved by the responsible congressional committees. Enclosed is a resolution approved by representatives of 38 States and two jurisdictions present at the council meeting on June 7-8, 1978 in support of this recommendation.

Below is a copy of the resolution adopted by over two-thirds of the States public welfare administrators.

ill effect. I urge you to hold hearings on the bill to allow us time to present our concern. I am sure you want to insure that problems are solved without creating new ones at the same time. Thank you very much for your consideration of this request.

That message was received just 1 day before reporting the bill and the request was not granted. I suspect the concerns of Governor Judge would have been reflected by other States, especially Public Law 280 States, had they been more aware of the provisions.

Below is a letter from the State of Montana attorney for social and rehabilitation services. The letter is unsigned because it was first transmitted to me by telecopier on the day before the markup and subsequently sent in the form below and not received in my office until 5 days after the markup. I suggest all Members will want to read this letter before voting on the bill.

STATE OF MONTANA,
SOCIAL AND REHABILITATION SERVICES,
Helena, Mont., June 20, 1978.

Hon. RON MARLENEE,
Congressman from Montana, U.S. House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN MARLENEE: In response to a request from Bob Ziemer of your staff, the Office of Legal Affairs of the Montana Department of Social and Rehabilitation Services has reviewed H.R. 12533—The Indian Child Welfare Act.

Our study of the bill has been hurried, but we can foresee numerous problems in the delivery of social services to Montana Indian children and families if the act is passed in its present form. For this reason we urge you to ask the Committee on Interior and Insular Affairs to defer further markup on the bill until affected States, and especially Montana, can more fully comment on its consequences.

Constitutional questions aside, several problems of implementation are readily apparent from reading the bill. For example, although the bill requires State courts to give preference to certain homes in placing Indian children based on evidence in the record, the bill does not provide any mechanism requiring the family or the tribe to present such evidence. Nor does it create a means by which already overburdened State courts can discover such evidence on their own.

But even more disturbing to the Montana Department of Social and Rehabilitation Services, is the bill's lack of clarity on the issue of payment for social services for Indian children and families. Section 201(b) of title II of the bill states:

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 other federally assisted program.

This language suggests a strong possibility that a State whose courts had not exercised jurisdiction over an Indian child or family would be called upon to fund at least part of the social services delivered to that

NATIONAL COUNCIL OF STATE
PUBLIC WELFARE ADMINISTRATORS
OF THE AMERICAN PUBLIC WELFARE ASSOCIATION,
Washington, D.C., June 7, 1978.

SOCIAL SERVICES COMMITTEE RECOMMENDATIONS³

Indian Child Welfare Act—H.R. 12533 (S. 1214)

1. Support objectives of proposed legislation to establish safeguards against separation of Indian children from their parents and inappropriate foster care or adoptive placements outside the cultural setting of the Indian child.
2. Recommend the council note that, while many constructive changes over the Senate-passed bill (S. 1214) have been incorporated in the House version, there remain a significant number of provisions whose impact on Indian families, tribal courts, State courts, and State and local child welfare services programs needs to be explored more extensively than has been done.
3. Express concern that the bill as written may work against its objective of achieving stability and permanency for the Indian child whose home situation is such that temporary or permanent placement becomes a necessity, and that the result may be many such children will be well served neither by the state/local public child welfare system or by the Indian community.
4. Recommend that H.R. 12533 in its June 7 version be widely disseminated for discussion among affected groups, including the more than 270 federally recognized governing bodies of Indian tribes, bands, and groups, as well as to representatives of State courts, juvenile judges, and public and private child welfare services agencies, before being debated by the full House.

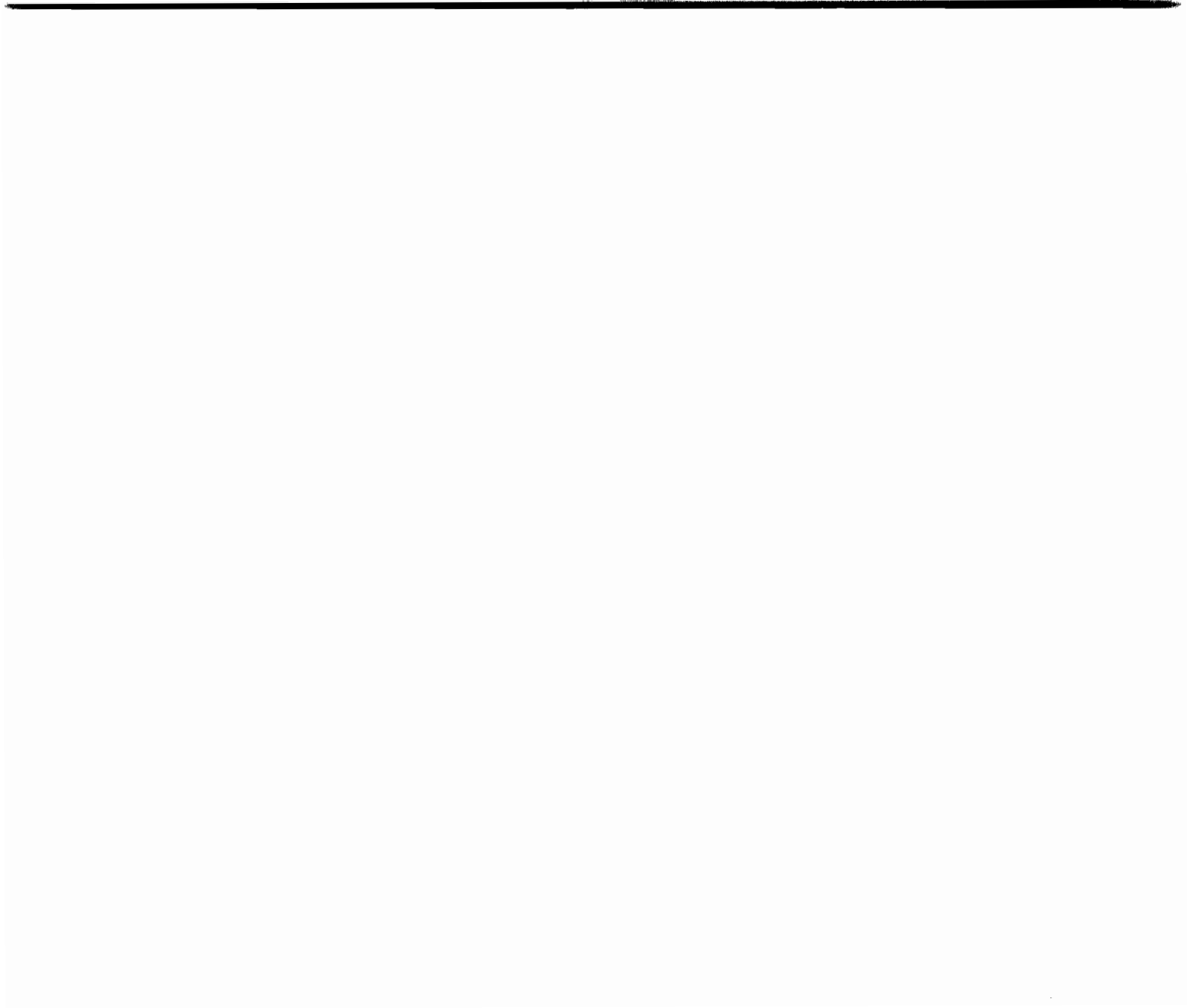
In addition, it is my understanding that a telegram was received by the full committee just prior to markup from the National Council of Juvenile and Family Court Judges, or a similar organization, asking for additional time for review. I did not see a copy of that communication but I was advised it exists.

I apologize for this lengthy dissent because basically I agree that some legislation is needed to give Indian tribes greater voice in the placement of Indian children. However, this bill goes way beyond what is needed by authorizing a whole new layer of Indian programs both on and off the reservations, payments to adoptive parents of adopted children, a certain impact on State courts, and the possible upsetting of boundaries for jurisdictional questions. For these and the other reasons outlined above I urge my colleagues to defeat this bill.

RON MARLENEE.

³ Approved by the National Council of State Public Welfare Administrators on June 7, 1978.

EXHIBIT B



DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Guidelines for State Courts; Indian Child Custody Proceedings

This notice is published in exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 DM 8.

There was published in the *Federal Register*, Vol. 44, No. 79/Monday, April 23, 1979 a notice entitled Recommended Guidelines for State Courts—Indian Child Custody Proceedings. This notice pertained directly to implementation of the Indian Child Welfare Act of 1978, Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. 1901 *et seq.* A subsequent *Federal Register* notice which invited public comment concerning the above was published on June 5, 1979. As a result of comments received, the recommended guidelines were revised and are provided below in final form.

Introduction

Although the rulemaking procedures of the Administrative Procedures Act have been followed in developing these guidelines, they are not published as regulations because they are not intended to have binding legislative effect. Many of these guidelines represent the interpretation of the Interior Department of certain provisions of the Act. Other guidelines provide procedures which, if followed, will help assure that rights guaranteed by the Act are protected when state courts decide Indian child custody matters. To the extent that the Department's interpretations of the Act are correct, contrary interpretations by the courts would be violations of the Act. If procedures different from those recommended in these guidelines are adopted by a state, their adequacy to protect rights guaranteed by the Act will have to be judged on their own merits.

Where Congress expressly delegates to the Secretary the primary responsibility for interpreting a statutory term, regulations interpreting that term have legislative effect. Courts are not free to set aside those regulations simply because they would have interpreted that statute in a different manner. Where, however, primary responsibility for interpreting a statutory term rests with the courts, administrative interpretations of statutory terms are given important but not controlling significance. *Batterton v. Francis*, 432 U.S. 416, 424-425 (1977).

In other words, when the Department writes rules needed to carry out

responsibilities Congress has explicitly imposed on the Department, those rules are binding. A violation of those rules is a violation of the law. When, however, the Department writes rules or guidelines advising some other agency how it should carry out responsibilities explicitly assigned to it by Congress, those rules or guidelines are not, by themselves, binding. Courts will take what this Department has to say into account in such instances, but they are free to act contrary to what the Department has said if they are convinced that the Department's guidelines are not required by the statute itself.

Portions of the Indian Child Welfare Act do expressly delegate to the Secretary of the Interior responsibility for interpreting statutory language. For example, under 25 U.S.C. 1918, the Secretary is directed to determine whether a plan for reassignment of jurisdiction is "feasible" as that term is used in the statute. This and other areas where primary responsibility for implementing portions of the Act rest with this Department, are covered in regulations promulgated on July 31, 1979, at 44 FR 45092.

Primary responsibility for interpreting other language used in the Act, however, rests with the courts that decide Indian child custody cases. For example, the legislative history of the Act states explicitly that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child. S. Rep. No. 95-597, 95th Cong., 1st Sess. 17 (1977). The Department's interpretation of statutory language of this type is published in these guidelines.

Some commenters asserted that Congressional delegation to this Department of authority to promulgate regulations with binding legislative effect with respect to all provisions of the Act is found at 25 U.S.C. 1952, which states, "Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." Promulgation of regulations with legislative effect with respect to most of the responsibilities of state or tribal courts under the Act, however, is not necessary to carry out the Act. State and tribal courts are fully capable of carrying out the responsibilities imposed on them by Congress without being under the direct supervision of this Department.

Nothing in the legislative history indicates that Congress intended this Department to exercise supervisory

control over state or tribal courts or to legislate for them with respect to Indian child custody matters. For Congress to assign to an administrative agency such supervisory control over courts would be an extraordinary step.

Nothing in the language or legislative history of 25 U.S.C. 1952 compels the conclusion that Congress intended to vest this Department with such extraordinary power. Both the language and the legislative history indicate that the purpose of that section was simply to assure that the Department moved promptly to promulgate regulations to carry out the responsibilities Congress had assigned it under the Act. Assignment of supervisory authority over the courts to an administrative agency is a measure so at odds with concepts of both federalism and separation of powers that it should not be imputed to Congress in the absence of an express declaration of Congressional intent to that effect.

Some commenters also recommended that the guidelines be published as regulations and that the decision of whether the law permits such regulations to be binding be left to the court. That approach has not been adopted because the Department has an obligation not to assert authority that it concludes it does not have.

Each section of the revised guidelines is accompanied by commentary explaining why the Department believes states should adopt that section and to provide some guidance where the guidelines themselves may need to be interpreted in the light of specific circumstances.

The original guidelines used the word "should" instead of "shall" in most provisions. The term "should" was used to communicate the fact that the guidelines were the Department's interpretations of the Act and were not intended to have binding legislative effect. Many commenters, however, interpreted the use of "should" as an attempt by this Department to make statutory requirements themselves optional. That was not the intent. If a state adopts those guidelines, they should be stated in mandatory terms. For that reason the word "shall" has replaced "should" in the revised guidelines. The status of these guidelines as interpretative rather than legislative in nature is adequately set out in the introduction.

In some instances a state may wish to establish rules that provide even greater protection for rights guaranteed by the Act than those suggested by these guidelines. These guidelines are not intended to discourage such action. Care should be taken, however, that the

provision of additional protections to some parties to a child custody proceeding does not deprive other parties of rights guaranteed to them by the Act.

In some instances the guidelines do little more than restate the statutory language. This is done in order to make the guidelines more complete so that they can be followed without the need to refer to the statute in every instance. Omission of any statutory language, of course, does not in any way affect the applicability of the statute.

A number of commenters recommended that special definitions of residence and domicile be included in the guidelines. Such definitions were not included because these terms are well defined under existing state law. There is no indication that these state law definitions tend to undermine in any way the purposes of the Act. Recommending special definitions for the purpose of this Act alone would simply provide unnecessary complications in the law.

A number of commenters recommended that the guidelines include recommendations for tribal-state agreements under 25 U.S.C. 1919. A number of other commenters, however, criticized the one provision in the original guidelines addressing that subject as tending to impose on such agreements restrictions that Congress did not intend should be imposed. Because of the wide variation in the situations and attitudes of states and tribes, it is difficult to deal with that issue in the context of guidelines. The Department is currently developing materials to aid states and tribes with such agreements. The Department hopes to have those materials available later this year. For these reasons, the provision in the original guidelines concerning tribal-state agreements has been deleted from the guidelines.

The Department has also received many requests for assistance from tribal courts in carrying out the new responsibilities resulting from the passage of this Act. The Department intends to provide additional guidance and assistance in that area also in the future. Providing guidance to state courts was given a higher priority because the Act imposes many more procedures on state courts than it does on tribal courts.

Many commenters have urged the Department to discuss the effect of the Act on the financial responsibilities of states and tribes to provide services to Indian children. Many such services are funded in large part by the Department of Health, Education, and Welfare. The policies and regulations of that

Department will have a significant impact on the issue of financial responsibility. Officials of Interior and HEW will be discussing this issue with each other. It is anticipated that more detailed guidance on questions of financial responsibility will be provided as a result of those consultations.

One commenter recommended that the Department establish a monitoring procedure to exercise its right under 25 U.S.C. 1915(e) to review state court placement records. HEW currently reviews state placement records on a systematic basis as part of its responsibilities with respect to statutes it administers. Interior Department officials are discussing with HEW officials the establishment of a procedure for collecting data to review compliance with the Indian Child Welfare Act.

Inquiries concerning these recommended guidelines may be directed to the nearest of the following regional and field offices of the Solicitor for the Interior Department:

- Office of the Regional Solicitor, Department of the Interior, 510 L Street, Suite 408, Anchorage, Alaska 99501, (907) 285-5301.
- Office of the Regional Solicitor, Department of the Interior, Richard B. Russell Federal Building, 75 Spring St., SW., Suite 1328, Atlanta, Georgia 30303, (404) 221-4447.
- Office of the Regional Solicitor, Department of the Interior, c/o U.S. Fish & Wildlife Service, Suite 308, 1 Gateway Center, Newton Corner, Massachusetts 02158, (617) 859-9258.
- Office of the Field Solicitor, Department of the Interior, 686 Federal Building, Fort Snelling, Twin Cities, Minnesota 55111, (612) 725-3540.
- Office of the Regional Solicitor, Department of the Interior, P.O. Box 25007, Denver Federal Center, Denver, Colorado 80225, (303) 234-3175.
- Office of the Field Solicitor, Department of the Interior, P.O. Box 548, Aberdeen, South Dakota 57401, (605) 225-7254.
- Office of the Field Solicitor, Department of the Interior, P.O. Box 1538, Billings, Montana 59103, (406) 245-6711.
- Office of the Regional Solicitor, Department of the Interior, Room E-2753, 2800 Cottage Way, Sacramento, California 95825, (916) 484-4331.
- Office of the Field Solicitor, Department of the Interior, Valley Bank Center, Suite 280, 201 North Central Avenue, Phoenix, Arizona 85073, (602) 261-4758.
- Office of the Field Solicitor, Department of the Interior, 3610 Central Avenue, Suite 104, Riverside, California 92506, (714) 787-1560.
- Office of the Field Solicitor, Department of the Interior, Window Rock, Arizona 86515, (602) 871-5151.
- Office of the Regional Solicitor, Department of the Interior, Room 3088, Page Belcher Federal Building, Tulsa, Oklahoma 74103, (916) 581-7501.

Office of the Field Solicitor, Department of the Interior, Room 7102, Federal Building & Courthouse, 500 Gold Avenue, S.W., Albuquerque, New Mexico 87101, (505) 766-2547.

Office of the Field Solicitor, Department of the Interior, P.O. Box 597, W.C.D. Office Building, Route 1, Anadarko, Oklahoma 73005, (405) 247-6673.

Office of the Field Solicitor, Department of the Interior, P.O. Box 1506, Room 319, Federal Building, 5th and Broadway, Muskogee, Oklahoma 74401, (918) 663-3111.

Office of the Field Solicitor, Department of the Interior, c/o Osage Agency, Grandview Avenue, Pawhuska, Oklahoma 74058, (918) 287-2431.

Office of the Regional Solicitor, Department of the Interior, Suite 8201, Federal Building, 125 South State Street, Salt Lake City, Utah 84138, (801) 624-5877.

Office of the Regional Solicitor, Department of the Interior, Lloyd 530 Building, Suite 607, 500 N.E. Multnomah Street, Portland, Oregon 97232, (503) 221-2125.

Guidelines for State Courts

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A. Policy

(1) Congress through the Indian Child Welfare Act has expressed its clear preference for keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children, and placing Indian children who must be removed from their homes within their own

families or Indian tribes. Proceedings in state courts involving the custody of Indian children shall follow strict procedures and meet stringent requirements to justify any result in an individual case contrary to these preferences. The Indian Child Welfare Act, the federal regulations implementing the Act, the recommended guidelines and any state statutes, regulations or rules promulgated to implement the Act shall be liberally construed in favor of a result that is consistent with these preferences. Any ambiguities in any of such statutes, regulations, rules or guidelines shall be resolved in favor of the result that is most consistent with these preferences.

(2) In any child custody proceeding where applicable state or other federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Indian Child Welfare Act, the state court shall apply the state or other federal law, provided that application of that law does not infringe any right accorded by the Indian Child Welfare Act to an Indian tribe or child.

A. Commentary

The purpose of this section is to apply to the Indian Child Welfare Act the canon of construction that remedial statutes are to be liberally construed to achieve their purpose. The three major purposes are derived from a reading to the Act itself. In order to fully implement the Congressional intent the rule shall be applied to all implementing rules and state legislation as well.

Subsection A.(2) applies to canon of statutory construction that specific language shall be given precedence over general language. Congress has given certain specific rights to tribes and Indian children. For example, the tribe has a right to intervene in involuntary custody proceedings. The child has a right to learn of tribal affiliation upon becoming 18 years old. Congress did not intend 25 U.S.C. 1921 to have the effect of eliminating those rights where a court concludes they are in derogation of a parental right provided under a state statute. Congress intended for this section to apply primarily in those instances where a state provides greater protection for a right accorded to parents under the Act. Examples of this include State laws which: impose a higher burden of proof than the Act for removing a child from a home, give the parents more time to prepare after receiving notice, require more effective notice, impose stricter emergency removal procedure requirements on those removing a child, give parents

greater access to documents, or contain additional safeguard to assure the voluntariness of consent.

B. Pretrial requirements

B.1. Determination That Child Is an Indian

(a) When a state court has reason to believe a child involved in a child custody proceeding is an Indian, the court shall seek verification of the child's status from either the Bureau of Indian Affairs or the child's tribe. In a voluntary placement proceeding where a consenting parent evidences a desire for anonymity, the court shall make its inquiry in a manner that will not cause the parent's identity to become publicly known.

(b)(i) The determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe is conclusive.

(ii) Absent a contrary determination by the tribe that is alleged to be the Indian child's tribe, a determination by the Bureau of Indian Affairs that a child is or is not an Indian child is conclusive.

(c) Circumstances under which a state court has reason to believe a child involved in a child custody proceeding is an Indian include but are not limited to the following:

(i) Any party to the case, Indian tribe, Indian organization or public or private agency informs the court that the child is an Indian child.

(ii) Any public or state-licensed agency involved in child protection services or family support has discovered information which suggests that the child is an Indian child.

(iii) The child who is the subject of the proceeding gives the court reason to believe he or she is an Indian child.

(iv) The residence or the domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community.

(v) An officer of the court involved in the proceeding has knowledge that the child may be an Indian child.

B.1. Commentary

This guideline makes clear that the best source of information on whether a particular child is Indian is the tribe itself. It is the tribe's prerogative to determine membership criteria and to decide who meets those criteria. *Cohen, Handbook of Federal Indian Law* 133 (1942). Because of the Bureau of Indian Affairs' long experience in determining who is an Indian for a variety of purposes, its determinations are also

entitled to great deference. See, e.g., *United States v. Sandoval*, 231, U.S. 28, 27 (1913).

Although tribal verification is preferred, a court may want to seek verification from the BIA in those voluntary placement cases where the parent has requested anonymity and the tribe does not have a system for keeping child custody matters confidential.

Under the Act confidentiality is given a much higher priority in voluntary proceedings than in involuntary ones. The Act mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones. Cf. 25 U.S.C. § 1912 with 25 U.S.C. § 1913. For voluntary placements,

however, the Act specifically directs state courts to respect parental requests for confidentiality. 25 U.S.C. § 1915(c) The most common voluntary placement involves a newborn infant.

Confidentiality has traditionally been a high priority in such placements. The Act reflects that traditional approach by requiring deference to requests for anonymity in voluntary placements but not in involuntary ones. This guideline specifically provides that anonymity not be compromised in seeking verification of Indian status. If anonymity were compromised at that point, the statutory requirement that requests for anonymity be respected in applying the preferences would be meaningless.

Enrollment is not always required in order to be a member of a tribe. Some tribes do not have written rolls. Others have rolls that list only persons that were members as of a certain date. Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative. *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979).

The guidelines also list several circumstances which shall trigger an inquiry by the court and petitioners to determine whether a child is an Indian for purposes of this Act. This listing is not intended to be complete, but it does list the most common circumstances giving rise to a reasonable belief that a child may be an Indian.

B.2. Determination of Indian Child's Tribe

(a) Where an Indian child is a member of more than one tribe or is eligible for membership in more than one tribe but is not a member of any of them, the court is called upon to determine with which tribe the child has more significant contacts.

(b) The court shall send the notice specified in recommended guideline B.4. to each such tribe. The notice shall

specify the other tribe or tribes that are being considered as the child's tribe and invite each tribe's views on which tribe shall be so designated.

(c) In determining which tribe shall be designated the Indian child's tribe, the court shall consider, among other things, the following factors:

- (i) length of residence on or near the reservation of each tribe and frequency of contacts with each tribe;
- (ii) child's participation in activities of each tribe;
- (iii) child's fluency in the language of each tribe;
- (iv) whether there has been a previous adjudication with respect to the child by a court of one of the tribes;
- (v) residence on or near one of the tribes' reservation by the child's relatives;
- (vi) tribal membership of custodial parent or Indian custodian;
- (vii) interest asserted by each tribe in response to the notice specified in subsection B.2.(b) of these guidelines; and
- (viii) the child's self identification.

(d) The court's determination together with the reasons for it shall be set out in a written document and made a part of the record of the proceeding. A copy of that document shall be sent to each party to the proceeding and to each person or governmental agency that received notice of the proceeding.

(e) If the child is a member of only one tribe, that tribe shall be designated the Indian child's tribe even though the child is eligible for membership in another tribe. If a child becomes a member of one tribe during or after the proceeding, that tribe shall be designated as the Indian child's tribe with respect to all subsequent actions related to the proceeding. If the child becomes a member of a tribe other than the one designated by the court as the Indian child's tribe, actions taken based on the court's determination prior to the child's becoming a tribal member continue to be valid.

B.2. Commentary

This guideline requires the court to notify all tribes that are potentially the Indian child's tribe so that each tribe may assert its claim to that status and the court may have the benefit of the views of each tribe. Notification of all the tribes is also necessary so the court can consider the comparative interest of each tribe in the child's welfare in making its decision. That factor has long been regarded an important consideration in making child custody decisions.

The significant factors listed in this section are based on recommendations

by tribal officials involved in child welfare matters. The Act itself and the legislative history make it clear that tribal rights are to be based on the existence of a political relationship between the family and the tribe. For that reason, the guidelines make actual tribal membership of the child conclusive on this issue.

The guidelines do provide, however, that previous decisions of a court made on its own determination of the Indian child's tribe are not invalidated simply because the child becomes a member of a different tribe. This provision is included because of the importance of stability and continuity to a child who has been placed outside the home by a court. If a child becomes a member before a placement is made or before a change of placement becomes necessary for other reasons, however, then that membership decision can be taken into account without harm to the child's need for stable relationships.

We have received several recommendations that "Indian child's tribe" status be accorded to all tribes in which a child is eligible for membership. The fact that Congress, in the definition of "Indian child's tribe," provided a criterion for determining which is the Indian child's tribe, is a clear indication of legislative intent that there be only one such tribe for each child. For purposes of transfer of jurisdiction, there obviously can be only one tribe to adjudicate the case. To give more than one tribe "Indian child's tribe" status for purposes of the placement preferences would dilute the preference accorded by Congress to the tribe with which the child has the more significant contacts.

A right of intervention could be accorded a tribe with which a child has less significant contacts without undermining the right of the other tribe. A state court can, if it wishes and state law permits, permit intervention by more than one tribe. It could also give a second tribe preference in placement after attempts to place a child with a member of the first tribe or in a home or institution designated by the first tribe had proved unsuccessful. So long as the special rights of the Indian child's tribe are respected, giving special status to the tribe with the less significant contacts is not prohibited by the Act and may, in many instances, be a good way to comply with the spirit of the Act.

Determinations of the Indian child's tribe for purposes of this Act shall not serve as any precedent for other situations. The standards in this statute and these guidelines are designed with child custody matters in mind. A different determination may be entirely appropriate in other legal contexts.

B.3. Determination That Placement Is Covered by the Act

(a) Although most juvenile delinquency proceedings are not covered by the Act, the Act does apply to status offenses, such as truancy and incorrigibility, which can only be committed by children, and to any juvenile delinquency proceeding that results in the termination of a parental relationship.

(b) Child custody disputes arising in the context of divorce or separation proceedings or similar domestic relations proceedings are not covered by the Act so long as custody is awarded to one of the parents.

(c) Voluntary placements which do not operate to prohibit the child's parent or Indian custodian from regaining custody of the child at any time are not covered by the Act. Where such placements are made pursuant to a written agreement, that agreement shall state explicitly the right of the parent or custodian to regain custody of the child upon demand.

B.3. Commentary

The purpose of this section is to deal with some of the questions the Department has been receiving concerning the coverage of the Act.

The entire legislative history makes it clear that the Act is directed primarily at attempts to place someone other than the parent or Indian custodian in charge of raising an Indian child—whether on a permanent or temporary basis. Although there is some overlap, juvenile delinquency proceedings are primarily designed for other purposes. Where the child is taken out of the home for committing a crime it is usually to protect society from further offenses by the child and to punish the child in order to persuade that child and others not to commit other offenses.

Placements based on status offenses (actions that are not a crime when committed by an adult), however, are usually premised on the conclusion that the present custodian of the child is not providing adequate care or supervision. To the extent that a status offense poses any immediate danger to society, it is usually also punishable as an offense which would be a crime if committed by an adult. For that reason status offenses are treated the same as dependency proceedings and are covered by the Act and these guidelines, while other juvenile delinquency placements are excluded.

While the Act excludes placements based on an act which would be a crime if committed by an adult, it does cover terminations of parental rights even

where they are based on an act which would be a crime if committed by an adult. Such terminations are not intended as punishment and do not prevent the child from committing further offenses. They are based on the conclusion that someone other than the present custodian of the child should be raising the child. Congress has concluded that courts shall make such judgments only on the basis of evidence that serious physical or emotional harm to the child is likely to result unless the child is removed.

The Act excludes from coverage an award of custody to one of the parents "in a divorce proceeding." If construed narrowly, this provision would leave custody awards resulting from proceedings between husband and wife for separate maintenance, but not for dissolution of the marriage bond within the coverage of the Act. Such a narrow interpretation would not be in accord with the intent of Congress. The legislative history indicates that the exemption for divorce proceedings, in part, was included in response to the views of this Department that the protections provided by this Act are not needed in proceedings between parents. In terms of the purposes of this Act, there is no reason to treat separate maintenance or similar domestic relations proceedings differently from divorce proceedings. For that reason the statutory term "divorce proceeding" is construed to include other domestic relations proceedings between spouses.

The Act also excludes from its coverage any placements that do not deprive the parents or Indian custodians of the right to regain custody of the child upon demand. Without this exception a court appearance would be required every time an Indian child left home to go to school. Court appearances would also be required for many informal caretaking arrangements that Indian parents and custodians sometimes make for their children. This statutory exemption is restated here in the hope that it will reduce the instances in which Indian parents are unnecessarily inconvenienced by being required to give consent in court to such informal arrangements.

Some private groups and some states enter into formal written agreements with parents for temporary custody (See e.g. Alaska Statutes § 47.10.230). The guidelines recommend that the parties to such agreements explicitly provide for return of the child upon demand if they do not wish the Act to apply to such placements. Inclusion of such a provision is advisable because courts frequently assume that when an

agreement is reduced to writing, the parties have only those rights specifically written into the agreement.

B.4. Determination of Jurisdiction

(a) In any Indian child custody proceeding in state court, the court shall determine the residence and domicile of the child. Except as provided in Section B.7. of these guidelines, if either the residence or domicile is on a reservation where the tribe exercises exclusive jurisdiction over child custody proceedings, the proceedings in state court shall be dismissed.

(b) If the Indian child has previously resided or been domiciled on the reservation, the state court shall contact the tribal court to determine whether the child is a ward of the tribal court. Except as provided in Section B.7. of these guidelines, if the child is a ward of a tribal court, the state court proceedings shall be dismissed.

B.4. Commentary

The purpose of this section is to remind the state court of the need to determine whether it has jurisdiction under the Act. The action is dismissed as soon as it is determined that the court lacks jurisdiction except in emergency situations. The procedures for emergency situations are set out in Section B.7.

B.5. Notice Requirements

(a) In any involuntary child custody proceeding, the state court shall make inquiries to determine if the child involved is a member of an Indian tribe or if a parent of the child is a member of an Indian tribe and the child is eligible for membership in an Indian tribe.

(b) In any involuntary Indian child custody proceeding, notice of the proceeding shall be sent to the parents and Indian custodians, if any, and to any tribes that may be the Indian child's tribe by registered mail with return receipt requested. The notice shall be written in clear and understandable language and include the following information:

- (i) The name of the Indian child.
- (ii) His or her tribal affiliation.
- (iii) A copy of the petition, complaint or other document by which the proceeding was initiated.
- (iv) The name of the petitioner and the name and address of the petitioner's attorney.

(v) A statement of the right of the biological parents or Indian custodians and the Indian child's tribe to intervene in the proceeding.

(vi) A statement that if the parents or Indian custodians are unable to afford

counsel, counsel will be appointed to represent them.

(vii) A statement of the right of the natural parents or Indian custodians and the Indian child's tribe to have, on request, twenty days (or such additional time as may be permitted under state law) to prepare for the proceedings.

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

(ix) A statement of the right of the parents or Indian custodians or the Indian child's tribe to petition the court to transfer the proceeding to the Indian child's tribal court.

(x) The potential legal consequences of an adjudication on future custodial rights of the parents or Indian custodians.

(xi) A statement in the notice to the tribe 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 right under the Act.

(c) The tribe, parents or Indian custodians receiving notice from the petitioner of the pendency of a child custody proceeding has the right, upon request, to be granted twenty days (or such additional time as may be permitted under state law) from the date upon which the notice was received to prepare for the proceeding.

(d) The original or a copy of each notice sent pursuant to this section shall be filed with the court together with any return receipts or other proof of service.

(e) Notice may be personally served on any person entitled to receive notice in lieu of mail service.

(f) If a parent or Indian custodian appears in court without an attorney, the court shall inform him or her of the right to appointed counsel, the right to request that the proceeding be transferred to tribal court or to object to such transfer, the right to request additional time to prepare for the proceeding and the right (if the parent or Indian custodian is not already a party) to intervene in the proceedings.

(g) If the court or a petitioning party has reason to believe that a parent or Indian custodian is not likely to understand the contents of the notice because of lack of adequate comprehension of written English, a copy of the notice shall be sent to the Bureau of Indian Affairs agency nearest to the residence of that person requesting that Bureau of Indian Affairs personnel arrange to have the notice explained to that person in the language that he or she best understands.

B.5. Commentary

This section recommends that state courts routinely inquire of participants in child custody proceedings whether the child is an Indian. If anyone asserts that the child is an Indian or that there is reason to believe the child may be an Indian, then the court shall contact the tribe or the Bureau of Indian Affairs for verification. Refer to sections B.1 and B.2 of these guidelines.

This section specifies the information to be contained in the notice. This information is necessary so the persons who receive notice will be able to exercise their rights in a timely manner. Subparagraph (xi) provides that tribes shall be requested to assist in maintaining the confidentiality of the proceeding. Confidentiality may be difficult to maintain—especially where small tribes are involved and the likelihood that the family involved is well known by tribal officials is great. Although Congress was concerned with confidentiality, it concluded that the interest of tribes in the welfare of their children justified taking some risks with confidentiality—especially in involuntary proceedings. It is reasonable, however, to ask tribal officials to maintain as much confidentiality as possible consistent with the exercise of tribal rights under the Act.

The time limits are minimum ones required by the Act. In many instances, more time may be available under state court procedures or because of the circumstances of the particular case.

In such instances, the notice shall state that additional time is available.

The Act requires notice to the parent or Indian custodian. At a minimum, parents must be notified if termination of parental rights is a potential outcome since it is their relationship to the child that is at stake. Similarly, the Indian custodians must be notified of any action that could lead to the custodians' losing custody of the child. Even where only custody is an issue, noncustodial parents clearly have a legitimate interest in the matter. Although notice to both parents and Indian custodians may not be required in all instances by the Act or the Fourteenth Amendment to the U.S. Constitution, providing notice to both is in keeping with the spirit of the Act. For that reason, these guidelines recommend notice be sent to both.

Subsection (d) requires filing the notice with the court so there will be a complete record of efforts to comply with the Act.

Subsection (e) authorizes personal services since it is superior to mail services and provides greater protection

or rights as authorized by 25 U.S.C. 1921. Since serving the notice does not involve any assertion of jurisdiction over the person served, personal notice may be served without regard to state or reservation boundaries.

Subsections (f) and (g) provide procedures to increase the likelihood that rights are understood by parents and Indian custodians.

B.6. Time Limits and Extensions

(a) A tribe, parent or Indian custodian entitled to notice of the pendency of a child custody proceeding has a right, upon request, to be granted an additional twenty days from the date upon which notice was received to prepare for participation in the proceeding.

(b) The proceeding may not begin until all of the following dates have passed:

(i) ten days after the parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice;

(ii) ten days after the Indian child's tribe (or the Secretary if the Indian child's tribe is unknown to the petitioner) has received notice;

(iii) thirty days after the parent or Indian custodian has received notice if the parent or Indian custodian has requested an additional twenty days to prepare for the proceeding; and

(iv) thirty days after the Indian child's tribe has received notice if the Indian child's tribe has requested an additional twenty days to prepare for the proceeding.

(c) The time limits listed in this section are the minimum time periods required by the Act. The court may grant more more time to prepare where state law permits.

B.6. Commentary

This section attempts to clarify the waiting periods required by the Act after notice has been received of an involuntary Indian child custody proceeding. Two independent rights are involved—the right of the parents or Indian custodians and the right of the Indian child's tribe. The proceeding may not begin until the waiting periods to which both are entitled have passed.

This section also makes clear that additional extensions of time may be granted beyond the minimum required by the Act.

B.7. Emergency Removal of an Indian Child

(a) Whenever an Indian child is removed from the physical custody of the child's parents or Indian custodians pursuant to the emergency removal or

custody provisions of state law, the agency responsible for the removal action shall immediately cause an inquiry to be made as to the residence and domicile of the child.

(b) When a court order authorizing continued emergency physical custody is sought, the petition for that order shall be accompanied by an affidavit containing the following information:

(i) The name, age and last known address of the Indian child.

(ii) The name and address of the child's parents and Indian custodians, if any. If such persons are unknown, a detailed explanation of what efforts have been made to locate them shall be included.

(iii) Facts necessary to determine the residence and the domicile of the Indian child and whether either the residence or domicile is on an Indian reservation. If either the residence or domicile is believed to be on an Indian reservation, the name of the reservation shall be stated.

(iv) The tribal affiliation of the child and of the parents and/or Indian custodians.

(v) A specific and detailed account of the circumstances that lead the agency responsible for the emergency removal of the child to take that action.

(vi) If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, a statement of efforts that have been made and are being made to transfer the child to the tribe's jurisdiction.

(vii) A statement of the specific actions that have been taken to assist the parents or Indian custodians so the child may safely be returned to their custody.

(c) If the Indian child is not restored to the parents or Indian custodians or jurisdiction is not transferred to the tribe, the agency responsible for the child's removal must promptly commence a state court proceeding for foster care placement. If the child resides or is domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, such placement must terminate as soon as the imminent physical damage or harm to the child which resulted in the emergency removal no longer exists or as soon as the tribe exercises jurisdiction over the case—whichever is earlier.

(d) Absent extraordinary circumstances, temporary emergency custody shall not be continued for more than 90 days without a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness.

that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

B.7. Commentary

Since jurisdiction under the Act is based on domicile and residence rather than simple physical presence, there may be instances in which action must be taken with respect to a child who is physically located off a reservation but is subject to exclusive tribal jurisdiction. In such instances the tribe will usually not be able to take swift action to exercise its jurisdiction. For that reason Congress authorized states to take temporary emergency action.

Since emergency action must be taken without the careful advance deliberation normally required, procedures must be established to assure that the emergency actions are quickly subjected to review. This section provides procedures for prompt review of such emergency actions. It presumes the state already has such review procedures and only prescribes additional procedures that shall be followed in cases involving Indian children.

The legislative history clearly states that placements under such emergency procedures are to be as short as possible. If the emergency ends, the placement shall end. State action shall also end as soon as the tribe is ready to take over the case.

Subsection (d) refers primarily to the period between when the petition is filed and when the trial court renders its decision. The Act requires that, except for emergencies, Indian children are not to be removed from their parents unless a court finds clear and convincing evidence that the child would be in serious danger unless removed from the home. Unless there is some kind of time limit on the length of an "emergency removal" (that is, any removal not made pursuant to a finding by the court that there is clear and convincing evidence that continued parental custody would make serious physical or emotional harm likely), the safeguards of the Act could be evaded by use of long-term emergency removals.

Subsection (d) recommends what is, in effect, a speedy trial requirement. The court shall be required to comply with the requirements of the Act and reach a decision within 90 days unless there are "extraordinary circumstances" that make additional delay unavoidable.

B.8. Improper Removal From Custody

(a) If, in the course of any Indian child custody proceeding, the court has reason to believe that the child who is the subject of the proceeding may have

been improperly removed from the custody of his or her parent or Indian custodian or that the child has been improperly retained after a visit or other temporary relinquishment of custody, and that the petitioner is responsible for such removal or retention, the court shall immediately stay the proceedings until a determination can be made on the question of improper removal or retention.

(b) If the court finds that the petitioner is responsible for an improper removal or retention, the child shall be immediately returned to his or her parents or Indian custodian.

B.8. Commentary

This section is designed to implement 25 U.S.C. § 1920. Since a finding of improper removal goes to the jurisdiction of the court to hear the case at all, this section provides that the court will decide the issue as soon as it arises before proceeding further on the merits.

C. Requests for Transfer to Tribal Court

C.1. Petitions under 25 U.S.C. § 1911(b) for transfer of proceeding

Either parent, the Indian custodian or the Indian child's tribe may, orally or in writing, request the court to transfer the Indian child custody proceeding to the tribal court of the child's tribe. The request shall be made promptly after receiving notice of the proceeding. If the request is made orally it shall be reduced to writing by the court and made a part of the record.

C.1. Commentary

Reference is made to 25 U.S.C. 1911(b) in the title of this section in order to clarify that this section deals only with transfers where the child is not domiciled or residing on an Indian reservation.

So that transfers can occur as quickly and simply as possible, requests can be made orally.

This section specifies that requests are to be made promptly after receiving notice of the proceeding. This is a modification of the timeliness requirement that appears in the earlier version of the guidelines. Although the statute permits proceedings to be commenced even before actual notice is received by parties entitled to notice, those parties do not lose their right to request a transfer simply because neither the petitioner nor the Secretary was able to locate them earlier.

Permitting late transfer requests by persons and tribes who were notified late may cause some disruption. It will also, however, provide an incentive to

the petitioners to make a diligent effort to give notice promptly in order to avoid such disruptions.

The Department received a number of comments objecting to any timeliness requirement at all. Commenters pointed out that the statute does not explicitly require transfer requests to be timely. Some commenters argued that imposing such a requirement violated tribal and parental rights to intervene at any point in the proceedings under 25 U.S.C. § 1911(c) of the Act.

While the Act permits intervention at any point in the proceeding, it does not explicitly authorize transfer requests at any time. Late interventions do not have nearly the disruptive effect on the proceeding that last minute transfers do. A case that is almost completed does not need to be retried when intervention is permitted. The problems resulting from late intervention are primarily those of the intervenor, who has lost the opportunity to influence the portion of the proceedings that was completed prior to intervention.

Although the Act does not explicitly require transfer petitions to be timely, it does authorize the court to refuse to transfer a case for good cause. When a party who could have petitioned earlier waits until the case is almost complete to ask that it be transferred to another court and retried, good cause exists to deny the request.

Timeliness is a proven weapon of the courts against disruption caused by negligence or obstructionist tactics on the part of counsel. If a transfer petition must be honored at any point before judgment, a party could wait to see how the trial is going in state court and then obtain another trial if it appears the other side will win. Delaying a transfer request could be used as a tactic to wear down the other side by requiring the case to be tried twice. The Act was not intended to authorize such tactics and the "good cause" provision is ample authority for the court to prevent them.

C.2. Criteria and Procedures for Ruling on 25 U.S.C. § 1911(b) Transfer Petitions

(a) Upon receipt of a petition to transfer by a parent, Indian custodian or the Indian child's tribe, the court must transfer unless either parent objects to such transfer, the tribal court declines jurisdiction, or the court determines that good cause to the contrary exists for denying the transfer.

(b) If the court believes or any party asserts that good cause to the contrary exists, the reasons for such belief or assertion shall be stated in writing and made available to the parties who are petitioning for transfer. The petitioners shall have the opportunity to provide the

court with their views on whether or not good cause to deny transfer exists. C.2. Commentary

Subsection (a) simply states the rule provided in 25 U.S.C. § 1911(b).

Since the Act gives the parents and the tribal court of the Indian child's tribe an absolute veto over transfers, there is no need for any adversary proceedings if the parents or the tribal court opposes transfer. Where it is proposed to deny transfer on the grounds of "good cause," however, all parties need an opportunity to present their views to the court.

C.3. Determination of Good Cause to the Contrary

(a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.

(b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:

(i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.

(ii) The Indian child is over twelve years of age and objects to the transfer.

(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

(c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

(d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer.

C.3. Commentary

All five criteria that were listed in the earlier version of the guidelines were highly controversial. Comments on the first two criteria were almost unanimously negative. The first criterion was whether the parents were still living. The second was whether an Indian custodian or guardian for the child had been appointed. These criteria were criticized as irrelevant and arbitrary. It was argued that children who are orphans or have no appointed Indian custodian or guardian are no more nor less in need of the Act's protections than other children. It was also pointed out that these criteria are

contrary to the decision in *Wisconsin Potawatomes of the Hannahville Indian Community v. Houston*, 397 F. Supp. 719 (W.D. Mich 1973), which was explicitly endorsed by the committee that drafted that Act. The court in that case found that tribal jurisdiction existed even though the children involved were orphans for whom no guardian had been appointed.

Although there was some support for the third and fourth criteria, the preponderance of the comment concerning them was critical. The third criteria was whether the child had little or no contact with his or her Indian tribe for a significant period of time. The fourth was whether the child had ever resided on the reservation for a significant period of time. These criteria were criticized, in part, because they would virtually exclude from transfers infants who were born off the reservation. Many argued that the tribe has a legitimate interest in the welfare of members who have not had significant previous contact with the tribe or the reservation. Some also argued that these criteria invited the state courts to be making the kind of cultural decisions that the Act contemplated should be made by tribes. Some argued that the use of vague words in these criteria accorded state courts too much discretion.

The fifth criteria was whether a child over the age of twelve objected to the transfer. Comment on this criteria was much more evenly divided and many of the critics were ambivalent. They worried that young teenagers could be too easily influenced by the judge or by social workers. They also argued that fear of the unknown would cause many teenagers to make an ill-considered decision against transfer.

The first four criteria in the earlier version were all directed toward the question of whether the child's connections with the reservation were so tenuous that transfer back to the tribe is not advised. The circumstances under which it may be proper for the state court to take such considerations into account are set out in the revised subsection (iv).

It is recommended that in most cases state court judges not be called upon to determine whether or not a child's contacts with a reservation are so limited that a case should not be transferred. This may be a valid consideration since the shock of changing cultures may, in some cases, be harmful to the child. This determination, however, can be made by the parent, who has a veto over transfer to tribal court.

This reasoning does not apply, however, where there is no parent available to make that decision. The guidelines recommend that state courts be authorized to make such determinations only in those cases where there is no parent available to make it.

State court authority to make such decisions is limited to those cases where the child is over five years of age. Most children younger than five years can be expected to adjust more readily to a change in cultural environment.

The fifth criterion has been retained. It is true that teenagers may make some unwise decisions, but it is also true that their judgment has developed to the extent that their views ought to be taken into account in making decisions about their lives.

The existence of a tribal court is made an absolute requirement for transfer of a case. Clearly, the absence of a tribal court is good cause not to ask the tribe to try the case.

Consideration of whether or not the case can be properly tried in tribal court without hardship to the parties or witnesses was included on the strength of the section-by-section analysis in the House Report on the Act, which stated with respect to the § 1911(b), "The subsection is intended to permit a State court to apply to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected." Where a child is in fact living in a dangerous situation, he or she should not be forced to remain there simply because the witnesses cannot afford to travel long distances to court.

Application of this criterion will tend to limit transfers to cases involving Indian children who do not live very far from the reservation. This problem may be alleviated in some instances by having the court come to the witnesses. The Department is aware of one case under that Act where transfer was conditioned on having the tribal court meet in the city where the family lived. Some cities have substantial populations of members of tribes from distant reservations. In such situations some tribes may wish to appoint members who live in those cities as tribal judges.

The timeliness of the petition for transfer, discussed at length in the commentary to section C.1, is listed as a factor to be considered. Inclusion of this criterion is designed to encourage the prompt exercise of the right to petition for transfer in order to avoid unnecessary delays. Long periods of uncertainty concerning the future are

generally regarded as harmful to the well-being of children. For that reason, it is especially important to avoid unnecessary delays in child custody proceedings.

Almost all commenters favored retention of the paragraph stating that reservation socio-economic conditions and the perceived adequacy of tribal institutions are not to be taken into account in making good cause determinations. Some commenters did suggest, however, that a case not be transferred if it is clear that a particular disposition of the case that could only be made by the state court held especially great promise of benefiting the child.

Such considerations are important but they have not been listed because the Department believes such judgments are best made by tribal courts. Parties who believe that state court adjudication would be better for such reasons can present their reasons to the tribal court and urge it to decline jurisdiction. The Department is aware of one case under the Act where this approach is being used and believes it is more in keeping with the confidence Congress has expressed in tribal courts.

Since Congress has established a policy of preferring tribal control over custody decisions affecting tribal members, the burden of proving that an exception to that policy ought to be made in a particular case rests on the party urging that an exception be made. This rule is reflected in subsection (d).

C.4. Tribal Court Declination of Transfer

(a) A tribal court to which transfer is requested may decline to accept such transfer.

(b) Upon receipt of a transfer petition the state court shall notify the tribal court in writing of the proposed transfer. The notice shall state how long the tribal court has to make its decision. The tribal court shall have at least twenty days from the receipt of notice of a proposed transfer to decide whether to decline the transfer. The tribal court may inform the state court of its decision to decline either orally or in writing.

(c) Parties shall file with the tribal court any arguments they wish to make either for or against tribal declination of transfer. Such arguments shall be made orally in open court or in written pleadings that are served on all other parties.

(d) If the case is transferred the state court shall provide the tribal court with all available information on the case.

C.4. Commentary

The previous version of this section provided that the state court should presume the tribal court has declined to accept jurisdiction unless it hears otherwise. The comments on this issue were divided. This section has been revised to require the tribal court to decline the transfer affirmatively if it does not wish to take the case. This approach is in keeping with the apparent intent of Congress. The language in the Act providing that transfers are "subject to declination by the tribal court" indicates that affirmative action by the tribal court is required to decline a transfer.

The recommended time limit for a decision has been extended from ten to twenty days. The additional time is needed for the court to become apprised of factors it may want to consider in determining whether or not to decline the transfer.

A new paragraph has been added recommending that the parties assist the tribal court in making its decision on declination by giving the tribal court their views on the matter.

Transfers ought to be arranged as simply as possible consistent with due process. Transfer procedures are a good subject for tribal-state agreements under 25 U.S.C. § 1919.

D. Adjudication of Involuntary Placements, Adoptions, or Terminations or Terminations of Parental Rights

D.1. Access to Reports

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child has 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. No decision of the court shall be based on any report or other document not filed with the court.

D.1. Commentary

The first sentence merely restates the statutory language verbatim. The second sentence makes explicit the implicit assumption of Congress—that the court will limit its considerations to those documents and reports that have been filed with the court.

D.2. Efforts To Alleviate Need To Remove Child From Parents or Indian Custodians

Any party petitioning a state court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to the commencement of the proceeding active efforts have been made to alleviate the

need to remove the Indian child from his or her parents or Indian custodians. These efforts shall take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers.

D.2. Commentary

This section elaborates on the meaning of "breakup of the Indian family" as used in the Act. "Family breakup" is sometimes used as a synonym for divorce. In the context of this statute, however, it is clear that Congress meant a situation in which the family is unable or unwilling to raise the child in a manner that is not likely to endanger the child's emotional or physical health.

This section also recommends that the petitioner take into account the culture of the Indian child's tribe and use the resources of the child's extended family and tribe in attempting to help the family function successfully as a home for the child. The term "individual Indian care givers" refers to medicine men and other individual tribal members who may have developed special skills that can be used to help the child's family succeed.

One commenter recommended that detailed procedures and criteria be established in order to determine whether family support efforts had been adequate. Establishing such procedures and requirements would involve the court in second-guessing the professional judgment of social service agencies. The Act does not contemplate such a role for the courts and they generally lack the expertise to make such judgments.

D.3. Standards of Evidence

(a) The court may not issue an order effecting a foster care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody with the child's parents or Indian custodian is likely to result in serious emotional or physical damage to the child.

(b) The court may not order a termination of parental rights unless the court's order is supported by evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(c) Evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or non-conforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child. To be clear and convincing, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding. The evidence must show the causal relationship between the conditions that exist and the damage that is likely to result.

D.3. Commentary

The first two paragraphs are essentially restatement of the statutory language. By imposing these standards, Congress has changed the rules of law of many states with respect to the placement of Indian children. A child may not be removed simply because there is someone else willing to raise the child who is likely to do a better job or that it would be "in the best interests of the child" for him or her to live with someone else. Neither can a placement or termination of parental rights be ordered simply based on a determination that the parents or custodians are "unfit parents." It must be shown that it is shown that it is dangerous for the child to remain with his or her present custodians. Evidence of that must be "clear and convincing" for placements and "beyond a reasonable doubt" for terminations.

The legislative history of the Act makes it pervasively clear that Congress attributes many unwarranted removals of Indian children to cultural bias on the part of the courts and social workers making the decisions. In many cases children were removed merely because the family did not conform to the decision-maker's stereotype of what a proper family should be—without any testing of the implicit assumption that only a family that conformed to that stereotype could successfully raise children. Subsection (c) makes it clear that mere non-conformance with such stereotypes or the existence of other behavior or conditions that are considered bad does not justify a placement or termination under the standards imposed by Congress. The focus must be on whether the particular conditions are likely to cause serious damage.

D.4. Qualified Expert Witnesses

(a) Removal of an Indian child from his or her family must be based on

competent testimony from one or more experts qualified to speak specifically to the issue of whether continued custody by the parents or Indian custodians is likely to result in serious physical or emotional damage to the child.

(b) Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:

(i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.

(ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

(iii) A professional person having substantial education and experience in the area of his or her specialty.

(c) The court or any party may request the assistance of the Indian child's tribe or the Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.

D.4 Commentary

The first subsection is intended to point out that the issue on which qualified expert testimony is required is the question of whether or not serious damage to the child is likely to occur if the child is not removed. Basically two questions are involved. First, is it likely that the conduct of the parents will result in serious physical or emotional harm to the child? Second, if such conduct will likely cause such harm, can the parents be persuaded to modify their conduct?

The party presenting an expert witness must demonstrate that the witness is qualified by reason of educational background and prior experience to make judgments on those questions that are substantially more reliable than judgments that would be made by nonexperts.

The second subsection makes clear that knowledge of tribal culture and childrearing practices will frequently be very valuable to the court. Determining the likelihood of future harm frequently involves predicting future behavior—which is influenced to a large degree by culture. Specific behavior patterns will often need to be placed in the context of the total culture to determine whether they are likely to cause serious emotional harm.

Indian tribes and Bureau of Indian Affairs personnel frequently know persons who are knowledgeable

concerning the customs and cultures of the tribes they serve. Their assistance is available in helping to locate such witnesses.

E. Voluntary Proceedings

E.1. Execution of Consent

To be valid, consent to a voluntary termination of parental rights or adoption must be executed in writing and recorded before a judge or magistrate of a court of competent jurisdiction. A certificate of the court must accompany any consent and must certify that the terms and consequences of the consent were explained in detail and in the language of the parent or Indian custodian, if English is not the primary language, and were fully understood by the parent or Indian custodian. Execution of consent need not be in open court where confidentiality is requested or indicated.

E.1. Commentary

This section provides that consent may be executed before either a judge or magistrate. The addition of magistrates was made in response to a suggestion from Alaska where magistrates are found in most small communities but "judges" are more widely scattered. The term "judge" as used in the statute is not a term of art and can certainly be construed to include judicial officers who are called magistrates in some states. The statement that consent need not be in open court where confidentiality is desired or indicated was taken directly from the House Report on the Act. A recommendation that the guideline list the consequences of consent that must be described to the parent or custodian has not been adopted because the consequences can vary widely depending on the nature of the proceeding, state law and the particular facts of individual cases.

E.2. Content of Consent Document

(a) The consent document shall contain the name and birthdate of the Indian child, the name of the Indian child's tribe, any identifying number or other indication of the child's membership in the tribe, if any, and the name and address of the consenting parent or Indian custodian.

(b) A consent to foster care placement shall contain, in addition to the information specified in (a), the name and address of the person or entity by or through whom the placement was arranged, if any, or the name and address of the prospective foster parents, if known at the time.

(c) A consent to termination of parental rights or adoption shall contain,

in addition to the information specified in (a), the name and address of the person or entity by or through whom any preadoptive or adoptive placement has been or is to be arranged.

E.2. Commentary

This section specifies the basic information about the placement or termination to which the parent or Indian custodian is consenting to assure that consent is knowing and also to document what took place.

E.3. Withdrawal of Consent to Placement

Where a parent or Indian custodian has consented to a foster care placement under state law, such consent may be withdrawn at any time by filing in the court where consent was executed and filed, an instrument executed by the parent or Indian custodian. When a parent or Indian custodian withdraws consent to foster care placement, the child shall as soon as is practicable be returned to that parent or Indian custodian.

E.3. Commentary

This section specifies that withdrawal of consent shall be filed in the same court where the consent document itself was executed.

E.4. Withdrawal of Consent to Adoption

A consent to termination of parental rights or adoption may be withdrawn by the parent at any time prior to entry of a final decree of voluntary termination or adoption by filing in the court where the consent is filed an instrument executed under oath by the parent stipulating his or her intention to withdraw such consent. The clerk of the court where the withdrawal of consent is filed shall promptly notify the party by or through whom any preadoptive or adoptive placement has been arranged of such filing and that party shall insure the return of the child to the parent as soon as practicable.

E.4. Commentary

This provision recommends that the clerk of the court be responsible for notifying the family with whom the child has been placed that consent has been withdrawn. The court's involvement frequently may be necessary since the biological parents are often not told who the adoptive parents are.

F. Dispositions

F.1. Adoptive Placements

(a) In any adoptive placement of an Indian child under state law preference must be given (in the order listed below)

absent good cause to the contrary, to placement of the child with:

(i) A member of the child's extended family;

(ii) Other members of the Indian child's tribe; or

(iii) Other Indian families, including families of single parents.

(b) The Indian child's tribe may establish a different order of preference by resolution. That order of preference must be followed so long as placement is the least restrictive setting appropriate to the child's needs.

(c) Unless a consenting parent evidences a desire for anonymity, the court or agency shall notify the child's extended family and the Indian child's tribe that their members will be given preference in the adoption decision.

F.1. Commentary

This section makes clear that preference shall be given in the order listed in the Act. The Act clearly recognizes the role of the child's extended family in helping to raise children. The extended family should be looked to first when it becomes necessary to remove the child from the custody of his or her parents. Because of differences in cultures among tribes, placement within the same tribe is preferable.

This section also provides that single parent families shall be considered for placements. The legislative history of the Act makes it clear that Congress intended custody decisions to be made based on a consideration of the present or potential custodian's ability to provide the necessary care, supervision and support for the child rather than on preconceived notions of proper family composition.

The third subsection recommends that the court or agent make an active effort to find out if there are families entitled to preference who would be willing to adopt the child. This provision recognizes, however, that the consenting parent's request for anonymity takes precedence over efforts to find a home consistent with the Act's priorities.

F.2. Foster Care or Preadoptive Placements

In any foster care or preadoptive placement of an Indian child:

(a) The child must be placed in the least restrictive setting which

(i) most approximates a family;

(ii) in which his or her special needs may be met; and

(iii) which is in reasonable proximity to his or her home.

(b) Preference must be given in the following order, absent good cause to the contrary, to 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, whether on or off the reservation;

(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 child's needs.

(c) The Indian child's tribe may establish a different order of preference by resolution, and that order of preference shall be followed so long as the criteria enumerated in subsection (a) are met.

F.2. Commentary

This guideline simply restates the provisions of the Act.

F.3. Good Cause To Modify Preferences

(a) For purposes of foster care, preadoptive or adoptive placement, a determination of good cause not to follow the order of preference set out above shall be based on one or more of the following considerations:

(i) The request of the biological parents or the child when the child is of sufficient age.

(ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.

(iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.

(b) The burden of establishing the existence of good cause not to follow the order of preferences established in subsection (b) shall be on the party urging that the preferences not be followed.

F.3. Commentary

The Act indicates that the court is to give preference to confidentiality requests by parents in making placements. Paragraph (i) is intended to permit parents to ask that the order of preference not be followed because it would prejudice confidentiality or for other reasons. The wishes of an older child are important in making an effective placement.

In a few cases a child may need highly specialized treatment services that are unavailable in the community where the families who meet the preference criteria live. Paragraph (ii) recommends that such considerations be considered as good cause to the contrary.

Paragraph (iii) recommends that a diligent attempt to find a suitable family meeting the preference criteria be made before consideration of a non-preference placement be considered. A diligent attempt to find a suitable family includes at a minimum, contact with the child's tribal social service program, a search of all county or state listings of available Indian homes and contact with nationally known Indian programs with available placement resources.

Since Congress has established a clear preference for placements within the tribal culture, it is recommended in subsection (b) that the party urging an exception be made be required to bear the burden of proving and exception is necessary.

G. Post-Trial Rights

G.1. Petition To Vacate Adoption

(a) Within two years after a final decree of adoption of any Indian child by a state court, or within any longer period of time permitted by the law of the state, a parent who executed a consent to termination of parental rights or adoption of that child may petition the court in which the final adoption decree was entered to vacate the decree and revoke the consent on the grounds that such consent was obtained by fraud or duress.

(b) Upon the filing of such petition, the court shall give notice to all parties to the adoption proceedings and shall proceed to hold a hearing on the petition. Where the court finds that the parent's consent was obtained through fraud or duress, it must vacate the decree of adoption and order the consent revoked and order the child returned to the parent.

G.1. Commentary

This section recommends that the petition to vacate an adoption be brought in the same court in which the decree was entered, since that court clearly has jurisdiction, and witnesses on the issue of fraud or duress are most likely to be within its jurisdiction.

G.2. Adult Adoptee Rights

(a) Upon application by an Indian individual who has reached age 18 who was the subject of an adoptive placement, the court which entered the final decree must inform such individual of the tribal affiliations, if any of the individual's biological parents and provide such other information necessary to protect any rights flowing from the individual's tribal relationship.

(b) The section applies regardless of whether or not the original adoption was subject to the provisions of the Act.

(c) Where state law prohibits revelation of the identity of the biological parent, assistance of the Bureau of Indian Affairs shall be sought where necessary to help an adoptee who is eligible for membership in a tribe establish that right without breaching the confidentiality of the record.

G.2. Commentary

Subsection (b) makes clear that adoptions completed prior to May 7, 1979, are covered by this provision. The Act states that most portions of Title I do not "affect a proceeding under State law" initiated or completed prior to May 7, 1979. Providing information to an adult adoptee, however, cannot be said to affect the proceeding by which the adoption was ordered.

The legislative history of the Act makes it clear that this Act was not intended to supersede the decision of state legislatures on whether adult adoptees may be told the names of their biological parents. The intent is simply to assure the protection of rights deriving from tribal membership. Where a state law prohibits disclosure of the identity of the biological parents, tribal rights can be protected by asking the BIA to check confidentially whether the adult adoptee meets the requirements for membership in an Indian tribe. If the adoptee does meet those requirements, the BIA can certify that fact to the appropriate tribe.

G.3. Notice of Change in Child's Status

(a) Whenever a final decree of adoption of an Indian child has been vacated or set aside, or the adoptive parent has voluntarily consented to the termination of his or her parental rights to the child, or whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive placement, or adoptive placement, notice by the court or an agency authorized by the court shall be given to the child's biological parents or prior Indian custodians. Such notice shall inform the recipient of his or her right to petition for return of custody of the child.

(b) A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice filed with the court. Such waiver may be revoked at any time by filing with the court a written notice of revocation, but such revocation would not affect any proceeding which occurred before the filing of the notice of revocation.

G.3. Commentary

This section provides guidelines to aid courts in applying the provisions of Section 106 of the Act. Section 106 gives

legal standing to a biological parent or prior Indian custodian to petition for return of a child in cases of failed adoptions or changes in placement in situations where there has been a termination of parental rights. Section 106(b) provides that whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive placement, or adoptive placement, such placement is to be in accordance with the provisions of the Act—which requires notice to the biological parents.

The Act is silent on the question of whether a parent or Indian custodian can waive the right to further notice. Obviously, there will be cases in which the biological parents will prefer not to receive notice once their parental rights have been relinquished or terminated. This section provides for such waivers but, because the Act establishes an absolute right to participate in any future proceedings and to petition the court for return of the child, the waiver is revocable.

G.4. Maintenance of Records

The state shall establish a single location where all records of every foster care, preadoptive placement and adoptive placement of Indian children by courts of that state will be available within seven days of a request by an Indian child's tribe or the Secretary. The records shall contain, at a minimum, the petition or complaint, all substantive orders entered in the proceeding, and the complete record of the placement determination.

G.4. Commentary

This section of the guidelines provides a procedure for implementing the provisions of 25 U.S.C. § 1915(e). This section has been modified from the previous version which required that all records be maintained in a single location within the state. As revised this section provides only that the records be retrievable by a single office that would make them available to the requester within seven days of a request. For some states (especially Alaska) centralization of the records themselves would create major administrative burdens. So long as the records can be promptly made available at a single location, the intent of this section that the records be readily available will be satisfied.

Forrest J. Gerard,
Assistant Secretary, Indian Affairs,
November 16, 1979.

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **PEOPLE v. IN RE W. B., a minor**

No.: **S181638**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On December 17, 2010, I served the attached **RESPONDENT'S MOTION FOR JUDICIAL NOTICE** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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[2 copies]

Hon. Rod Pacheco
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Hon. Christian F. Thierbach
c/o Clerk of the Court
Juvenile Court
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Riverside, CA 92501-3526

Court of Appeal
Fourth Appellate District
Division Two
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and furthermore declare, I electronically served a copy of the above document from the Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on December 17, 2010, to Appellate Defender's, Inc's electronic notification address, eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 17, 2010, at San Diego, California.

Olivia de la Cruz

Declarant

Olivia de la Cruz

Signature



