VOLUME NO. 41 OPINION NO. 76

ADOPTION - Effect of Indian Child Welfare Act on obligation to provide child protection services and financial assistance;
CHILD CUSTODY AND SUPPORT - Effect of Indian Child Welfare Act on obligation to provide child protection services and financial assistance;

INDIANS - Effect of Indian Child Welfare Act on obligation to provide child protection services and financial assistance;
INDIANS - Licensing of foster care homes on Indian reservations;
LICENSES - Foster care homes on Indian reservations;
SOCIAL AND REHABILITATION SERVICES, DEPARTMENT OF - Effect of Indian Child Welfare Act on obligation to provide child protection services and financial assistance;
SOCIAL AND REHABILITATION SERVICES, DEPARTMENT OF - Licensing of foster care homes on Indian reservations;
ADMINISTRATIVE RULES OF MONTANA - Sections 46.5.603 to 46.5.607;
MONTANA CODE ANNOTATED - Sections 18-11-101 to 18-11-111, 41-3-301, 41-3-401 to 41-3-406;
UNITED STATES CODE - 25 U.S.C. §§ 1901 to 1963; 42 U.S.C. §§ 601 to 676.

HELD: 1. The Montana Department of Social and Rehabilitation Services does not have jurisdiction to provide child protection services to Indian children subject to exclusive tribal jurisdiction under the Indian Child Welfare Act or residing on the reservation and eligible for tribal membership.

2. The Montana Department of Social and Rehabilitation Services may not make payments under Title IV-E of the Social Security Act to Indian children whose foster care or adoption placement is subject to exclusive tribal jurisdiction under the Indian Child Welfare Act.

3. The Montana Department of Social and Rehabilitation Services may not provide child protection services and benefits funded solely by state and local monies to Indian children whose foster care or adoption placement is subject to exclusive tribal jurisdiction under the Indian Child Welfare Act or who are eligible for comparable assistance under Bureau of Indian Affairs programs.

4. The Montana Department of Social and Rehabilitation Services may not continue to provide child protection services or benefits to an Indian child whose child custody

proceeding has been transferred from state district court to tribal jurisdiction under the Indian Child Welfare Act.

5. The Montana Department of Social and Rehabilitation Services has the authority to license foster care homes maintained by nontribal members on Indian reservations. The Department has the authority to license foster care homes operated by tribal members on a reservation only if the tribe does not engage in such licensing activity.

30 July 1986

David Lewis, Director
Department of Social and
Rehabilitation Services
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Dear Mr. Lewis:

You have requested my opinion concerning the responsibilities of the Montana Department of Social and Rehabilitation Services (Department) with respect to (1) the provision of child protection services and certain benefits to Indian children and (2) the licensing of foster care homes located on Indian reservations. Your specific questions are:

1. Does the Department have jurisdiction to provide child protection services to an Indian child residing or domiciled on his tribe's reservation?

2. What are the Department's responsibilities with respect to the provision of services and benefits under Title IV-E of the Social Security Act, 42 U.S.C. §§ 671 to 675, to an Indian child residing or domiciled on his tribe's reservation?

3. Does the Department have a responsibility to provide child protection services, which are funded solely by state and local monies, to an Indian child residing on a reservation and eligible for

assistance under Bureau of Indian Affairs programs?

4. Does the Department have a responsibility to continue provision of child protection services to an Indian child residing and domiciled off his tribe's reservation after a child custody proceeding has been transferred pursuant to section 101(b) of the Indian Child Welfare Act, 25 U.S.C. § 1911(b), to that tribe?

5. Does the Department have jurisdiction to license member-maintained and nonmember-maintained foster care homes located on an Indian reservation?

These questions raise largely unresolved issues requiring analysis of relevant federal and state statutes, regulations, and decisional authority.

I.

The Department's child protection service responsibilities are varied but, for present purposes, can be separated into those which involve temporary or permanent separation of a child from his parents' custody and those which attempt to further the child's best interests without such separation. Representative of the first category are abuse, neglect, or dependency proceedings which seek termination of the parents' custodial rights; the second category involves services such as day care and homemaker assistance which do not effect removal of the child from parental custody. This distinction is significant because, as developed below, the Indian Child Welfare Act, 25 U.S.C. §§ 1901 to 1963 (1983) (ICWA), applies only to "child custody proceedings" which are defined in section 4(1), 25 U.S.C. § 1903(1), with reference to four kinds of individually described actions: (1) "foster care placement" which means temporary placement in a foster care home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand but where parental rights have not been terminated; (2) "termination of parental rights" which means any action resulting in termination of the parent-child relationship; (3) "preadoptive placement" which means the temporary placement of an Indian child in a foster home or

institution after termination of parental rights prior to or in lieu of adoption placement; and (4) "adoptive placement" which means the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption. The common element among these four sub-terms is voluntary or involuntary separation of an Indian child from the custody of his parents or Indian custodian. Consequently, while certain of the Department's child protection service responsibilities will be directly affected by the ICWA, others will not. With respect to the second category of child protective services, different analytical principles must be applied to determine the Department's authority.

A.

The ICWA was enacted in response to widespread concern over the high incidence of removal by, inter alia, state agencies of Indian children from their parents' or Indian custodians' custody and placement into non-Indian environments. See 25 U.S.C. § 1901(4). Its general purpose, as stated in section 3, 25 U.S.C. § 1902, is "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" governing such removal and placement. See also H.R. Rep. No. 1386, 95th Cong., 2d Sess. 8 (1978); see generally In re M. E. M., 195 Mont. 329, 333, 635 P.2d 1313, 1316 (1981). With respect to these proceedings, Title I of the ICWA establishes two jurisdictional standards: (1) Indian tribes, as opposed to the state, have exclusive jurisdiction over any child custody proceeding (a) involving an Indian child who resides or is domiciled within that tribe's reservation unless jurisdiction is vested in the state by existing federal law or (b) any Indian child who is a ward of a tribal court irrespective of his residence or domicile; and (2) a state court is required in any proceeding for the foster care placement or termination of parental rights of an Indian child not domiciled or residing within the reservation of that child's tribe to transfer the proceeding to the tribe's jurisdiction, absent good cause to the contrary or objection by either parent, upon a parent's, an Indian custodian's or the tribe's petition, subject to declination of the transfer by the tribe's court. 25 U.S.C. § 1911(a) and (b). Indian children who are tribal court wards are not at issue in this opinion. Before discussion of other

substantive aspects of Title I, the scope of exclusive tribal jurisdiction over an Indian child, not already a tribal court ward, under section 101(a), 25 U.S.C. § 1911(a), must be clarified because it is a predicate for much of the analysis below.

I recognize that a literal construction of section 101(a) may indicate that a tribe has exclusive jurisdiction over any Indian child residing or domiciled within its reservation. I further realize that the ICWA is designed to restrict state, and not tribal, jurisdiction in child custody proceedings. Nonetheless, section 101(a) must be read in pari materia with section 101(b), 25 U.S.C. § 1911(b), which permits the exercise of state court jurisdiction over an Indian child "not domiciled or residing within the reservation of the Indian child's tribe." When such a child is residing on a reservation of a tribe other than his own, precise application of section 101(b) invests the state court with jurisdiction, subject to its notice and transfer provisions. This interpretation of section 101(b), which directly militates against construing section 101(a) as granting a tribe exclusive jurisdiction over nonmember Indian children within its reservation, comports with clear legislative intent that the child's tribe be given the opportunity to assume jurisdiction in custody proceedings. It also comports with recent decisional authority suggesting that a tribe's inherent sovereignty powers do not encompass broader regulation of nonmember Indians than non-Indians. Montana v. United States, 450 U.S. 544, 564 (1980) ("in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members"); Washington v. Confederated Tribes, 447 U.S. 134, 161 (1980) (because "nonmembers are not constituents of the governing tribe[,] ... [f]or most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation"); see also New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983). The ICWA's legislative history, moreover, reflected no expansion of the sovereignty rights of one tribe as against members of different tribes but, instead, indicated only that the statute's jurisdictional standards paralleled extant case law; those decisions, in turn, recognized exclusive tribal jurisdiction in child custody matters involving the tribe's children domiciled on the reservation. H.R.

Rep. No. 1386 at 21. While the issue is close, the most sensitive reading of sections 101(a) and 101(b) supports the conclusion that the former provision grants a tribe exclusive jurisdiction only over children residing or domiciled on the reservation who are members of or eligible for membership in that tribe or, if members are eligible for membership in another tribe, have the more significant contacts with the tribe asserting such jurisdiction. See 25 U.S.C. § 1903(5). I must emphasize, however, that the ICWA does not specifically address the question of one tribe's jurisdiction over another tribe's child and that the mere existence of possible state court jurisdiction under section 101(b) does not, in itself, preclude a tribe's exercise of jurisdiction over an Indian child not eligible for membership in the tribe.

Title I additionally establishes substantive and procedural standards for voluntary consent to foster care placement or termination of parental rights as to Indian children in state court proceedings and for preferential adoption placement of such children into Indian families. 25 U.S.C. §§ 1913, 1915. State court jurisdiction over the emergency removal or placement of an Indian child residing or domiciled on his tribe's reservation is limited to those who are temporarily located off the reservation; i.e., a state court has no such jurisdiction over such a child when he is within the reservation. 25 U.S.C. § 1922. See 124 Cong. Rec. 38,107 (Oct. 14, 1978) (statement of Rep. Udall).

Viewed as a whole, Title I clearly circumscribes state court authority to act in child custody proceedings. Exclusive tribal jurisdiction attaches to those proceedings when the child resides or is domiciled on his tribe's reservation, while state court jurisdiction, subject to a parent's, an Indian custodian's, or the tribe's right to request transfer, exists only if the child both resides and is domiciled off the reservation. These provisions reflect an intent by Congress to commit to tribal resolution the removal of an Indian child from his parents' custody and placement into an environment calculated to further his best interests. It is important, however, to reiterate that the ICWA's recognition of tribal primacy in such matters was preceded by court decisions establishing the exclusivity of tribal jurisdiction in domestic relations matters involving Indian children domiciled on their tribes' reservations. See, e.g., Fisher v. District Court, 424

U.S. 382 (1976) (per curiam) (reversing state court determination that it had jurisdiction over adoption proceeding in which all parties were tribal members domiciled on Northern Cheyenne Reservation); Wisconsin Potowatomies v. Houston, 393 F. Supp. 719 (D. Mich. 1973) (tribe, rather than state probate court, had authority to control custody and placement of Indian children domiciled on reservation when probate court assumed jurisdiction); Wakefield v. Little Light, 276 Md. 333, 347 A.2d 228 (1975) (state court did not have jurisdiction over custody proceeding where Indian child domiciled on Crow Reservation). Thus, even without reference to the ICWA, compelling tribal sovereignty interests exist with respect to Indian children, residing or domiciled within the reservation, who are members or eligible for membership because of their parentage.

Montana statutes establishing the Department's child protection service responsibilities provide a detailed procedure for effecting temporary or permanent termination of parental or Indian custodian custody. Under section 41-3-301(1), MCA, a departmental social worker may remove to a protective facility any youth who is believed to be "in immediate or apparent danger of harm." A petition for temporary investigative authority or protective services must thereafter be filed within 48 hours "unless arrangements acceptable to the [Department] for the care of the child have been made by the parents." § 41-3-301(3), MCA. Such proceeding is initiated in state district court and is prosecuted by the county attorney, the attorney general, or a specially-retained attorney. § 41-3-402, MCA. The Department may alternatively initiate an abuse, neglect, or dependency action and request temporary custody or termination of, inter alia, the parent-child legal relationship. § 41-3-401(10), MCA. The latter proceeding may also be commenced by the Department even though emergency protective services have not been provided. In either proceeding the district court is vested with broad powers to determine both the youth's need for protective services or his abused, neglected, or dependent status and to fashion relief consonant with his best interests. §§ 41-3-403, 41-3-406, MCA. These aspects of the Department's child protection service responsibilities are, therefore, integrated into a detailed and comprehensive adjudicatory scheme in which state district courts have jurisdiction. The Department's authority to interfere with parental

custody is unquestionably restricted by that same scheme. See State ex rel. State Tax Appeal Board v. Board of Personnel Appeals, 181 Mont. 366, 371, 593 P.2d 747, 750 (1979) ("administrative agencies are bound by the terms of the statutes or regulations bringing them their powers and are required to act accordingly"); City of Polson v. Public Service Commission, 155 Mont. 464, 469, 473 P.2d 508, 511 (1970) ("[i]t is a basic rule of law that the Commission, as an administrative agency, has only those powers specifically conferred upon it by the legislature").

Natural application of the ICWA and Montana statutes controlling the Department's authority to seek temporary or permanent termination of parental or Indian custodian custody accordingly dictates a conclusion that the Department may not provide such child protection services to Indian children if exclusive tribal jurisdiction exists. Consequently, when a child resides or is domiciled on his tribe's reservation, the Department may not act. In that regard, I note that the term "child custody proceeding" refers not only to judicial proceedings but also to purely administrative actions such as, for example, temporary or emergency removal of an Indian child from his parents' or Indian custodian's custody. This construction of such term is required by its definition in section 4(1) of the ICWA, 25 U.S.C. § 1903(1), and by legislative history establishing that, as initially proposed, the statute used the term "child placement" which was, in part, defined as "any proceedings, judicial, quasi-judicial, or administrative" in nature. See 123 Cong. Rec. 9995 (Apr. 1, 1977) (original text of S. 1214, 95th Cong., 1st Sess. § 4(g) (1977)); S. Rep. No. 597, 95th Cong., 1st Sess. 2 (1977) (reporting out S. 1214 which was introduced as H. R. 12533, 95th Cong., 2d Sess. (1978)); H.R. Rep. No. 1386 at 19. Although amendments to H.R. 12533, which eventually served as the basis for the ICWA, changed the term "child placement" to "child custody proceeding," the purpose of the modification was to eliminate perceived ambiguity in the former term "with respect to the various provisions of the bill" but, quite obviously, not to limit its scope to purely judicial proceedings. H.R. Rep. No. 1386 at 19-20; see 124 Cong. Rec. 38,102 (Oct. 14, 1978) (statement of Rep. Udall). Any other result creates a significant void in the ICWA's coverage inimical to its very purpose. Moreover, were the ICWA inapplicable to purely administrative actions or proceedings by states, section

122, dealing with emergency removals or placements, would have been drafted far differently. That section is clearly intended as a highly restricted exception to exclusive tribal jurisdiction under section 101(a) when an Indian child is temporarily off his tribe's reservation although residing or domiciled thereon. Since, as indicated by section 41-3-301, MCA, such emergency removals may well be necessary before a judicial proceeding can be commenced, the limited exception to section 101(a) would be meaningless if the term "child custody proceeding" did not encompass purely administrative actions.

Lastly, the ICWA does authorize state and tribal 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." 25 U.S.C. § 1919(a). The Department is, under the State-Tribal Cooperative Agreements Act, §§ 18-11-101 to 111, MCA, authorized to enter into such agreements. Although none has been reached in Montana, they provide a method for the Department to perform child protection services, which constitute a child custody proceeding under the ICWA, with respect to an Indian child residing or domiciled on his tribe's reservation.

B.

Whether an Indian child residing on his tribe's reservation is within the Department's jurisdiction for the purpose of receiving protective services, which do not constitute a child custody proceeding under the ICWA, is subject to different analytical standards. These standards were summarized in White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142-43 (1980):

> Congress has broad power to regulate tribal affairs under the Indian Commerce Clause. ... This congressional authority and the "semi-independent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. ... Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." ... The

> two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important "backdrop," ... against which vague or ambiguous federal enactments must always be measured. [Citations omitted.]

See Rice v. Rehner, 463 U.S. 712, 718-20 (1983). The Court later observed that, "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." 448 U.S. at 144.

Because the purpose of child protection services is to further a child's best interests, a child's on-reservation residence and eligibility for tribal membership or actual membership are decisive factors in determining the scope of the Department's regulatory authority. As indicated by the ICWA, its legislative history and antecedent decisions, tribes have a uniquely important sovereignty interest in matters affecting the viability of their members' parent-child relationships. Indeed, the ICWA has been criticized for not expressly restricting state involvement prior to actual removal of a child from parental custody. Barsh, The Indian Child Welfare Act of 1978: A Critical Analysis, 31 Hastings L.J. 1287, 1306 (1980). The ICWA's limited scope in this regard, however, can hardly be construed as implicit congressional approval of state agency jurisdiction when a "child custody proceeding" is not present. Not only would such a conclusion run contrary to the notion that, as to reservation intra-tribal affairs, a tribe is invested with substantial autonomy, but it would also be inconsistent with the ICWA's underlying purpose of protecting on-reservation tribal family structure from often ill-considered state action. See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 168-71 (1982) ("[t]he Court has been careful to protect the tribes from interference with tribal control over

their own members"); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978) (refusing to recognize a federal cause of action to protect rights created by Title I of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301 to 1303, because such right might "substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity"). Moreover, "[r]epeal by implication of an established tradition of immunity or self-governance is disfavored." Rice v. Rehner, 463 U.S. at 720.

The Department's authority to provide child protection services not constituting a child custody proceeding under the ICWA, therefore, does not extend to an Indian child residing on his tribe's reservation. The affected tribe, instead, has exclusive jurisdiction over and responsibility for the child. However, the State-Tribal Cooperative Agreements Act does authorize the Department to enter into agreements with tribes concerning the provision of such services. It must be underscored that, absent an agreement to the contrary, the Department cannot be required by tribal court order to provide services since those courts have no inherent jurisdiction over it.

II.

Title IV of the Social Security Act, 42 U.S.C. §§ 601 to 676 (1983), authorizes grants to states for aid to needy families with children and for child-welfare services. Part E to Title IV was enacted by Pub. L. No. 96-272, 94 Stat. 501 (1980), and extends federal financial assistance to states with approved plans for foster care and adoption assistance, foster care maintenance payments, and adoption assistance programs. 42 U.S.C. §§ 671 to 673. Montana formulated a state plan which, in turn, has been approved by the Health and Human Services Department. The plan makes no reference to the several Indian reservations in this state, nor does it specifically discuss the provision of Title IV-E funds to Indian children. Title IV-E and its associated federal administrative regulations are similarly silent.

42 U.S.C. § 672(a) permits states with approved plans to make foster care maintenance payments if certain conditions are met. Paragraph 2 of those conditions requires that the involved child's "placement and care [be] the responsibility of (A) the State agency administering the State plan approved under section 671

of this Title, or (B) any other public agency with whom the State agency administering or supervising the administration of the State plan approved under section 671 of the this Title has made an agreement which is still in effect." As developed above, however, foster care placements are, with respect to an Indian child residing or domiciled on his tribe's reservation, matters outside the Department's statutory responsibility and vested within the affected tribe's exclusive jurisdiction. Since there can be no reasoned argument that the 1980 amendments establishing Title IV-E extend such authority to the states, I must conclude that, by operation of the ICWA, the Department is not responsible for making foster care maintenance payments on behalf of such a child. The Department, moreover, is not required by Title IV-E to enter into agreements with tribally-controlled agencies which may have responsibility for an Indian child's placement or care. Native Village of Stevens v. Smith, 770 F.2d 1486, 1488-89 (9th Cir. 1985), cert. denied, 106 S. Ct. 1640 (1986).

The adoption assistance program in 42 U.S.C. § 673 does not contain a provision comparable to 42 U.S.C. § 672(a)(2). Nonetheless, it does necessitate substantial state involvement in various adoption-related decisions, some of which rest exclusively with an Indian child's tribe under the ICWA if he resides or is domiciled on its reservation. The state agency must thus decide whether the involved child is one with "special needs." That designation requires the agency to determine that (1) "the child cannot or should not be returned to the home of his parents"; (2) "there exists with respect to the child a specific factor or condition ... because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption assistance"; and (3) "a reasonable, but unsuccessful, effort has been made to place the child with appropriate adoptive parents without providing adoption assistance." 42 U.S.C. § 673(c). A state's ability to make these often difficult determinations clearly rests upon a high degree of administrative involvement in child custody proceedings and an independent evaluation of the results of such proceedings. Such involvement and evaluation are directly contrary to the exclusivity of tribal jurisdiction under section 101(a) of the ICWA, 25 U.S.C. § 1911(a).

Finally, the Department cannot be required by tribal court order to make foster care maintenance or adoption assistance payments. As stated above with respect to provision of child protection services, tribal courts have no inherent jurisdiction over the Department, and thus any responsibility to make such payments for an Indian child residing on his tribe's reservation arises only after appropriate agreements under section 104 of the ICWA, 25 U.S.C. § 1919, and 42 U.S.C. § 672(a)(2) have been concluded.

III.

The response to your third question is partially controlled by the analysis above in connection with the first. The Department does not have authority to provide child protection services, which constitute a child custody proceeding under the ICWA, to an Indian child residing or domiciled on his tribe's reservation. It further does not have authority to provide such services, which do not constitute a child custody proceeding under the ICWA, to an Indian child who resides on his tribe's reservation. The scope of such responsibility is unaffected by the child's eligibility, or lack thereof, for participation in Bureau of Indian Affairs programs. Furthermore, in those instances where an Indian child is not subject to exclusive tribal jurisdiction but is eligible for Bureau of Indian Affairs programs, the Department is not obligated to provide child protection services and benefits to the extent the federal program offers comparable assistance. See McNabb v. Heckler, 628 F. Supp. 544 (D. Mont. 1986).

IV.

Once a proceeding has been transferred to tribal jurisdiction under section 101(b) of the ICWA, 25 U.S.C. § 1911(b), such jurisdiction is exclusive and forecloses provision of child protection services by the Department for those reasons discussed under Part I.A above. Because tribal courts have the discretion under section 101(b) to decline jurisdiction over a proposed transfer, the district court's notice of transfer should include a stated period of time within which declination should be affirmatively indicated. The Department of the Interior recommends that the period be established at not less than 20 days. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,592 (1979). During such period the Department should continue to

provide child protection services unless, prior to its expiration, the tribal court acts to assume jurisdiction.

V.

The Department has promulgated regulations governing the licensure of youth foster homes to which Part IV-E referrals and payments are made. §§ 46.5.603 to 46.5.607, ARM. Because the Department may make such referrals and payments to foster homes within a reservation in instances when the tribe does not have exclusive jurisdiction under the ICWA, the question of whether the Department can impose its licensing regulations is not merely a theoretical concern.

First, if the foster home has been tribally licensed, section 201(b) of the ICWA, 25 U.S.C. § 1931(b), requires that, for Part IV-E or other federally-assisted programs, the tribal license "be deemed equivalent to licensing or approval" by the Department. Second, foster care homes of nontribal members, not tribally-licensed, clearly fall within the Department's licensing jurisdiction because, as developed above, the Department will normally have no responsibility for placing into those homes children who are members or eligible for membership in the tribe; consequently, no tribal interest is directly affected. Last, while licensing of foster homes maintained by tribal members will affect the tribe's sovereignty interests since on-reservation regulation of its members is involved, the Department should make licensing available to such members unless tribally-established procedures exist for licensure. If those procedures exist, the Department should request tribal members to secure the requisite license through the tribe and be bound by the eventual tribal determination. If no licensing procedures exist, the Department should process the license request in accordance with its administrative rules.

THEREFORE, IT IS MY OPINION:

1. The Montana Department of Social and Rehabilitation Services does not have jurisdiction to provide child protection services to Indian children subject to exclusive tribal jurisdiction under the Indian Child Welfare Act or residing on the reservation and eligible for tribal membership.

2. The Montana Department of Social and Rehabilitation Services may not make payments under Title IV-E of the Social Security Act to Indian children whose foster care or adoption placement is subject to exclusive tribal jurisdiction under the Indian Child Welfare Act.

3. The Montana Department of Social and Rehabilitation Services may not provide child protection services and benefits funded solely by state and local monies to Indian children whose foster care or adoption placement is subject to exclusive tribal jurisdiction under the Indian Child Welfare Act or who are eligible for comparable assistance under Bureau of Indian Affairs programs.

4. The Montana Department of Social and Rehabilitation Services may not continue to provide child protection services or benefits to an Indian child whose child custody proceeding has been transferred from state district court to tribal jurisdiction under the Indian Child Welfare Act.

5. The Montana Department of Social and Rehabilitation Services has the authority to license foster care homes maintained by nontribal members on Indian reservations. The Department has the authority to license foster care homes operated by tribal members located on a reservation only if the tribe does not engage in such licensing activity.

Very truly yours,

MIKE GREELY
Attorney General