STATE OF MAINE
122nd LEGISLATURE
SECOND REGULAR SESSION

Final Report of the COMMITTEE TO STUDY STATE COMPLIANCE WITH THE FEDERAL INDIAN CHILD WELFARE ACT OF 1978

January 2006

Members:

Sen. Margaret Rotundo, Chair
Rep. Deborah L. Simpson, Chair
Sen. Kevin L. Raye
Rep. Roger L. Sherman
Rep. Mike Sockalexis
Mr. David Hathaway
Hon. Vendean V. Vafiades
Mr. Dan Despard
Gov. Robert Newell
Ms. Erlene Paul
Ms. Rosella Silliboy
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Appendices

EXECUTIVE SUMMARY

The Indian Child Welfare Act (ICWA) was signed into law in 1978 in response to Congressional findings that too many Indian families were broken up by children being removed and then placed in non-Indian foster and adoptive homes and institutions. Congress designed ICWA to restrain the authority of state agencies and courts in removing and placing Indian children. ICWA established specific standards for removing Indian children from their homes, tribal jurisdiction for handling such cases, and substantive requirements including placement preferences for an Indian child entering foster or adoptive care. The dual focus of the Act is the well-being of both tribes and children as fundamental and complementary goals.

The Committee to Study State Compliance with the Federal Indian Child Welfare Act of 1978 ("Committee") was established during the First Regular Session of the 122nd Legislature by Resolve 2005, Chapter 118. Due to the late appointments of some members, the Committee held only one meeting although a consensus was reached.

The general consensus of the Committee was that Maine's compliance with ICWA has improved tremendously in recent years. In particular, it appears that fewer children are being removed from Indian homes. There is an improved relationship between tribes, the Department of Health and Human Services (DHHS) and the Office of the Attorney General with respect to ICWA issues. A Wabanaki conference on ICWA issues scheduled for March 2006 has a goal of building on the collaboration that has occurred in recent years, and working towards making Maine ICWA practices and procedures a model for the nation.

State ICWA training programs have improved in recent years. All caseworkers in the DHHS receive ICWA training before starting their casework. The court system has also revised its procedures and forms to include inquiry into the application of ICWA at every stage of a child protection proceeding. However, the Committee discovered that there are still some problems with inadequate training for staff of social service agencies with whom the DHHS contracts.

The State agreement with the Houlton Band of Maliseet Indians, signed in December 2002, appears to be a model of success. The experience of the Houlton Band of Maliseet Indians is illustrative of the changing ICWA environment in Maine. For many years, the Band had serious issues and concerns with respect to child placement decisions, especially the removal of children from their families and placements in non-Indian homes. Since the agreement was signed the Band feels things have improved dramatically; there is now a process and an institutional willingness to work through any issues that do arise.

While state implementation of ICWA seems to have improved markedly in recent years, the Committee did conclude there are areas where further improvements can be made.

The Committee presents the following recommendations:

1. **ICWA training for DHHS and contract agencies.** The Committee recommends that the DHHS seek input and assistance from the tribes in developing and providing ICWA training for child case workers. The Committee recommends that the DHHS ensure that such training include clear instruction in the purposes of and policy behind ICWA. ICWA training should be provided to all DHHS child case workers as well as to employees of agencies the DHHS contracts with to provide child welfare services. For purposes of ICWA training, the Department is encouraged to seek out and make use of culturally appropriate videos and other educational materials from entities such as the National Indian Child Welfare Association.

2. **Update and develop agreements between the state and tribes.** Section 1919 of ICWA authorizes Indian tribes and states to enter into agreements respecting care and custody of Indian children and jurisdiction over child custody proceedings. In Maine, the state currently has agreements with the Houlton Band of Maliseet Indians (2002) and the Penobscot Nation (1987). The Committee recommends that the DHHS work with the Penobscot Nation to determine whether an update of its agreement with the State may be appropriate and work with the Aroostook Band of Micmacs and the Passamaquoddy Tribe to determine whether appropriate ICWA agreements may be developed.

3. **Recruit Indian foster families and placement options.** A major obstacle to implementing ICWA is the lack of available Indian foster families. The Committee recommends that the DHHS work with tribes to provide assistance in recruiting foster families.

4. **Outreach for non-Indian foster families.** The committee learned that currently, non-Indian foster or adoptive families of Maliseet children receive a resource packet of cultural information that assists families in helping the children identify with their cultural heritage. The Committee recommends that the DHHS work with all of the tribes to ensure that all non-Indian foster or adoptive families of Indian children receive culturally appropriate materials to assist the families in helping the children identify with their cultural heritage.

5. **Examine the successful model of agreement with the Houlton Band of Maliseet Indians.** The Committee believes the changes that have occurred in the State's handling of ICWA issues with respect to the Houlton Band of Maliseet Indians is a remarkable model of success. While the committee did not have time to examine the process that led to the agreement between the Band and the State or the details of the agreement, it is clear that something fairly dramatic has been accomplished. The committee recommends that the DHHS examine that process and the agreement and, to the extent appropriate, replicate its success across the State.

COMMITTEE PROCESS

The Committee to Study State Compliance with the Federal Indian Child Welfare Act of 1978 ("Committee") was established during the First Regular Session of the 122nd Legislature by Resolve 2005, Chapter 118. A copy of the authorizing legislation is attached as Appendix A. The 12-member Committee included five Legislators, including the Tribal Representative of the Penobscot Nation, representatives of each of the four federally recognized tribes in Maine, a member of the Office of the Attorney General, a representative of the judicial branch and a representative of the Department of Health and Human Services (DHHS). The roster of Committee members is attached as Appendix C.

The Resolve required the Committee to meet no later than August 1, 2005. Due to some members of the Committee not being appointed until early November, the chairs requested an extension of the reporting deadline from December 7, 2005 to January 9, 2006 (a copy of the letter requesting the extension is attached as Appendix B). This was granted by the Legislative Council on November 28, 2005.

The Committee convened on December 15, 2005 for a single meeting. The Committee discussed how it should proceed given its late start, the timing in relation to the holidays, and the impending deadline of January 9th. The committee learned that a Wabanaki conference on the Indian Child Welfare Act (ICWA), to include representatives from the DHHS and the Office of the Attorney General, is scheduled for March 2006, that a goal of the conference is the build on the collaboration that has occurred in recent years between the State and the Tribes and to work toward making Maine ICWA practices and procedures a model for the nation. The committee discussed coordinating its work with that conference and perhaps seeking to extend the study into the 2006 interim. However, the committee concluded that the best course would be simply to report its consensus recommendations (all of which were readily reached during the committee's discussion), to acknowledge the tremendous progress that has been made by the State in recent years in meeting the requirements and spirit of ICWA, and to encourage the parties, who seem clearly to be actively involved in on-going collaboration and productive dialogue, to continue that collaboration and dialogue.

The Committee to Study State Compliance with the Federal Indian Child Welfare Act of 1978, pursuant to Resolve 2005, Chapter 118, submits this report and recommendations to the Joint Standing Committee on Judiciary and the Legislative Council of the 122nd Legislature. The committee is not introducing any legislation with this report.

BACKGROUND AND ISSUES OF THE INDIAN CHILD WELFARE ACT

The Indian Child Welfare Act (ICWA) was signed into law in 1978 in response to Congressional findings that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions."[1] From 1969 to 1974, the Association on American Indian Affairs (AAIA) conducted nationwide studies on the impact of state child welfare practices on American Indian children. AAIA's research, presented at the Congressional hearings, indicated that 25%-35% of all American Indian children in some states were removed from their homes and placed in foster or adoptive homes or in institutions.[2]

Congress designed ICWA to restrain the authority of state agencies and courts in removing and placing Indian children because in child custody proceedings states "have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."[3] Thus, the law established standards for removing Indian children from their homes, tribal jurisdiction for handling such cases, and substantive requirements for any state decisions involving adoptive and foster placements for children identified as Indian.

ICWA has a dual focus with the well-being of tribes and children as fundamental and complementary goals.[4] The stated policy of ICWA is "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families."[5] This protection is accomplished in large part by the jurisdictional lines drawn by the Act. ICWA is designed to maximize the opportunity for tribal courts to determine the fate of their children. The Act grants tribes exclusive jurisdiction in all child custody matters involving Indian children who are wards of tribal courts or who reside or are domiciled on Indian reservations. On petition, cases involving Indian children domiciled outside a reservation are required, with some exceptions, to be transferred to the tribal court. This jurisdiction obviously applies to tribes with their own court systems. In Maine, the Passamaquoddy Tribe and the Penobscot Nation have tribal courts and have such jurisdiction. The Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs currently do not have tribal courts so child custody cases are, absent other agreements between the State and either Band, handled through State court. ICWA does permit the State and a tribe to enter into agreements regarding jurisdiction (subject to termination upon 180-day notice by either party).[6] The Houlton Band of Maliseet Indians have an agreement with the State that provides for the transfer of ICWA cases to the Penobscot court or the Passamaquoddy court, as authorized by the Band in accordance with any

[1] 25 U.S.C. §1901, sub-§4
[2] Albertson, Kirk (2004-05) "Applying Twenty-Five Years of Experience: The Iowa Indian Child Welfare Act" *American Indian Law Review* 29
[3] 25 U.S.C. §1901, sub-§5
[4] Atwood, Barbara Ann (2002) "Flashpoints Under the ICWA: toward a new understanding of state court resistance" *Emory Law Journal* 51(2)
[5] 25 U.S.C. §1902
[6] 25 U.S.C. §1919

agreements the Band has with the Penobscot Nation or the Passamaquoddy Tribe (see Appendix H).

ICWA also contains substantive provisions including preferences for placement of an Indian child for adoption or foster care.[7] Section 1915(a) provides that an Indian child being adopted must be placed with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families. Section 1915(b) provides that an Indian child in foster care should be placed with (1) a member of the child's extended family; (2) foster home approved by the child's tribe; (3) an Indian foster home approved by an authorized non-Indian licensing authority; or (4) 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. (See Appendix F for flow charts.)

The Act authorizes tribes and the State to enter into agreements with respect to care and custody of Indian children. These agreements can be terminated with 180 days notice by either side at any time.[8]

ICWA gives flexibility to state courts in both jurisdictional and placement standards by stating that these procedures apply "in the absence of a good cause to the contrary."[9] The Bureau of Indian Affairs has outlined "good cause" further in its guidelines.[10] (See Appendix E for a copy of the BIA guidelines.) These guidelines are both non-binding and sometimes controversial. The BIA guidelines provide that good cause exists to prevent transferring a child custody case to tribal court when no tribal court exists; the proceedings are in an advanced stage; the child is over the age of 12 years old; evidence necessary to decide the case could not be presented in tribal court without hardship to the parties; the parents of a child under five are not available and the child has had little contact with the tribe; or the tribal court declines to accept the transfer. The BIA guidelines provide that good cause to deviate from the placement preferences is present when the biological parents request it; extraordinary physical and emotional needs for a child exist as established by a qualified expert witness; and there are insufficient suitable families available for placement after a diligent search has been completed.

The flow charts in Appendix F provide an overview of the ICWA's jurisdictional and substantive procedures and standards.

Flashpoints

On a national basis, most ICWA disagreements concern transferring jurisdiction of a child custody case from state court to tribal courts and "good cause" exceptions in the

[7] 25 U.S.C. §1915
[8] 25 U.S.C. §1919
[9] 25 U.S.C. §§1911, 1915
[10] Department of the Interior, Bureau of Indian Affairs *Guidelines for State Courts: Indian Child Custody Proceedings* Federal Register, November 26, 1979

law. It does not appear that fundamental disagreements in these areas currently exist in Maine.

Some state courts have employed a judge-made doctrine of the "existing Indian family exception" to deny that ICWA applies in certain child custody cases. This doctrine first appeared in Kansas and has been endorsed by at least 10 states. The Kansas Supreme Court ruled that ICWA did not apply to "an illegitimate infant who has never been a member of an Indian home or culture … [and] so long as the mother is alive to object, would probably never become part of the [father's] or any other Indian family".[11] The existing Indian family exception has been used to argue that when neither the child nor parents have maintained a significant social, cultural or political relationship with their tribe, ICWA does not apply and thus the case remains in state court.

A court must show good cause for not following the placement preferences laid out in ICWA. However, in some custody situations, states have argued that it is not in the child's best interests to remove a child from a long-standing custodial arrangement. Other courts have exhibited misgivings about potential disruption of an Indian child's placement when there are strong custodial bonds with existing non-Indian caregivers. Some state courts have argued that separating the best interest of the child from the child's connection with a tribe is contrary to ICWA, which seeks to promote the child's interest by promoting tribal connection.

State Action Beyond ICWA

ICWA establishes minimum standards for the removal of children from their families and the placement of those children in foster or adoptive homes. States remain free to institute stronger laws with "a higher standard of protection"[12] and some states have done this (for example, Iowa and Nebraska).

The Iowa Indian Child Welfare Act was signed into law in May 2003, and its primary purpose is to limit the ability of state court judges to avoid applying ICWA.[13] The Act repeats much of the language of the federal ICWA but it clarifies provisions of the federal Act as it applies to Iowa. For example, it requires notice for all custody proceedings whether voluntary or involuntary, allows tribes rather than state courts to determine who is an Indian child, and does not allow a deviation from placement preferences.[14]

Studies and Data

In recent years, state governments have undertaken analyses of compliance with ICWA (in particular, Arizona, North Dakota, South Dakota). In addition, the GAO recommended in its April 2005 report that the Administration for Children and Families

[11] cited in Albertson
[12] 25 U.S.C. §1921
[13] Albertson
[14] Iowa Code 232B, also known as the Iowa Indian Child Welfare Act.

(ACF) use ICWA compliance information available through its existing child welfare oversight activities to target guidance and assistance to states; HHS disagreed with this recommendation arguing that it does not have the authority under ICWA to do this.[15] The GAO was hampered by lack of data at the state level. An overview of the GAO report is provided in Appendix G.

Committee member and Penobscot Nation Tribal Representative Michael Sockalexis collected and provided for the committee file various materials related to ICWA, which are listed in Appendix J.

[15] GAO (April 2005) *ICWA: Existing Information on Implementation Issues Could be Used to Target Guidance and Assistance to States*

KEY FINDINGS

The Committee was established to study Maine's compliance with the federal Indian Child Welfare Act of 1978. While the committee met only once, it arrived at several important findings.

1. Maine's compliance vastly improved. The general consensus was that Maine's compliance with ICWA has improved tremendously in recent years; of particular note, it appears fewer children are being removed from Indian homes. There appears to be an improved relationship between tribes, the DHHS and the Office of the Attorney General with respect to ICWA issues. Periodic meetings, improved awareness and training and vastly improved communication have led to problem solving and a climate conducive to meeting the goals of ICWA. The Committee understands that this improvement is a result of the tireless efforts of the tribes to increase state awareness of the issues and to work with the State to resolve them. The Committee recognizes and commends the DHHS for its responsiveness in this area in recent years and for the significant progress that has been made in meeting the goals of ICWA.

2. A model of success: State agreement with the Houlton Band of Maliseet Indians. Tribes and States are authorized, though not required, under ICWA to negotiate agreements with respect to care and custody of Indian children and jurisdiction. The committee learned that only two of the four federally recognized tribes in Maine have agreements with the State. The Houlton Band of Maliseet Indians and the State signed an agreement in December 2002. The Penobscot Nation has an agreement from 1987. Neither the Passamaquoddy Tribe nor the Aroostook Band of Micmacs have agreements with the State.

The experience of the Houlton Band of Maliseet Indians is illustrative of the changing ICWA environment in Maine. For many years, the Maliseets had serious issues and concerns with respect to child placement decisions, especially the removal of children from their families and placements in non-Indian homes. Committee member, Chief Brenda Commander noted to the committee that things are now "100% better" than they were; issues still arise, but there is now a process and an institutional willingness to work through them. The Committee believes that the State's ICWA agreement with the Houlton Band of Maliseets and the good working relationship that has come with it provide a useful model for success.

3. Progress in reducing the number of Indian children removed from their families. The committee learned that the numbers of children being removed from their Indian families has come down since 2002. According to the DHHS, recent efforts have focused on keeping foster children in general in their home communities; the foster care population has been reduced by more than 20% in the last three years. Betsy Tannian, ICWA Director for the Houlton Band of Maliseet Indians, stated that only 2-3 Maliseet children have been removed from their homes in the last couple of years. There are still significant numbers of Indian children in foster care with non-native families; this is because many of these children have been in foster care for some time and the tribes

consider that it would not be in the child's best interest to remove them from those families.

4. Shortage of Indian foster and adoptive homes; maintaining cultural connections. The committee found that there continues to be a shortage of Indian families for foster and adoption placements. Part of the 2002 agreement between the State and the Houlton Band of Maliseet Indians included a cultural agreement to deal with children placed in non-native homes. The intention is to get an agreement with the non-native family to allow the child to continue cultural contacts and shared heritage. A cultural handbook was created by an intern with the Maliseets. The committee believes that efforts to maintain cultural connections are important when an Indian child is placed with non-Indian foster and adoptive families.

5. The importance of training. The committee learned that State ICWA training programs have improved in recent years. All new caseworkers in the Department of Health and Human Services (DHHS) receive ICWA training before starting their casework. The court system has also revised its procedures and forms to include inquiry into the application of ICWA at every stage of a child protection proceeding. However, the committee found that there is room for improvement, in particular with the ICWA training given to staff of social service agencies with whom the DHHS contracts.

CONCLUSIONS AND RECOMMENDATIONS

The Committee to Study State Compliance with the Federal Indian Child Welfare Act of 1978 presents the following conclusions and recommendations. These recommendations advance the conclusion of the Committee members that state compliance with ICWA is tremendously important, has made great strides in the last few years, but that there is still room for improvement. These recommendations were formulated and adopted through a consensus process by the Committee members present at the committee's single meeting held on December 15, 2005.[16]

The Committee urges the DHHS to continue its commendable efforts to maintain and improve its working relationships with the tribes on ICWA issues and compliance; the committee urges the DHHS to pay particular attention to training issues and to explore opportunities to discuss and develop appropriate agreements with each of the Maine tribes (building on the successful model of the agreement with the Houlton Band of Maliseet Indians).

Recommendations for Improving Maine's Compliance with the Federal Indian Child Welfare Act

1. **ICWA training for DHHS and contract agencies.** The Committee recommends that the DHHS seek input and assistance from the tribes in developing and providing ICWA training for child case workers. The Committee recommends that the DHHS ensure that such training include clear instruction in the purposes of and policy behind ICWA. ICWA training should be provided to all DHHS child case workers as well as to employees of agencies the DHHS contracts with to provide child welfare services. For purposes of ICWA training, the Department is encouraged to seek out and make use of culturally appropriate videos and other educational materials available from entities such as the National Indian Child Welfare Association.

2. **Update and develop agreements between the state and tribes.** Section 1919 of ICWA authorizes Indian tribes and states to enter into agreements respecting care and custody of Indian children and jurisdiction over child custody proceedings. In Maine, the state currently has agreements with the Houlton Band of Maliseet Indians (2002) and the Penobscot Nation (1987). The Committee recommends that the DHHS work with the Penobscot Nation to determine whether an update of its agreement with the State may be appropriate and work with the Aroostook Band of Micmacs and the Passamaquoddy Tribe to determine whether appropriate ICWA agreements may be developed.

[16] Governor Robert Newell, Rosella Silliboy and Representative Roger Sherman were not present for the Committee meeting. Janet Lola represented Erlene Paul who was also unable to be present. This report, however, was circulated to all members for comments.

3. **Recruit Indian foster families and placement options.** A major obstacle to implementing ICWA is the lack of available Indian foster families. The Committee recommends that the DHHS work with tribes to provide assistance in recruiting foster families.

4. **Outreach for non-Indian foster families.** The committee learned that currently, non-Indian foster or adoptive families of Maliseet children receive a resource packet of cultural information that assists families in helping the children identify with their cultural heritage. The Committee recommends that the DHHS work with all of the tribes to ensure that all non-Indian foster or adoptive families of Indian children receive culturally appropriate materials to assist the families in helping the children identify with their cultural heritage.

5. **Examine the successful model of agreement with the Houlton Band of Maliseet Indians.** The Committee believes the changes that have occurred in the State's handling of ICWA issues with respect to the Houlton Band of Maliseet Indians is a remarkable model of success. While the committee didn't have time to examine the process that led to the agreement between the Band and the State or the details of the agreement, it is clear that something fairly dramatic has been accomplished. The committee recommends that the DHHS examine that process and the agreement and, to the extent appropriate, replicate its success across the State.

APPENDIX A

Authorizing Legislation, Resolve 2005, Chapter 118

CHAPTER 118
S.P. 139 - L.D. 415

Resolve, To Create the Committee To Study State Compliance with the Federal Indian Child Welfare Act of 1978

Emergency preamble. Whereas, acts and resolves of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, the Committee To Study State Compliance with the Federal Indian Child Welfare Act of 1978 should be established to examine the extent to which the State complies with the federal Indian Child Welfare Act of 1978 and to identify ways in which to improve compliance; and

Whereas, the study must be initiated before the 90-day period expires in order that the study may be completed and a report submitted in time for submission to the next legislative session; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore, be it

Sec. 1. Committee established. Resolved: That the Committee To Study State Compliance with the Federal Indian Child Welfare Act of 1978, referred to in this resolve as "the committee," is established; and be it further

Sec. 2. Committee membership. Resolved: That the committee consists of the following members:

1. Two members of the Senate, appointed by the President of the Senate;

2. Three members of the House of Representatives, appointed by the Speaker of the House;

3. The Governor of the Passamaquoddy Tribe, or a designee;

4. The Governor of the Penobscot Nation, or a designee;

5. The Tribal Chief of the Houlton Band of Maliseet Indians, or a designee;

6. The Tribal Chief of the Aroostook Band of Micmacs, or a designee;

7. The Commissioner of Health and Human Services, or the commissioner's designee; and

8. The Attorney General, or the Attorney General's designee.

The Chief Justice of the Supreme Judicial Court is requested to designate a representative of the judicial branch to serve as a voting member of the committee; and be it further

Sec. 3. Chairs. Resolved: That the first-named Senate member is the Senate chair of the committee and the first-named House of Representatives member is the House chair of the committee; and be it further

Sec. 4. Appointments; convening of committee. Resolved: That all appointments must be made no later than 30 days following the effective date of this resolve. The appointing authorities shall notify the Executive Director of the Legislative Council once all appointments have been completed. Within 15 days after appointment of all members, the chairs shall call and convene the first meeting of the committee, which may be no later than August 1, 2005; and be it further

Sec. 5. Duties. Resolved: That the committee shall study state compliance with the federal Indian Child Welfare Act of 1978. The committee may hold one public hearing, in Augusta, to collect public testimony; and be it further

Sec. 6. Staff assistance. Resolved: That the Legislative Council shall provide necessary staffing services to the committee; and be it further

Sec. 7. Compensation. Resolved: That the legislative members of the committee are entitled to receive the legislative per diem, as defined in the Maine Revised Statutes, Title 3, section 2, and reimbursement for travel and other necessary expenses related to their attendance at authorized meetings of the committee. Public members not otherwise compensated by their employers or other entities that they represent are entitled to receive reimbursement of necessary expenses for their attendance at authorized meetings of the committee; and be it further

Sec. 8. Report. Resolved: That, no later than December 7, 2005, the committee shall submit a report that includes its findings and recommendations, including suggested legislation, for presentation to the Joint Standing Committee on Judiciary and the Legislative Council. The committee is authorized to introduce legislation related to its report to the Second Regular Session of the 122nd Legislature at the time of submission of its report; and be it further

Sec. 9. Extension. Resolved: That, if the committee requires a limited extension of time to complete its study and make its report, it may apply to the Legislative Council, which may grant an extension; and be it further

Sec. 10. Committee budget. Resolved: That the chairs of the committee, with assistance from the committee staff, shall administer the committee's budget. Within 10 days after its first meeting, the committee shall present a work plan and proposed budget to the Legislative Council for its approval. The committee may not incur expenses that would result in the committee's exceeding its approved budget. Upon request from the committee, the Executive Director of the Legislative Council shall promptly provide the committee chairs and staff with a status report on the committee budget, expenditures incurred and paid and available funds.

Emergency clause. In view of the emergency cited in the preamble, this resolve takes effect when approved.

APPENDIX B

Copy of Letter Requesting Deadline Extension

Committee to Study State Compliance with the Federal Indian Child Welfare Act of 1978

MEMORANDUM

TO: Representative John Richardson, Speaker of the House, Chair
Senator Beth Edmonds, President of the Senate, Vice-Chair
c/o David Boulter, Executive Director, Legislative Council

FROM: Senator Margaret Rotundo, Senate Chair
Representative Deborah L. Pelletier-Simpson, House Chair
Committee to Study State Compliance with the Federal Indian Child Welfare Act of 1978

DATE: 7 November 2005

RE: Request for Deadline Extension

Pursuant to this committee's authorizing legislation, Resolves of 2005, Ch. 118, Sec. 9, we are requesting a limited extension of our reporting deadline. Our current reporting deadline is Dec. 7th. As you know, Senate appointments to this committee were not made until late October. We are moving as quickly as possible to schedule our work, but we see no reasonable way in which the committee can conduct any meaningful study of ICWA compliance and produce a report by Dec. 7th.

Consequently, we would ask that our reporting deadline be extended to January 9th.

Thank you for your consideration of this request. If you have any questions, please do not hesitate to contact us.

cc: Members, ICWA Study Committee
Patrick Norton, Director, OPLA

Council Approved 28 Nov '05

APPENDIX C

Membership List, Committee to Study State Compliance with the Federal Indian Child Welfare Act of 1978

Committee to Study State Compliance with the Federal Indian Child Welfare Act of 1978

Resolve 2005, Ch. 118
December 14, 2005

Appointment(s) by the President

Sen. Margaret Rotundo – Chair — Senate Member
446 College St.
Lewiston, ME 04240
207-784-3259

Sen. Kevin L. Raye — Senate Member
63 Sunset Cove Lane
Perry, ME 04667
207-853-9406

Appointment(s) by the Speaker

Rep. Deborah L. Pelletier-Simpson – Chair — House Member
551 Turner Street
Auburn, ME 04210
207-777-1379

Rep. Roger L. Sherman — House Member
PO Box 682
Houlton, ME 04730
207-532-7073

Rep. Mike Sockalexis — House Member
23 H Street
Bangor, ME 04401
207-659-2230

Attorney General

David Hathaway — Designee
Attorney General's Office
6 State House Station
Augusta, ME 04333
207-626-8800

Chief Justice

Honorable Vendean V. Vafiades — Representing the Judicial Branch
Maine District Court
145 State Street
Augusta, ME 04333-0111
207-287-6950

Commissioner, Department of Health & Human Services

Dan Despard — Designee
Bureau of Child & Family Services
11 State House Station
Augusta, ME 04333
207-287-5052

Governor of the Passamaquoddy Tribe

Gov. Robert Newell — Governor
Passamaquoddy Tribe
Indian Township/PO Box 301
Princeton, ME 04668
207-796-2301

Governor of the Penobscot Nation

Erlene Paul — Governor's Designee
Penobscot Nation
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Indian Island, ME 04468
207-817-7497

Tribal Chief, Aroostook Band of Micmacs

Rosella Silliboy — Tribal Chief's Designee
Aroostook Band of Micmacs
7 Northern Rd
Presque Isle, ME 04769
207-764-1972

Tribal Chief, Houlton Band of Maliseet Indians

Chief Brenda Commander — Tribal Chief
Houlton Band of Maliseets
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Houlton, ME 04730
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Staff:
Anna Broome 287-1670
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Jon Clark 287-1670
OPLA

APPENDIX D

Indian Child Welfare Act of 1978

United States Code
TITLE 25 - INDIANS
CHAPTER 21 - INDIAN CHILD WELFARE

Section 1901. Congressional findings

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 (FOOTNOTE 1) '' and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(FOOTNOTE 1) So in original. Probably should be capitalized.

(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.

Section 1902. Congressional declaration of policy

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

Section 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term -

(1) ''child custody proceeding'' shall mean and include -

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

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

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

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

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

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

(3) ''Indian'' means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 1606 of title 43;

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

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

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

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

(8) ''Indian tribe'' means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43;

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

(10) ''reservation'' means Indian country as defined in section

1151 of title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) ''Secretary'' means the Secretary of the Interior; and

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

SUBCHAPTER I - CHILD CUSTODY PROCEEDINGS

Section 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

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) Transfer of proceedings; declination by tribal court

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) State court proceedings; intervention

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) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

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.

Section 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

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

(b) Appointment of counsel

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 section 13 of this title.

(c) Examination of reports or other documents

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) Remedial services and rehabilitative programs; preventive measures

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) Foster care placement orders; evidence; determination of damage to child

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) Parental rights termination orders; evidence; determination of damage to child

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.

Section 1913. Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents

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) Foster care placement; withdrawal of consent

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) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

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) Collateral attack; vacation of decree and return of custody; limitations

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.

Section 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

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 sections 1911, 1912, and 1913 of this title.

Section 1915. Placement of Indian children

(a) Adoptive placements; preferences

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) Foster care or preadoptive placements; criteria; preferences

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) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

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

(d) Social and cultural standards applicable

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) Record of placement; availability

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.

Section 1916. Return of custody

(a) Petition; best interests of child

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 1912 of this title, that such return of custody is not in the best interests of the child.

(b) Removal from foster care home; placement procedure

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 chapter, 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.

Section 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

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.

Section 1918. Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

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

(b) Criteria applicable to consideration by Secretary; partial retrocession

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

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

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

jurisdiction by the tribe;
(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and
(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.
(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.
(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval
If the Secretary approves any petition under subsection (a) of this section, 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) of this section, 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) Pending actions or proceedings unaffected
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 1919 of this title.

Section 1919. Agreements between States and Indian tribes

(a) Subject coverage
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) Revocation; notice; actions or proceedings unaffected
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.

Section 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception

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.

Section 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

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 subchapter, the State or Federal court shall apply the State or Federal standard.

Section 1922. Emergency removal or placement of child; termination; appropriate action

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

Section 1923. Effective date

None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

SUBCHAPTER II - INDIAN CHILD AND FAMILY PROGRAMS

Section 1931. Grants for on or near reservation programs and child welfare codes

(a) Statement of purpose; scope of programs

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

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

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

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

(4) home improvement programs;

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

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

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

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

(b) Non-Federal matching funds for related Social Security or other Federal financial assistance programs; assistance for such programs unaffected; State licensing or approval for qualification for assistance under federally assisted program

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 (42 U.S.C. 620 et seq., 1397 et seq.) 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 chapter. The provision or possibility of assistance under this chapter 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.

Section 1932. Grants for off-reservation programs for additional services

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

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

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

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

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

Section 1933. Funds for on and off reservation programs

(a) Appropriated funds for similar programs of Department of Health and Human Services; appropriation in advance for payments

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 and Human Services, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health and Human Services: 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) Appropriation authorization under section 13 of this title

Funds for the purposes of this chapter may be appropriated pursuant to the provisions of section 13 of this title.

Section 1934. "Indian" defined for certain purposes

For the purposes of sections 1932 and 1933 of this title, the term ''Indian'' shall include persons defined in section 1603(c) of this title.

SUBCHAPTER III - RECORDKEEPING, INFORMATION AVAILABILITY, AND TIMETABLES

Section 1951. Information availability to and disclosure by Secretary

(a) Copy of final decree or order; other information; anonymity

affidavit; exemption from Freedom of Information Act

Any State court entering a final decree or order in any Indian child adoptive placement after November 8, 1978, shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show -

(1) the name and tribal affiliation of the child;

(2) the names and addresses of the biological parents;

(3) the names and addresses of the adoptive parents; and

(4) the identity of any agency having files or information relating to such adoptive placement.

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

(b) Disclosure of information for enrollment of Indian child in tribe or for determination of member rights or benefits; certification of entitlement to enrollment

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.

Section 1952. Rules and regulations

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.

SUBCHAPTER IV - MISCELLANEOUS PROVISIONS

Section 1961. Locally convenient day schools

(a) Sense of Congress

It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

(b) Report to Congress; contents, etc.

The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health and Human Services, 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 November 8, 1978. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades.

Section 1962. Copies to the States

Within sixty days after November 8, 1978, 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 chapter, together with committee reports and an explanation of the provisions of this chapter.

Section 1963. Severability

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

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APPENDIX E

BIA Guidelines for State Courts

Bureau of Indian Affairs

Guidelines for State Courts; Indian Child Custody Proceedings

FEDERAL REGISTER

Monday

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Part III

Department of the Interior

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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. 70/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 Administration 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 reassumption 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 complication 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 tribe with such agreements. The Department hopes to have those materials available later 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 the 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 of 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) 265-5302.

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 306, 1 Gateway Center, Newton corner, Massachusetts 02156, (617) 829-0258.

Office of the Field Solicitor, Department of the Interior, 685 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 549, Aberdeen, South Dakota 57401, (605) 225-7254

Office of the Field Solicitor, Department of the Interior, P.O. Box 25007, Denver, Colorado 80225, (303) 234-3175.

Office of the Field Solicitor, Department of the Interior, P.O. Box 549, 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) 787-1580.

Office of the Field Solicitor, Department of the Interior, Window Rock, Arizona 86615 (602) 871-5151.

Office of the Regional Solicitor, Department of the Interior, Room 3068, Page Belcher Federal Building, Tulsa, Oklahoma 74103, (918) 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 397, W.C.D. Office Building, Route 2 Anadarko, Oklahoma 73005, (405) 427-0673.

Office of the Field Solicitor, Department of the Interior, P.O. Box 1505, Room 318,Federal Building, 5th and Broadway, Muskogee, Oklahoma 74401, (918) 683-3111.

Office of the Field Solicitor, Department of the Interior, c/o Osage Agency, Grandview Avenue, Pawhuska, Oklahoma 74056 (918) 287-3431.

Office of the Regional Solicitor, Department of Interior, Suite 6201, Federal Building, 125 South State Street, Salt Lake City, Utah 84138, (801)524-5877.

Office of the Regional Solicitor, Department of the Interior, Lloyd 500 Building, Suite 807, 500 N.E. Multnomah Street, Portland, Oregon 97232, (503) 231-2125.

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 judgement 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 any individual case contrary to these preferences. The Indian Child Welfare Act, the federal regulations implementing the Act, the recommended guidelines and nay 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.

In any child custody proceedings 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 purposes. 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.

i. 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.

a. 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 and 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. *Cohen, Handbook of Federal Indian Law 133* (1942). Because of the Bureau of Indian Affair's 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 confidentially 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. For voluntary placements, however, the Act specifically directs state courts to respect parental requests for confidentiality. 25 U.S.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. Brocheau, 597 F. 2nd 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 tribe's 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.

a. 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.
b. If the child is a member of only one tribe, that tribe shall be designated the Indian child's tribe even thought 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 the "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 *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.

Determination 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 difference 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 Sections 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.

a. 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.
b. 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.
c. Notice may be personally served on any person entitled to receive notice in lieu of mail service.
d. 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 in not already a party) to intervene in the proceedings.

e. 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 section 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 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 notices does not involve any assertion of jurisdiction over the person served, personal notices 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 parent or Indian child's tribe (or the Secretary if the Indian child's tribe is unknown to the petitioner) has received notice;

i. 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
ii. 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.

a. The time limits listed in this section are minimum time periods required by the Act. The court may grant 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.

i. 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.

i. 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.
ii. The tribal affiliation of the child and of the parents and/or Indian custodians.
iii. A specific and detailed account of the circumstances that lead the agency responsible for the emergency removal of the child to take that action.
iv. 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.
v. 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.

a. 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.

b. 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 trail 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 his merits.

A. 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 this title of 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, 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 statue 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 trail 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 this 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.

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

a. 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.
b. 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 that other children. It was also pointed out that these criteria are contrary to the decision in *Wisconsin Potwatomies of the Hannahville Indian Community v. Houston*, 397 F. Supp. 719 (W.D. Misch 1973), which was explicitly endorsed by the committee that drafted that Act. The court in that case found that tribal jurisdiction existed even through 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. 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'' 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 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. Come 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. The 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.

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.

A. 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 the statue, 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 nonconforming 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 casual 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.

i. Any 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.

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

a. 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 non-experts.

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.

A. 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 birthday 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 who 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.

A. 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:

    a. A member of the Indian child's extended family;

    i. Other members of the Indian child's tribe; or
    ii. Other Indian families, including families of single parents.

a. 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.
b. 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 culture 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 agenda 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

a. (i) most approximates a family;
b. (ii) in which his or her special needs may be met; and

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

a. 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 met the child's needs.

b. 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 provision 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:

a. 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.

a. 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 an exception is necessary.

A. 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 content 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 the 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 provision 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 confidentiality 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 the 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. Gerrard,

Assistant Secretary, Indian Affairs

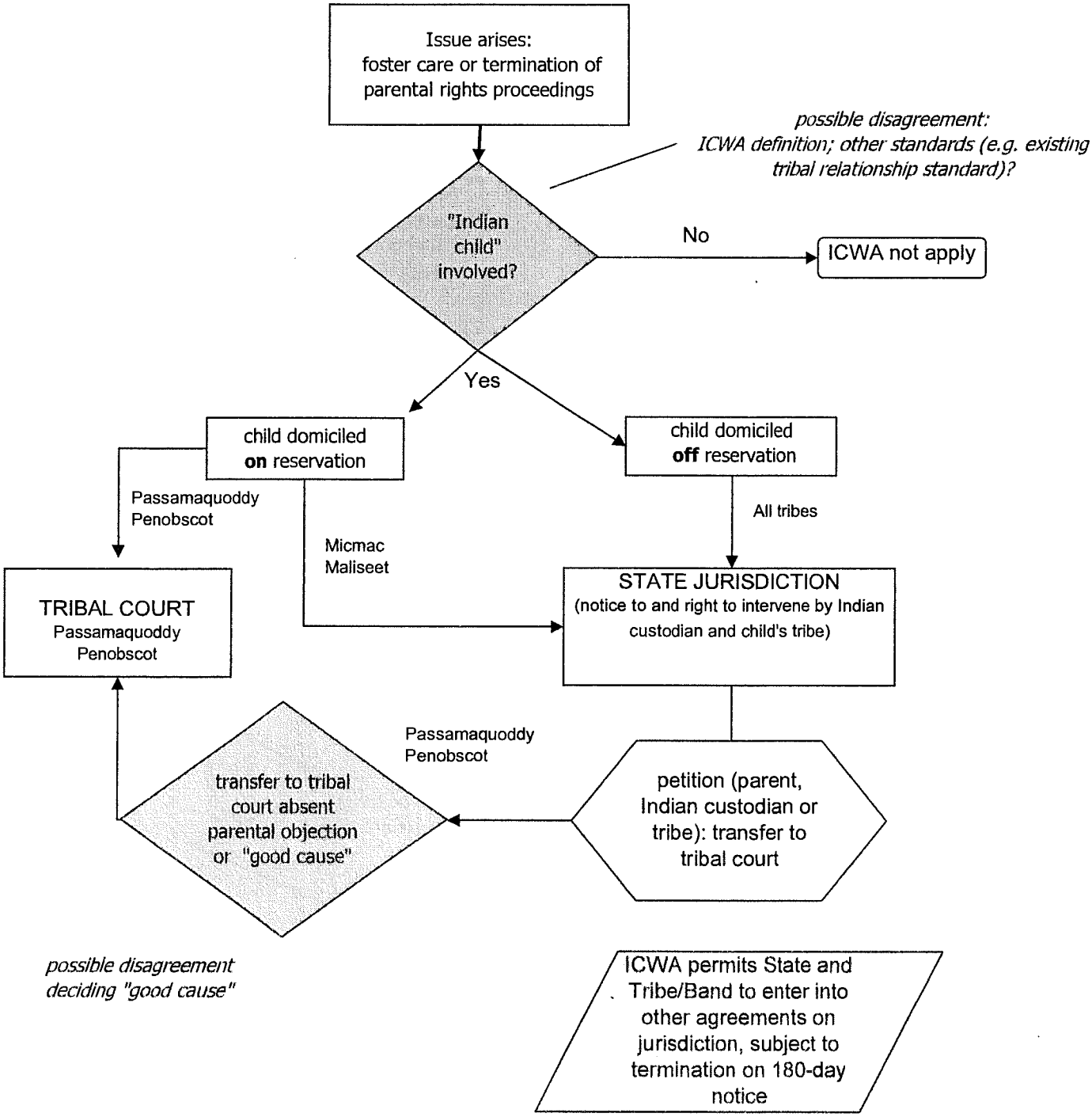
November 16, 1979.

APPENDIX F

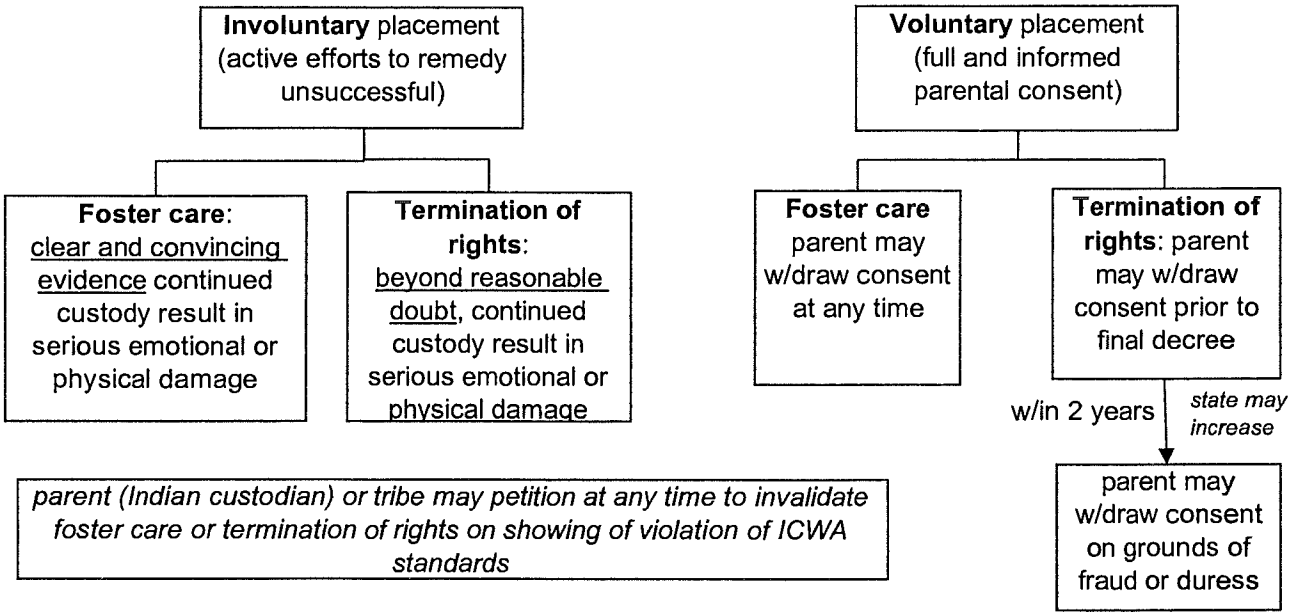
OPLA Flow Charts Showing Key ICWA Standards and Procedures

ICWA OVERVIEW

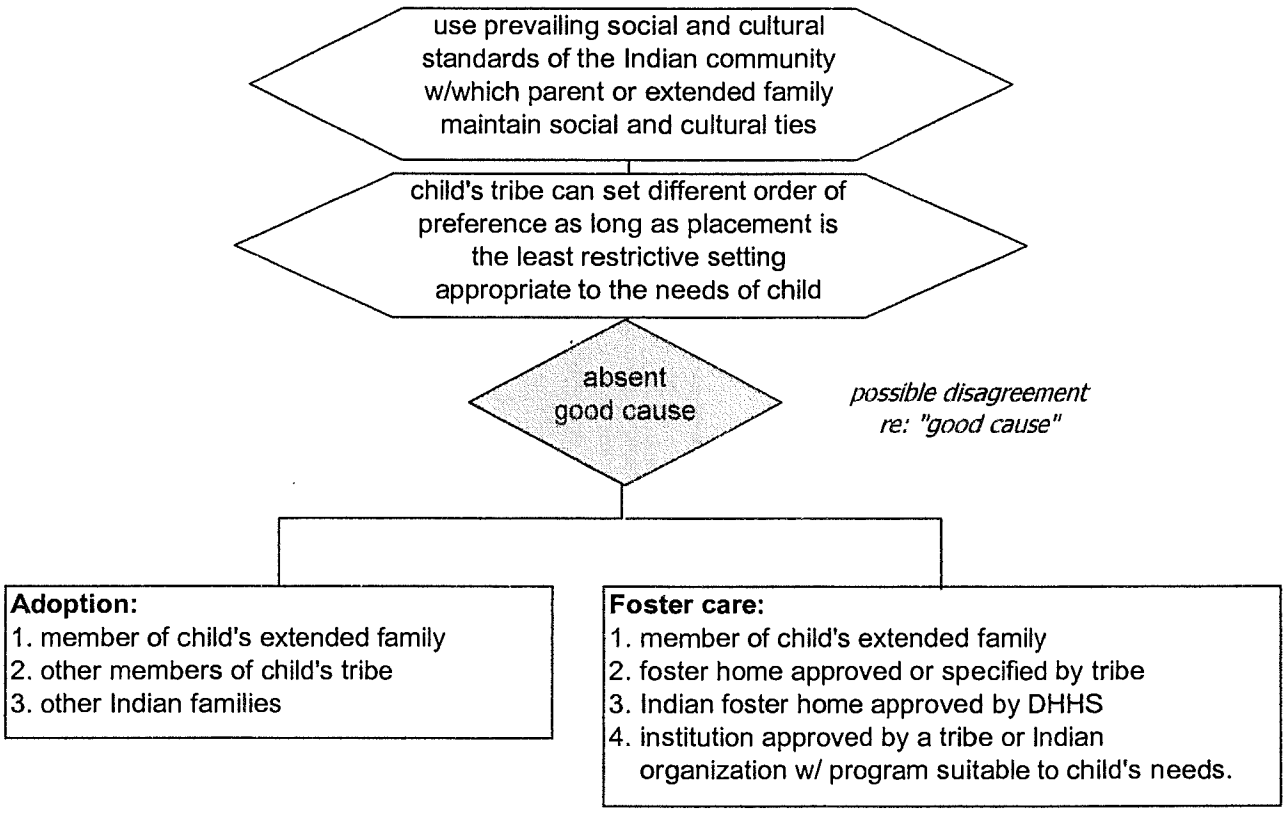
Jurisdiction



Basic Placement Standards



Placement Preferences



APPENDIX G

Highlights, April 2005, GAO Report on ICWA

April 2005

INDIAN CHILD WELFARE ACT

Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States

GAO Accountability · Integrity · Reliability

Highlights

Highlights of GAO-05-290, a report to congressional requesters

Why GAO Did This Study

In the 1960s and 1970s, American Indian children were about six times more likely to be placed in foster care than other children and many were placed in non-American Indian homes or institutions. In 1978, the Congress enacted the Indian Child Welfare Act (ICWA) to protect American Indian families and to give tribes a role in making child welfare decisions for children subject to ICWA. ICWA requires that (1) tribes be notified and given an opportunity to intervene when the state places a child subject to ICWA in foster care or seeks to terminate parental rights on behalf of such a child and (2) children be placed if possible with relatives or tribal families. This report describes (1) the factors that influence placement decisions for children subject to ICWA; (2) the extent to which, if any, placements for children subject to ICWA have been delayed; and (3) federal oversight of states' implementation of ICWA.

What GAO Recommends

GAO recommends that the Department of Health and Human Services' Administration for Children and Families (ACF) consider using ICWA compliance information available through its existing child welfare oversight activities to target guidance and assistance to states. HHS disagreed with our recommendation. We continue to believe that ACF could use the information it gathers to help states improve their ICWA compliance.

www.gao.gov/cgi-bin/getrpt?GAO-05-290.

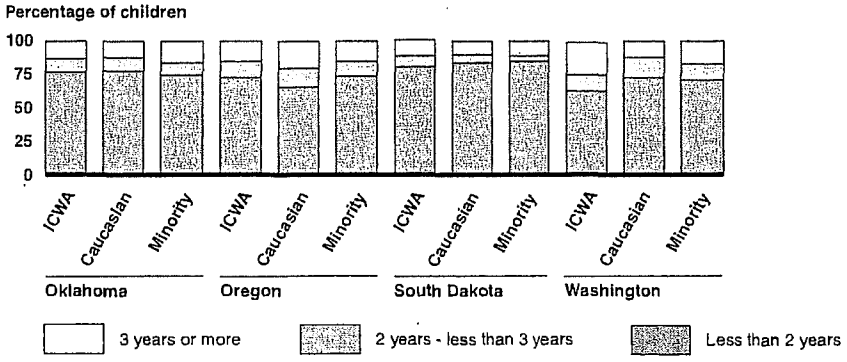
To view the full product, including the scope and methodology, click on the link above. For more information, contact Cornelia Ashby at (202) 512-8403 or ashbyc@gao.gov.

What GAO Found

Placement decisions for children subject to ICWA can be influenced by how long it takes to determine that ICWA applies, the availability of American Indian foster and adoptive homes, and the level of cooperation between states and tribes. While these factors are unique to American Indian children, other factors can affect decisions similarly for all children. Many states, for example, place all children with relatives if possible and may consider changing placements for all children—regardless of ICWA status—when relatives are identified after initial placement. Our survey showed few differences between children subject to ICWA and other children in how often states had to decide whether to move a child to another home.

National data on children subject to ICWA are unavailable; data that were available from four states showed no consistent pattern in how long children subject to ICWA remained in foster care or how often they were moved to different foster homes compared to other children. In general, most children leaving foster care in fiscal year 2003 in the four states were reunified with their families, although children subject to ICWA were somewhat less likely to be reunified or adopted and were somewhat more likely to leave through a guardianship arrangement.

Length of Stay for Children Exiting Foster Care in FY 2003 in Four States



Source: Data provided by child welfare agencies in these states.

ACF does not have explicit oversight responsibility for states' implementation of ICWA and the information the agency obtains through its general oversight of state child welfare systems sometimes provides little meaningful information to assess states' efforts. For example, the ICWA information states provided in their 2004 progress reports varied widely in scope and content and many states did not report on the effect of their implementation efforts. Further, while limited information from ACF's reviews of states' overall child welfare systems indicate some ICWA implementation concerns, the process does not ensure that ICWA issues will be addressed in states' program improvement plans.

APPENDIX H

Copy of the Houlton Band of Maliseet Indians ICWA Agreement with the State

9/3/02

INTERGOVERNMENTAL AGREEMENT:
HOULTON BAND OF MALISEET INDIANS AND STATE OF MAINE

WHEREAS, the Houlton Band of Maliseet Indians ("Tribe") is a Federally Recognized Tribe; and

WHEREAS, The State of Maine ("State") currently provides child welfare services to the Tribe; and

WHEREAS, The United States Congress did in 1978 enact the Federal Indian Child Welfare Act, Public Law 95-608 (Codified at 25 U.S.C §§1901 *et seq* ("ICWA"); and

WHEREAS, The goal of ICWA is to place Indian children in Indian homes so that the Tribe's culture can subsist in the future; and

WHEREAS, Both the State and the Tribe agree that Indian children and families deserve to receive the same level of services and protection from harm as non-Indian children and families, whether they live on or off the reservation, and also deserve the protections afforded them by ICWA,

WHEREAS, The Tribe has not had a Tribal Court available to assume jurisdiction of child welfare cases until now;

WHEREAS, The Tribe has entered into an agreement to use the services of the Tribal Court of the Penobscot Nation or the Passamaquoddy Nation as its own Tribal Court, until the Tribe has established its own Tribal Court;

WHEREAS, Both the State and the Tribe agree the appropriate care and placement of the Tribe's children is essential to the cultural integrity of the Tribe; and

WHEREAS, Both parties want to improve the care and placement of the Tribe's children, protect the children and ensure the preservation of the Tribe's culture.

NOW THEREFORE BE IT RESOLVED, that the State and the Tribe shall enter into an Intergovernmental Agreement that meets the requirements of ICWA, as authorized by 25 USCS §1919;

BE IT FURTHER RESOLVED, that the Tribe shall enter into a separate agreement with the Penobscot Nation to use the Penobscot Tribal Court or the Passamaquoddy Tribe to use the Passamaquoddy Tribal Court as the Tribe's Tribal Court, until such time as the Tribe shall establish its own Tribal Court, and the Tribe will adopt a Child Welfare Code and Policy, as well as foster home licensing rules;

BE IT FURTHER RESOLVED that the Tribe will put in place a social services team, including social workers, to manage the care of any children of the Tribe who are in need of child protection services;

BE IT FURTHER RESOLVED, that for purposes of this agreement and for purposes of the application of ICWA and without prejudice to any party in any other discussions, disputes or contested matters, the Trust Lands held by the Tribe are defined as reservation(s).

BE IT FURTHER RESOLVED, that at the request of the Tribe, the State will request that the District Court transfer all pending child welfare and adoption cases to the Tribal Court in accordance with ICWA, and will request that any new actions filed in the District Court be transferred to the Tribal Court in accordance with ICWA.

BE IT FURTHER RESOLVED, that the State will assist the Tribe in its efforts to reclaim its most valuable resource – its children, by providing funding and services when necessary to effectuate the goals of ICWA, as specified herein.

I. History In 1978, the United States Congress passed Public Law 95-608, the federal Indian Child Welfare Act (codified at 25 U.S.C. §§1901 *et seq*)(ICWA). Prior to the passage of ICWA, Indian children were being adopted and placed in foster care at a much higher rate than other children. As a result, Indian children were losing all contact with their families, tribes, and cultural traditions. Indian Tribes were becoming non-existent as their populations dwindled. ICWA attempted to remedy this by stating that "there is no resource. .more vital to the continued existence and integrity of Indian tribes than their children" and that child welfare agencies had failed "to recognize the essential tribal relations of Indian people and the culture and social standards prevailing in Indian communities and families." (25 U.S.C. §1901).

As a result of ICWA, Indian children are entitled to all rights given to other children with a higher standard of protections for the rights of Indian families to ensure that whenever possible, Indian families stay together If it is not possible for children to remain with their parents, ICWA specifies an order of preference for placement of Indian children that favors placement with the extended family, the Tribe, or other Indian custodians.

In 1976, the Federal Indian Policy Review Commission, found that in the early 1970's Indian children in Aroostook County were placed in foster homes at a rate of 62.4 times (6,240 percent) greater that the Statewide rate for non-Indians. (Final Report of the Federal Indian Policy Review Commission: Task Force Four: Federal, State and Tribal Jurisdiction, p. 205). This situation was brought to the attention of the Congress during consideration of the Indian Child Welfare Act. (Senate Select Committee on Indian Affairs 95th Cong. 1st Session on S. 1214, the Indian Child Welfare Act of 1977, pp. 343-349) The Tribe now intends to assume more

responsibility under ICWA and reach an agreement with the State on child welfare matters to ensure the appropriate placement of the Tribe s children in the future.

Because the Tribe has not had a Tribal Court. the Tribe has not been able to have its child protection cases heard by a Tribal Judge. All Maliseet child protection cases have been heard solely in the State court, which is not satisfactory to the Tribe. The Tribe has not had a tribal child welfare system until this time. and therefore has relied on the State for casework and foster care licensing. While the State and the Tribe have made efforts to recruit foster parents, there are a limited number of Indian foster homes available for placement.

II. Summary of ICWA. ICWA protects the integrity and longevity of Indian tribes by preventing the removal of Indian children from their families absent certain safeguards. ICWA accomplishes this through the following (*The following statements are only provided as a summary and are not intended to amend or replace the actual ICWA provisions*).

A. Requiring that active efforts be made to identify a child's membership or eligibility for membership in any Indian Tribe.

B. Recognition of the jurisdiction of Indian Tribes and Tribal Courts.

C. Providing for exclusive jurisdiction of Indian Tribes over child custody proceedings involving an Indian child who resides or is domiciled on the reservation.

D. Providing for transfer of child custody proceedings to the jurisdiction of the Indian child's 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.

E. Requiring that the State give full faith and credit to the public acts. records and judicial proceedings of any federally recognized Indian Tribe regarding child welfare proceedings.

F Requiring state courts, in the placement of Indian children, to observe a high standard in order to promote the continuity of Indian families.

G. Requiring compliance with the order of preference for placement of Indian children as set forth by ICWA, or by the Tribe if the Tribe has selected an order of preference compatible with its own history, culture, and traditions.

H. Requiring notice to tribe(s), Indian parents and custodians of state court child custody proceedings involving Indian Children.

I. Providing for the right of parents, custodians, and Tribes to intervene as parties to any State court proceeding.

J Providing for court-appointed lawyers to represent indigent parents and court-appointed guardians ad litem to represent Indian Children.

K. Providing protections for the parents who voluntarily place their child in foster care or terminate their parental rights.

L. Recognition of Tribal licensing and/or approval of standards for foster homes, group homes, adoptive families, and social services.

M. Funding of Tribal social services to Indian families for use in connection with child welfare goals.

N. Providing for a process to invalidate the State court actions when ICWA has been violated.

O. Assisting adults who were adopted out of their Tribes to research Tribal affiliation.

III. Purpose. This Agreement was developed to ensure that the Houlton Band of Maliseet Indians ("Tribe") have maximum participation in determining the disposition of cases involving the Tribe's children. Both parties agree that the history of child welfare and adoption services within the Tribe have ceded authority to the State and resulted in placements outside of Maliseet homes. Additionally, both parties agree that it is in the Tribe's best interest to certify more foster and pre-adoptive homes, have a larger social-services network that allows the Tribe and State to work cooperatively to protect Indian Children and families.

This Agreement outlines the rights and responsibilities of both the State and the Tribe under ICWA and governs all proceedings having to do with the placement of the Tribe's children.

This Agreement provides for the confidential exchange of information regarding Indian families so that the Tribe and the State can work cooperatively to give Indian families the best possible resources available.

III. Legal Authority 25 USC § 1919 authorizes States and Indian Tribes to enter into Intergovernmental Agreements involving the care and custody of Indian children. Because the State is responsible for all children in its jurisdiction, 42 USC §670, *et seq* (Social Security Act) authorizes Tribes to enter into agreements with States for child welfare assistance monies and adoption assistance.

IV Jurisdiction. The parties acknowledge and agree that the Tribe has jurisdiction over child custody proceedings as described by ICWA. This jurisdiction extends to all of the Tribe's children who are members or eligible for membership under the Tribe's definition, regardless of whether domiciled on the Reservation or not.

The parties agree that in order for the Tribe to meaningfully participate in the placement of its children, notice must be made to the Tribe every time the custody or care of a Tribal child is at issue.

The Parties agree that it is in the best interest of the Indian Children and families and the Tribe for the Tribe to take jurisdiction of existing cases and all future cases as contemplated by ICWA.

V Full Faith and Credit. The parties agree to provide full faith and credit for the public acts, records, and judicial proceedings of the other in matters governed by this Agreement.

VI. Interpretation of Agreement. This Agreement shall be construed liberally so as to achieve results consistent with ICWA and this Agreement. The following guidelines shall be followed:

A. Indian families should be preserved;

B. Cases involving the Tribe's children should be heard in a Tribal Court whenever possible.

C. Indian children who must be removed from their homes should have placements within their own families or Tribe.

D The State and the Tribe will collaborate on child welfare and custody decisions for children who remain in the custody of the State. The State will defer to Tribal determinations on child welfare and custody, unless the State believes that such Tribal determinations pose a risk to the child. Where the State disagrees with a Tribal determination and makes a different determination, the Tribe retains the right to raise the issue in the appropriate forum.

VII. Definitions

The following definitions shall apply to this Agreement, unless otherwise indicated:

A. "Adoption" means the permanent placement of an Indian child for adoption that results in a final decree of adoption.

B. "Active Efforts" means active and thorough efforts by the State and Tribe social services agencies to fulfill its obligations of ICWA and this Agreement and to keep the child in the home as a first priority

C. "Best Interests of the Indian Child" means the standard of review required under ICWA. Meeting the Best Interests of the Indian Child recognizes the importance of maintaining connections with the family and with the Tribe.

D "Case Plan" means a written plan prepared by the Tribe's social services department that documents the reasons the child is under the jurisdiction of the Court and the steps that must be taken in order for the child to receive a permanent placement.

E. "Custodian" means a person over 18 years of age who has custody of a child but does not have parental rights.

F "Department of Human Services (DHS)" means the Maine State Department of Human Services.

G. "Dispositional Review Hearing" means any scheduled court hearing to review the status of the child and family

H. "Domicile" means a person's true, permanent home, or the place that the person intends to return even though the person is actually residing elsewhere; a child's domicile is determined by the domicile of his/her custodial parent(s) and or guardian or custodian.

I. "Guardian" means a person over 18 years of age who has legal custody of an Indian Child as so ordered by a court but who does not have parental rights.

J "Extended Family" shall be defined by the Tribe. Should the Tribe fail to identify a child's Extended Family, Extended Family shall mean a person who is at least eighteen (18) and who is the child's grandparent, aunt, uncle, brother, sister, brother-in-law sister-in-law, niece, nephew, first cousin, second cousin, or step-parent.

K. "Foster Placement" means any and all initial and subsequent actions involving the removal of an Indian child from its parents or Indian guardian or custodian for temporary placement in a foster home or institution or the home of a guardian or custodian, where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated.

L. "ICWA" means the Indian Child Welfare Act, 25 U.S.C §§1901, *et seq*

M. "Imminent physical danger" means a threat of immediate physical injury to an Indian Child.

N. "Indian" means any person who is a member of any Indian Tribe, or who is an Alaska Native as defined in the Alaska Native Claims Settlement Act (43 U.S.C. §1602(g)).

O. "Indian Child" means any unmarried person who is under the age of eighteen (18) 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.

P "Indian Tribe" means any Indian tribe, band, nation, or other organized group or community of Indians that is federally recognized.

Q "Legal Custody" means the legally enforceable duty, responsibility, and authority to provide care and control of a child as interpreted by the State court or the Tribal Court when transferring legal responsibility for care from a parent, custodian, or guardian to the Tribe, DHS, the Tribal Court, or individual pursuant to a court order

R. "Notice" shall mean the notification of the Tribe that an Indian Child is the subject of a foster placement or adoption hearing according to ICWA and this Agreement.

S. "Order of Placement" shall mean the following order of preference in placing Indian Children, unless the Tribe determines a different order of preference:

1 Member of a Child's Extended Family;
2. Other member of the Child's Tribe;
3. Other Indian family; or, if the above cannot be met,
4. Non-Indian family

T "Qualified Expert Witness" is a person who is a member of the Indian Child's Tribe who is recognized by the Tribe as familiar with the Tribe's custom and organization as to child-rearing or a lay expert witness who has substantial experience in his or her field or a certified professional who has

substantial education and experience with Indian Children. "Qualified Expert Witness" as used here has the same meaning as the term is used in the Indian Child Welfare Act.

U "Termination of Parental Rights" (TPR) means any action by the State or the Tribe resulting in the permanent severing of the parent-child relationship.

V "Tribal Court" shall mean any Court authorized by the Tribe to uphold the Tribe's laws, regulations and customs.

W "Tribal Social Services Agency" means the Tribal departments with responsibility for implementing ICWA and/or the provision of social services to Indian families.

X. "Ward of Tribal Court" shall mean a child who is deemed in need of services and has been placed in the custody of the Tribal Court. A child may be a Ward of Tribal Court without being available for adoption within the State.

VIII. Agreement with State of Maine

A. The State desires to assist the Tribe in protecting its children and promoting the future of the Tribe. Therefore, the State agrees to do the following:

1. Notify the Tribe whenever an Indian Child is at risk of placement, and offer an opportunity to intervene by the Tribe to avoid placement by DHS. When a case has been assigned to a caseworker, the State will notify the parents of the parents' option to notify the Tribe and to seek services from the Tribe.
2. Establish a system of regularly scheduled training for DHS staff that will emphasize the importance of identifying an Indian Child's Tribal affiliations and extended family for placement purposes.
3 Make training programs for caseworkers and foster parents available to any potential foster parents or caseworkers for the Tribe;
4. Provide notice to the Tribe and for intervention by the Tribe in cases of child custody proceeding.
5 Provide appropriate notice to the Tribe for administrative hearings and reviewing of child custody proceedings that involve an Indian Child.
6. Provide the Tribe a copy of any court decrees regarding adoptions of Indian Children of the Tribe.
7 Provide any information to a Tribe, adoptive family or Indian Child that may be necessary to establish membership.
8. Maintain records on Indian Children in residential facilities including group homes and foster homes, including the extent of compliance with placement preferences in ICWA.

B. Funding Issues: The State and/or DHS will do the following to assist with funding:

1 To the extent possible, assist the Tribe in obtaining state and federal funding to facilitate the Tribe's ability to provide services that address the conditions in a child's home to support the goal of family preservation. This means that the State will do the following:

a. Promote access by the Tribe to services available with providers who have contracted with the State by providing information and any necessary authorizations;
b. Advocate for direct funding to the Tribe by the federal government through Title IV-E of the Social Security Act, and/or work to develop an agreement to pass through IV-E funds to the tribe; and
c. Assist the Tribe to maximize funding available through Medicaid, including the provision of technical assistance.

IX. Implementation of Agreement.

A. Timing. The State agrees that all child welfare and pre-adoption cases currently open involving an Indian Child shall, upon request of the Tribe, be transferred to Tribal Court, absent an objection by either parent and subject to declination by the Tribal Court. Tribal Court will hear the case at the next dispositional review hearing.

B. Notice. The State shall review all cases currently active in DHS to ensure that proper notice was given to the Tribe under ICWA and this Agreement. The State will take corrective action in cases where no notice or improper notice was given to notify the Tribe immediately of the error.

C Confidentiality DHS shall disclose confidential information to the Tribe in any case where the Tribe has exercised its right to intervene in support of the purposes of ICWA. DHS will comply with any State or Tribal Court order requiring disclosure of such information. The parties will execute a confidentiality agreement to ensure that the confidentiality of cases that are exchanged between the Tribe and the State is protected. The Tribe will share confidential child protection information with the State where the State has initiated a child protection investigation and the Tribe has relevant information about the family Both parties recognize the importance of confidentiality in child welfare proceedings and will train their staff on how to ensure such confidentiality

D Training and Preparation. Whenever possible, the State shall assist the Tribe in training and preparing staff for the ICWA caseload. The State and the Tribe will work collaboratively to make trainings available at least two times per year. DHS caseworkers, at the request of the Tribe, shall work directly with counselors from Tribal Social Services to ensure a smooth transition for the families.

E. Continuing DHS Responsibility for Services. DHS shall continue to be responsible for cases until they are completely transferred to the Tribe's jurisdiction and custody has been transferred to the Tribe, Tribal Court or other entity. The parties agree that the transfer to Tribal Court includes a transfer of custody from DHS to the Tribe, the Tribal Court or other entity specified in the transfer order.

F Procedures for cases in Tribal Court. Within 120 days of the signing of this Agreement, the State and the Tribe shall work together to create procedures for identifying the Tribe's children currently in the custody of DHS, effecting Tribal Court jurisdiction over new cases, and transferring continuing cases to Tribal Court. The State and the Tribe shall also establish written policies for the implementation of this Agreement that each party will follow. A copy of these procedures will be provided to all DHS employees, Tribal social services employees, State and Tribal Court judges and clerks and all others whose actions or activities may fall under this Agreement.

G. Compliance Agreement. The Tribe and DHS agree to each appoint an individual to be designated for working with ICWA compliance. This compliance "team" shall meet quarterly with Tribe and State specialists to review procedures created under this Agreement and propose any new procedures required to improve services in the future. The team will review any Indian Child cases in State or Tribal Court upon the request of a social worker from either the Tribe or the State, to examine ICWA compliance and make recommendations to the parties.

H. Sanctions for Non-Compliance. The State and the Tribe shall work together to determine appropriate sanctions for violations of ICWA and this Agreement. At a minimum sanctions will include further monitoring of the situation, and may include a corrective action plan.

I. Inter-Agency Coordination. The Tribe and DHS agree to coordinate with the other agency to implement the terms of this Agreement. Such coordination will include training, on-going consultation, developing and negotiating agreements with other agencies, and any appropriate measures to ensure that this Agreement is understood and effectively implemented.

X. Training. DHS shall require its state child welfare professionals who handle cases dealing with Indian Children, and strongly encourage private agencies who work with child welfare and placing Indian Children, to require their staff members to receive training specific to the Indian Child Welfare Act and this Agreement. Additionally, the Tribe shall require that its social service workers and court personnel attend such training.

A. This training shall include (but not be limited to) the following areas:

1. Procedures to implement ICWA and this Agreement;
2. Notice Requirements;
3. Provision of protective services;
4. Provision of emergency foster care placement services;
5. Legal requirements to complete involuntary foster care placement or termination of parental rights;
6. Voluntary foster care placement;
7. Applicability of placement preference standards;
8. Records maintenance;
9. Adoption of Indian Children; and
10. Cultural issues affecting the Tribe.

B. The tribe will develop and deliver training in collaboration with the State to promote knowledge and understanding of the following:

1. Behavioral issues that come with the clashing of two sets of cultural norms;
2. Socio-economic factors effecting the Tribe;
3. Historical relationship with the State and child welfare personnel;
4. Parenting skill support;
5. Reality that parent "substitutes" may have raised children;
6. Extended family and non-family members who are family-like in their relationship to the Indian Child; and
7. Any other issues specific to the child's Tribe or the area.

C. DHS agrees to assist with logistics and funding for these trainings.

XI. Transfers to Tribal Social Services Agencies and to Tribal Courts.

A. Mandatory Transfers. The parties agree that except for an emergency or an objection by a parent, in the absence of good cause to the contrary, all child protection proceedings in Indian Child cases, at the request of the Tribe, must be transferred to the Tribal Social Services agencies for appropriate action in Tribal Court or directly to Tribal Court.

B. Transfer Procedures. The parties further agree that the procedures they develop will include procedures for identifying cases that trigger ICWA and

this Agreement, preferably prior to any action being taken in State court. The State agrees that it will provide training to DHS workers to help them identify the Tribe's children and notify the Tribe when such a child has been reported to that agency

C Emergencies. The parties shall establish written procedures for identifying emergencies and providing for placements that are temporary until a placement under ICWA and this Agreement can be secured.

D Review of Indian Children currently in placement. Within 120 days of the implementation of this Agreement, DHS shall review all of its cases involving Indian Children. If the State or Tribe learns of a placement that fails to meet the placement preferences or the good cause exception in ICWA, DHS will work with the Tribe to develop a plan that is satisfactory to all parties.

XII. Funding Issues

A. Foster Care Maintenance Payments. The parties agree that families providing family foster care for Indian Children in the custody of DHS shall be paid the customary maintenance amount that DHS would have provided the family had they been fostering a non-Indian Child.

B. Sections XII (C) and (D) of this agreement below, where a child is in Tribal custody and is adopted, will become effective upon the implementation of an agreement between the Department and the Tribe to pass through federal IV-E funds to the Tribe and then following a change in the Adoption rules to allow the Department to use state funds for adoption assistance in this situation.

C. Adoptive Placement Costs. A child placement agency responsible for the pre-adoptive placement of Indian Children shall be reimbursed at the usual and customary rate for such costs from the State. The State will work with the Tribe to develop a Tribal placement agency that will receive the usual and customary rate from the State.

D Adoption Assistance Payment. DHS, in coordination with the Tribe's social services department, agrees to provide adoption assistance payments to approved adoptive parents who have obtained a child through a Tribal Court proceeding, provided that the child and the parent meet all of the eligibility requirements set out in 42 U.S.C §670, and state law (Maine Title 18-A, Article IX Part 4 and the Maine Rules for Adoption Assistance) or the Tribe s adoption standards.

E. Future Funding. DHS also agrees to provide assistance to the Tribe to identify, evaluate and obtain other social service funding.

XIII. Recruitment and Registry of Foster Homes and Adoptive Homes.

A. Recruitment. The parties agree to cooperate in a joint effort to develop a plan to recruit Indian foster and adoptive homes. The recruiting plan may include public advertising and other means likely to secure appropriate Indian homes. DHS shall provide training to assist potential Indian foster care providers to comply with the State and Tribe licensing requirements for foster or adoptive placements.

B. Registry The parties agree to establish and maintain a registry of all Indian Homes licensed by the State of Maine, licensed or approved by the Tribe, and available to receive Indian Children for foster care or adoption. The registry will identify the name, address, tribal affiliation of the home, whether the home is licensed or registered with the State or the Tribe, and whether the home is available for foster or adoptive placement or both. The registry will be established by the State and maintained collaboratively by the Tribe, the State and any other tribe that wishes to participate. The registry will be accessible by both the Tribe(s) and the State.

XIV Inter-State Issues.

A. If another state requests that the Department assume responsibility for a child that the other state wishes to place in Maine, the Department will ask the Tribe to determine whether or not the child is a member of or eligible for membership in the Tribe and will subsequently notify the Tribe. The Department will refuse to accept responsibility for the child until a mutually developed plan for the child has been established between the Tribe and the Department.

B. When DHS makes a request to another state that an Indian Child be sent there for the purpose of foster care or pre-adoptive placement, a copy of the request shall be sent at the same time to the Child's Tribe.

C. Retention of Jurisdiction. The sending state or Tribe shall retain jurisdiction over the Indian Child until the receiving state or the Tribe has accepted jurisdiction of the case.

XVI Coordination of Agencies. DHS will notify all other State agencies currently associated with the care or protection of Indian Children, about the existence and contents of this Agreement and will coordinate other state services that support the goals of this Agreement. Nothing in this agreement obligates other state agencies that are not a party to this agreement to take or refrain from any specific action.

XVII Dispute Resolution. The parties agree that, upon the request of either party, disputes arising under this Agreement shall be submitted for resolution to a dispute resolution "team" consisting of one DHS designee, one Tribe designee and a third member selected by both the DHS and the Tribe. A dispute shall only be referred to the dispute resolution team after other informal efforts at resolving the dispute have been unsuccessful. The parties agree to be bound by the decision of the dispute resolution team. Each party will have an opportunity to be heard by the team as to the merits of its position. The decision of the team will be in writing. The parties to this agreement will develop rules and procedures as to how the team's hearing will be conducted.

XVIII. Amendment of Agreement. The parties agree that amendments to this Agreement shall be in writing and must be agreed to by both parties.

XV Termination of Agreement. This Agreement shall remain in effect until revoked. Either party may revoke giving sixty (60) days written notice to the other, provided that any services provided under this Agreement do not lapse until provisions have been otherwise made.

XVI. Severability Clause. Should any clause in this Agreement be deemed invalid or unlawful, the rest of the Agreement shall still be binding and remain in full force and effect.

Date: 09/16/02

Brenda A. Commander
Tribal Chief
Houlton Band of Maliseet Indians

Date: Sept 16, 2002

Kevin W Concannon
Commissioner, Department of Human Services
State of Maine

Date: 9-16-02

G. Steven Rowe
Attorney General
State of Maine

APPENDIX I

Copy of the Penobscot Nation ICWA Agreement with the State

CHILD WELFARE
AGREEMENT BETWEEN
THE MAINE DEPARTMENT OF HUMAN SERVICES
AND
THE PENOBSCOT INDIAN NATION

I. INTRODUCTORY STATEMENT

Protection of children who are suspected to be or are victims of abuse or neglect is a goal of the Department of Human Services (DHS) and the Penobscot Indian Nation (PIN). Both agree to work cooperatively toward this goal. Furthermore, if jurisdiction is not clear, nothing in this agreement is to prevent either the State or the Nation from taking what action it believes necessary to protect a child from immediate risk of serious harm, provided the other is notified and jurisdiction established as soon after as possible. This agreement is intended to advance, and not to in any way impede or inhibit, cooperation between DHS and PIN toward the goal of protection of children.

II. DEFINITIONS

Child Protective Referral:

A written or oral report from a person who knows or has reasonable cause to suspect that a child has been or is likely to be abused or neglected.

Child Protective Services:

Receipt and investigation of referrals of suspected child abuse or neglect, case planning, referral to appropriate services and resources, and case management toward the elimination or alleviation of child abuse or neglect of a child in his own home, initiation of court action to protect child.

Indian Child:

An unmarried person who is under age eighteen and is either (a) a member of a federally recognized Indian tribe or Alaskan Native group; or (b) is eligible for membership in such a tribe or group and is the

biological child of a member of such a tribe or group (Reference 25 U.S.C. 1903).

Intake Study.

The process of fact-gathering and assessment by which a referral for child protective services is received and the decision is made whether there is risk of child abuse or neglect and what action is to be taken.

Interstate Compact on the Placement of Children.

Enacted by almost all states and jurisdiction within the United States, this uniform law establishes orderly procedures for the interstate placement of children and fixes responsibilities for those involved in the placement of the child (Title 22 M.R.S.A. §4191-4247).

Substitute Care Services:

Assessment, case planning, case management, provision or arrangement of needed services for a child placed outside his own home by a state or tribal agency which has custody of the child or a voluntary agreement for placement with the parent.

III. SPECIFIC PROVISIONS

A. CHILD PROTECTIVE SERVICES FOR CHILDREN RESIDING IN THE PENOBSCOT INDIAN RESERVATION

The Maine Department of Human Services under Title 22 M.R.S.A. §4001 et seq. is required to receive and investigate allegations of suspected abuse and neglect of children. Through this agreement the responsibility of the Penobscot Indian Nation for the receipt and investigation of such referrals regarding Indian children as defined by the Indian Child Welfare Act who reside on the reservation is recognized. The Maine Department of Human Services retains responsibility for referrals regarding children who are not Indian children as defined by the Indian Child Welfare Act.

DHS

1. When a child protective referral is received by a regional office or Children's Emergency Services regarding a child residing on the reservation, the intake screening and assessment information

PIN

1. When a child protective referral regarding a child residing on the reservation is received, intake information will be gathered according to established policy and procedures. If there is doubt whether PIN has

will be gathered according to DHS procedures, and the referral source will be informed that

(a) PIN Department of Human Services Child & Family Services Program (hereafter "PIN Child & Family Services Program") will be contacted to determine the tribal status of the child.

(b) If PIN Child & Family Services Program has jurisdiction, referral information will be given to PIN Child & Family Services Program.

(c) If DHS has jurisdiction, DHS and PIN Child & Family Services Program will work as closely and cooperatively as possible, and PIN will be involved to the full extent that the situation affects the welfare of the Indian family.

This procedure will be employed whether the referral is received while such a child is present on the reservation or is off the reservation at the time of referral.

jurisdiction, the referral source will be informed that if it is determined that DHS has jurisdiction the information will be given to DHS. Department of Human Services Child & Family Services Program (hereafter "PIN Child & Family Services Program") will then obtain from the appropriate tribal entity the tribal status of the child.

2. The DHS intake worker will call the PIN Child & Family Services Program Director to obtain the tribal status of the child(ren).

2. Upon DHS request to determine the tribal status of a referral received by DHS, the PIN Program Director or designee will obtain from the appropriate tribal entity the status of the child and will notify the DHS intake worker or supervisor of the tribal status.

B. <u>CHILD PROTECTIVE SERVICES FOR INDIAN CHILDREN AS DEFINED BY THE INDIAN CHILD WELFARE ACT WHO ARE DOMICILED OR RESIDING ON THE PENOBSCOT NATION RESERVATION.</u>

1. When DHS has received a child protective referral regarding a child and it has been determined that the child is an Indian child as defined by the

1. PIN Child and Family Services staff will record the referral and determine what further action is to betaken.

Act, the DHS intake worker or supervisor will give to the Program Director or designated caseworker; Child & Family Services, the information obtained from the referral source(s) and if DHS has had previous child welfare involvement with the family being referred, other information relevant to PIN's assessment of the current situation and case planning.

2. DHS may provide consultation upon request.

2. May request consultation as needed.

3. Upon request by PIN and to the extent of available resources, DHS will provide information and assist PIN in locating off-reservation placement for children within PIN jurisdiction. Jurisdiction over and responsibility for such placement will remain with PIN.

3. Will request information and assistance in locating off-reservation placement for children within its jurisdiction where PIN determines that such placement is in the best interests of the child.

4. Will make available to PIN open child protective cases those social services which are funded with the Social Service Block Grant and are available to DHS child protective cases through contracts between DHS and community agencies, in accordance with DHS policy and procedures for use of these services.

4. Will utilize these social services as appropriate and in accordance with DHS policy and procedures for use of payment to those services.

5. Will refer to DHS families who have been referred for or are receiving child protective services from PIN and who move outside of the Penobscot Indian Reservation and will provide relevant information.

C. CHILD PROTECTIVE SERVICES FOR CHILDREN WHO RESIDE OR ARE DOMICILED ON THE RESERVATION IN AN INDIAN HOME BUT WHO ARE NOT INDIAN CHILDREN AS DEFINED BY THE INDIAN CHILD WELFARE ACT:

DHS

PIN

1. When a referral is received and it is determined by contacting the Program Director, Child & Family Services Program, that

1. When a referral is received involving a child who is not an Indian child as defined by the Act, the PIN caseworker

the child is not an Indian child, the intake worker will send the case to the DHS supervisor for assignment.	will call the regional intake worker or CES.
2. The assigned DHS caseworker contacts the PIN caseworker to review the information available and to decide how to jointly conduct the intake study.	2. The PIN Child & Family Services Program or caseworker reviews with the assigned DHS caseworker the referral information, information PIN has regarding the referred child or family and DHS information and with the DHS caseworker decide how to jointly conduct the intake study.
3. When a DHS representative comes to the reservation, he or she is to be met by a representative of the Penobscot Nation (Child & Family Services staff, tribal police, or if either are unavailable, others designated by the Governor for such a purpose).	3. A representative of the Penobscot Nation will meet the DHS caseworker. This will be PIN Child & Family staff or in cases of emergency the police, or other so designated by the Governor for such a purpose.
4. The intake study will be conducted according to DHS policy and procedures and conducted jointly with PIN Child & Family Services.	4. Will participate in the intake study of non-Indian children residing on the reservation in an Indian home.
5. At the completion of the intake study will meet with PIN caseworker to review the findings and develop a case plan which reflects the best interests of the Indian family.	5. Will meet with DHS caseworker to review and study findings and to develop case plan.
6. At least every three months meet with PIN as a service provider to review the progress and if necessary, revise the case plan.	6. As a service provider will meet with DHS caseworker at least every three months to review the case progress and if necessary to revise the case plan.
7. Will notify PIN of any plan to terminate services at least 30 days prior to such termination.	7. Upon request will provide to DHS and to families information about services available to children and families residing on the reservation.
8. Will supply PIN all information received in the course of the	

case which is in any way relevant to the welfare of the Indian family.

D. CHILD PROTECTIVE SERVICES TO PENOBSCOT CHILDREN DOMICILED OR RESIDING OFF THE RESERVATION.

DHS	PIN
1. When DHS initiates a petition for a child protection order, it will: a. verify tribal status as in A.1. and 2. b. and if the Act applies to the child, will notify PIN, Director of Social Services, that a petition is being filed.	1. Will obtain verification of tribal status as in 1.a.
2. Will serve the Governor, Penobscot Indian Nation, with a copy of the petition by certified mail, and on the same day shall mail a copy of the petition by first class mail to the Director of PIN Child & Family Service Program.	2. Will decide and notify DHS of its determination as to intervention prior to hearing under §4035. Nothing in this agreement shall preclude PIN's right to intervene, request jurisdiction, or take other action at a later date as established by statute or other authority.
3. Provide all necessary and relevant information to PIN in order to assess extended family or licensed Indian foster homes on the reservation as potential placements for a child in need of placement.	3. Will assist in the assessment of potential placement resources for children in need of placement.
4. Will provide all necessary and relevant information to PIN Child & Family Services Program to assess intervenor status.	4. Will appear as witnesses in State Court hearings, if requested by DHS.
5. Will provide all relevant information on the case when the Nation obtains intervenor status in state court, or is	5. Will provide adequate notice of hearings to any DHS workers.

granted tribal jurisdiction upon request of PIN Child & Family Services Program.

6. Will appear as witnesses in the subsequent hearing in tribal court, should transfer of jurisdiction take place, if requested by PIN Child & Family Services Program.

7. Will provide adequate notice of hearings to any PIN workers.

8. Will refer to PIN families who have been referred for or who are receiving child protective services from DHS and who move to the Penobscot Indian Reservation, and will provide PIN with relevant information.

9. DHS may request consultation as needed.

10. Where questions arise concerning provision of information, DHS staff will refer such questions to their attorneys.

6. May provide consultation as needed.

7. Where questions arise concerning provision of information, PIN staff will refer such questions to their attorneys.

E. SUBSTITUTE CARE SERVICES FOR CHILDREN IN THE LEGAL CUSTODY OF THE PENOBSCOT INDIAN NATION

Intra-State Placement

DHS	PIN
1. Will provide information on facilities in accordance with Title 22 M.R.S.A. 7703.	1. May request information on licensed foster homes/child care facilities which may be placement resources for PIN children.
2. With the permission of the applicant, will notify and involve PIN Child & Family Services when an application for a family foster home license is received from a member of the Penobscot Nation.	2. Will participate in the licensing study for families residing on the PIN reservation with the permission of the family.

3. May participate in licensing studies of Penobscot applicants residing off the PIN reservation with the permission of the family.

F. TRAINING AND TECHNICAL ASSISTANCE

1. Will make available to PIN Social Service staff the training available to DHS child welfare staff.

1. Will make available to DHS child welfare staff the training available to PIN child welfare staff.

G. DISCLOSURE OF INFORMATION

1. Disclosure of any information under the agreement shall be made in accordance with 22 M.R.S.A. §4008 and 22 M.R.S.A. §7703.

1. Disclosure of any information regarding PIN cases will be made in accordance with the applicable provisions of the PIN code.

H. AMENDMENT AND TERMINATION

1. This agreement does not terminate any other child specific agreement entered into by two parties.

2. This agreement may be amended at any time upon the mutual agreement of the parties.

3. This agreement may be terminated by either party upon notification of the other party 180 days in advance.

I. COMPUTER MATCHING

The parties agree to continue to explore computer matching of tribal census roles to DHS computers so as to facilitate identification of tribal members.

2/5/87
Governor, Penobscot Indian Nation

Director, Bureau of ~~Special~~ Social Services

1/29/87
Commissioner, Department of Human Services

APPENDIX J

List of Materials Supplied to Committee by Penobscot Tribal Representative Michael Sockalexis

Materials supplied to the committee by
Penobscot Tribal Representative Michael Sockalexis
(archived in the study master file)

2004-2005 Comprehensive Statewide Implementation Plan. Florida Department of Children and Families

2005 Children's Legislative Agenda. Child Welfare League of America

Agreement Regarding Child Custody Services and Proceedings between the _____ Tribe and the State of Washington Department of Social and Health Services (model agreement)

An Analysis of Compliance with the Indian Child Welfare Act in South Dakota. National Center for State Courts and the North American Indian Legal Services, 2004

Child Welfare Services. Title 42 U.S.C., Part IV-B

Government-to-Government Report, 2004 Oregon Department of Human Services (to the Legislative Commission on Indian Services)

Guide to Compliance With the Federal Indian Child Welfare Act in New York State. New York State Office of Children & Family Services, 2001

Indian Child Welfare Act: Existing Information on Implementation Issues Could be Used to Target Guidance and Assistance to States. Washington: GAO, April 2005

The Indian Child Welfare Act: The Need for a Separate Law B.J Jones. American Bar Association, General Practice, Solo & Small Firm Division website, www.abanet.org/genpractice/compleat/f95child.html

ICWA Implementation Problems Addressed by H.R. 2750 "Indian Child Welfare Act Amendments of 2003" National Indian Child Welfare Association (policy statement on proposed ICWA amendments that ultimately did not pass Congress)

Proud Heritage: Native American Services in New York State. New York State Office of Children & Family Services, 2001

Summary of SB 678, A Bill to Improve Compliance with the Indian Child Welfare Act. (Senate Bill in California introduced on February 22, 2005, currently before Appropriations Committee).

Testimony of Jack F Trope, Executive Director, Association on American Indian Affairs, Rockville, Maryland, before the Subcommittee on Human Resources of the House Committee on Ways and Means. January 28, 2004