

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 52nd LEGISLATURE - REGULAR SESSION

COMMITTEE ON HUMAN SERVICES & AGING

Call to Order: By Rep. Tim Whalen, Vice-Chair, on January 28, 1991, at 3:10 p.m.

ROLL CALL

Members Present:

Angela Russell, Chair (D)
Tim Whalen, Vice-Chairman (D)
Arlene Becker (D)
Jan Brown (D)
Brent Cromley (D)
Patrick Galvin (D)
Stella Jean Hansen (D)
Royal Johnson (R)
Betty Lou Kasten (R)
Thomas Lee (R)
Charlotte Messmore (R)
Jim Rice (R)
Sheila Rice (D)
Wilbur Spring (R)
Carolyn Squires (D)
Jessica Stickney (D)
Bill Strizich (D)
Rolph Tunby (R)

Members Excused: William Boharski and Tim Dowell

Staff Present: David Niss, Legislative Council
Jeanne Krumm, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

HEARING ON HB 366

Presentation and Opening Statement by Sponsor:

REP. ANGELA RUSSELL, House District 99, Lodge Grass, stated that HB 366 is an act to appropriate \$701,088 to the Department of Family Services to provide child protection services on Indian Reservations. This bill is a recommendation from the Native American Children's Subcommittee of the State Youth Services Advisory Counsel. This bill will provide 13.4 full time employees (FTE's) to work in the area of child abuse and neglect on certain reservations in the State of Montana. Although there is \$701,088 appropriated, half of those dollars are state money

and half are federal money.

Proponents' Testimony:

Diane Sands, Executive Director, Montana Womens Lobby, stated that the committee should look at the impact on the seventh generation. The children that are abused and neglected hand down these acts from one generation to another. It is critical that children on Indian Reservations, as well as the general population, need to be taken care of.

Loise Zokan-Delos Reyes, Executive Director of Bureau of Indian Affairs, (BIA), stated that there are three reservations in Montana that do not receive the same type of services that other citizens in the State of Montana receive, those reservations include Northern Cheyenne; Rocky Boy; and Crow. The BIA has worked with people from the Department of Family Services (DFS) over the past year to identify the issues of direct services on Indian Reservations. The three mentioned have not received any direct service staff from the state. The BIA staff is only there to fill in the gaps when there are no other existing programs to provide the services on the reservations. The services are limited to half the case load that we currently have. As a federal agency we are responsible for looking at what these people should be getting from the state. **EXHIBIT 1 & 2**

Ernie Bighorn, Director of Indian Development and Education Alliance (IDEA) and Montana United Indian Association (MUIA), stated that there are six off reservation services for Indians in the State of Montana, those include Missoula, Great Falls, Butte, Anaconda, Miles City, and Billings. The off reservation services that the IDEA and MUIA receive Native Americans who come as out patients. We provide a variety of types of services, one of those is social service. This program deals with welfare people who receive ARPC payments, food stamps and other kinds of social services. The off reservation services would like us to receive the 13.4 FTE positions. The Childrens Alliance is concerned that there is a high number of percentage of Native Americans in prisons. 25% of foster care children are Native American. Most of those children come from off reservation settings. It would be to the advantage of the State of Montana fund at least one FTE position to an off reservation agreement. These funds could be spent for prevention programs in working with Native Americans. We are putting money into crises situations like foster care. Until you look at ways to prevent these types of crises there will be less state funds required. **EXHIBIT 3**

Judy Garrity, Montana Children's Alliance (MCA), stated that this issue was placed on the 1991 Childrens Agenda that is put out by MCA. In addition to MCA there are 47 other organizations that were in support of the bills that were put on the Children's Agenda. When the staffing requirements were studied about a year ago, the study was for 13.4 additional FTE's. Three reservations in Montana do not have DFS personnel on the reservation. This

was based on the needs assessment justified in the DFS Indian Child Welfare Specialist and on the Federal Standards for child abuse and neglect case loads recommended by the Childrens Bureau of the U.S. Department of Health and Human Services. Those figures were also supported by North Dakota's Department of Human Services, who felt that it was the most comparable to our state in geographic size and population. There are 4.6 FTE's for the Rocky Boy Reservation; 4.8 FTE's for the Northern Cheyenne Reservation; 2.0 additional FTE's for the Fort Peck Reservation; 1 additional FTE for Fort Belknap Reservation; and 1 FTE for Urban Resource Development position. These reservations will need an additional 2.5 FTE positions. That initial estimate of 13.4 should be amended to 15.9 FTE's. This also increases the cost estimates to \$892,558 total and less than half of that would be from General Fund money.

Paulette Kohman, Montana Council for Maternal & Child Health, stated that the federal Indian Child Act requires that they take special precautions in dealing with Indian children to treat them and put them in appropriate daycare homes. This legislature requested DFS to come up with a report indicating where the major gaps in services were. EXHIBIT 4

Opponents' Testimony: None

Questions From Committee Members:

REP. S. RICE asked if \$892,558 is half of that General Fund money and the other half federal money. Mr. Walsh said that if the services are being provided to all kids, then the federal government will participate 50%. In terms of the appropriation, half would be with the General Fund and the other half would be from the Federal Employee Fund.

REP. S. RICE asked what Title IV-E meant. Mr. Walsh stated that Title IV-E is the title of the Social Security Act that has to do with allowing for reimbursement to the state for foster care patients.

REP. MESSMORE asked are there monies in the current budget proposal. Mr. Walsh stated that the state would be able to appropriate additional General Fund monies and those monies are not included in the budget at this time.

REP. HANSEN asked if the language in this bill includes all Indian reservations. Mr. Walsh stated that the study that DFS conducted was of all seven reservations in Montana. There are four reservations where DFS staff are providing services currently. The estimate given was in terms of identifying needs of 13.4 FTE's.

REP. CROMLEY asked how many staff are used on the other reservations. Mr. Walsh stated that in the other reservations there is at least enough staff committed to carry out the

services to the rest of the reservations.

REP. MESSMORE asked if DFS is in agreement with the 13.9 FTE's. Mr. Walsh said that the study was conducted by the needs identified with the Crow Reservation. In order to provide services there has to be an agreement with that reservation. At the time the study was done, we were not close to reaching an agreement.

REP. KASTEN asked about the case load for the FTE's. Mr. Walsh stated that the case loads were standards recommended by organizations like National Child Welfare for Native Americans. For ongoing child care services the case load would be 17 cases per month.

REP. J. RICE asked what is the federal requirement the legislature is required to meet. Mr. Walsh stated that there are several documents telling how the case plan would be reviewed by the foster care review committees at least every six months to see if the dispositional requirements are being met. The cases have a dispositional hearing within eight months or an additional four months after that. The specific requirement is that they meet the income resource criteria.

REP. J. RICE asked what the federal government does if this requirement isn't met. Mr. Walsh stated that they will take sanctions against us. It is based on the number of cases based on the federal reviews and the number of cases that are ineligible and the dollar amount involved.

REP. JOHNSON asked if reservations were sovereign nations. Mr. Walsh stated that they are, with the exception of the Flathead Crow Reservation.

REP. JOHNSON stated that he thought this bill was trying to protect children, more in a protective plea sense. Once we have identified the problem the child is put into foster care. Mr. Walsh stated that when referral is made for abuse or neglect, the social worker has a small obligation. They must investigate that obligation. The determination is made that in fact there is abuse or neglect and we are allowed to file protective services and we can either try to keep those children together with their own families. If there is an element of danger risk for the children to stay with their biological family, then they are moved to an out-of-home care center.

REP. KASTEN asked if \$90,000 covers the costs for FTE program for the Native Americans. Mr. Walsh stated that the costs as reflected in the bill, are staffing costs that do not include foster care or other services.

REP. HANSEN asked how many FTE's are on a reservation in the program now. Mr. Walsh stated that 12.8 are currently in the program.

REP. LEE asked will the state be involved in funding any more portions of the program that these children will be involved in. Mr. Walsh stated that they will be. The children are in the foster care payments.

REP. TUNBY asked where on the reservations, do they have these services and are they inspected. Mr. Walsh stated that the responsibility is to do that by providing services to be able to enable them to remain in their own home or to be safe in another environment.

REP. STRIZICH asked what the federal responsibility is of the Child Protection Act under direct services. Ms. Reyes stated that currently the BIA's congressional mandate has filled the gaps. Basically those children and families who are not eligible for any other federally funded or state programs on the reservations where the state does not fulfill its responsibility, the BIA has staff there. The case loads are from 45 to 60 per worker. It is different from the standards we are talking about here. The BIA has a primary interest and that is when all the funds get distributed from the federal government, they go to HHS which distributes it to the state, BIA gets a small portion of whatever is left. That is why the BIA's ratio is so much different. BIA's primary concern is protection of the children, that is why the BIA does emergency intervention. The IHS basically provides the medical portion and the whole child protection program. They provide some mental health counseling. The IHS was a spin off from the Bureau of Indian Affairs back in the 1950's. They provide a very much needed service at this time.

REP. WHALEN asked if the \$701,000 is all state money. Ms. Reyes stated that it was half of that.

REP. WHALEN asked if we were already receiving money under the IV-E requirements and are we not spending them right now. Ms. Reyes stated that the Title IV-E program is an entitlement program. Those children that are found eligible for IV-E benefit will be reimbursed from the federal government. The same applies to any positions that are funded under this program. If the state pursues this type of legislation, you will get the offset from the federal government based on the number of children that are eligible for that program. If we don't act now, it may not be the case.

REP. JOHNSON asked if DFS has budgeted for whatever portion of the money needed and in the event that there were no more monies that went to the DFS, what type of program would be cut out to use this money. Ms. Walsh stated that services that are mandated are to be provided by state law and federal requirements. The children are entitled to these services whether or not children are on or off the reservations.

REP. JOHNSON asked if the services were mandated before the

current budget was put together. Mr. Walsh stated that the budget that the BIA prepared for the Governor's budget program planning is included for the additional FTE's requested.

Closing by Sponsor:

REP. RUSSELL stated that there is need for additional FTE's to serve children on reservations. Many times you look at reservations and think they are a federal responsibility and that there are many different agents that work there and their personnel. One group will say that it is their own responsibility and other groups say it is theirs. People do fall into those cracks and a lot of services aren't given where they should be given.

EXECUTIVE ACTION ON HB 366

Motion: REP. STICKNEY MOVED HB 366 DO PASS.

Discussion:

REP. J. RICE asked if this bill would be more appropriate in the Appropriations Committee. REP. RUSSELL stated that this bill will end up in Appropriations.

REP. BECKER asked under section 1, should the total amount be used be from the General Fund. David Niss stated that is correct, but when half the money comes from the federal government, the money contributed by the federal government goes into a special subfund called the Federal Special Revenue Fund. Half of the money should only be appropriated from the General Fund and half should be appropriated from the Federal Special Revenue Fund.

Motion/Vote: REP. RUSSELL moved to amend HB 366. Motion carried unanimously.

1. Page 1, line 20.

Following: "Appropriation."

Insert: "(1)"

2. Page 1.

Following: line 24

Insert: "(2) If, during the biennium for which the appropriation in subsection (1) is made, the State of Montana concludes an agreement for the provision of child protection services with the members of the Crow Indian nation living on the Crow Indian Reservation in Montana, the appropriation in subsection (1) is then increased to \$892,558 for the biennium ending June 30, 1993, for 15.9 FTEs for child protection services to Native American children on Montana's Indian reservations."

Motion/Vote: REP. RUSSELL MOVED HB 366 DO PASS AS AMENDED.
Motion carried unanimously.

EXECUTIVE ACTION ON HB 325

Motion: REP. MESSMORE MOVED HB 325 DO PASS.

Motion/Vote: REP. STICKNEY moved to amend to HB 325. Motion carried unanimously.

Page 1, line 24.

Following: "facilities"

Insert: ", all"

Motion: REP. HANSEN MOVED HB 325 DO PASS AS AMENDED. Motion carried unanimously.

ADJOURNMENT

Adjournment: 4:10 p.m.


ANGELA RUSSELL, Chair


Jeanne Krumm, Secretary

AR/jck

HOUSE OF REPRESENTATIVES

HUMAN SERVICES AND AGING COMMITTEE

ROLL CALL

DATE 1-28-91

NAME	PRESENT	ABSENT	EXCUSED
REP. ANGELA RUSSELL, CHAIR	✓		
REP. TIM WHALEN, VICE-CHAIR	✓		
REP. ARLENE BECKER	✓		
REP. WILLIAM BOHARSKI			✓
REP. JAN BROWN	✓		
REP. BRENT CROMLEY	✓		
REP. TIM DOWELL			✓
REP. PATRICK GALVIN	✓		
REP. STELLA JEAN HANSEN	✓		
REP. ROYAL JOHNSON	✓		
REP. BETTY LOU KASTEN	✓		
REP. THOMAS LEE	✓		
REP. CHARLOTTE MESSMORE	✓		
REP. JIM RICE	✓		
REP. SHEILA RICE	✓		
REP. WILBUR SPRING	✓		
REP. CAROLYN SQUIRES	✓		
REP. JESSICA STICKNEY	✓		
REP. BILL STRIZICH	✓		
REP. ROLPH TUNBY	✓		

HOUSE STANDING COMMITTEE REPORT

January 28, 1991

Page 1 of 1

Mr. Speaker: We, the committee on Human Services and Aging
report that House Bill 366 (first reading copy -- white) do
pass as amended .

Signed: _____
Angela Russell, Chairman

And, that such amendments read:

1. Page 1, line 20.

Following: "Appropriation."

Insert: "(1)"

2. Page 1.

Following: line 24

Insert: "(2) If, during the biennium for which the appropriation
in subsection (1) is made, the state of Montana concludes
an agreement for the provision of child protection services
with the members of the Crow Indian nation living on the
Crow Indian Reservation in Montana, the appropriation in
subsection (1) is then increased to \$892,538 for the
biennium ending June 30, 1993, for 15.9 FTEs for child
protection services to Native American children on Montana's
Indian reservations."

HOUSE STANDING COMMITTEE REPORT

January 28, 1991

Page 1 of 1

Mr. Speaker: We, the committee on Human Services and Aging
report that House Bill 325 (first reading copy -- white) do
pass as amended .

Signed: _____
Angela Russell, Chairman

And, that such amendments read:

1. Page 1, line 24.
Following: "facilities"
Insert: ", all"

EXHIBIT 1

DATE 1-28-91

HB 366

Social Services
Code 351

JUN 1 1990

Governor Stan Stephens
State of Montana
Office of Governor
Helena, Montana 59620

Dear Mr. Stephens:

We are writing to express our concern about the Department of Family Services' failure to provide a State-wide program of Social Services to the Indian reservations in the State of Montana. The three reservations of concern are Crow, Rocky Boy's, and Northern Cheyenne. Each situation is a little different, but the basic principle in each case is the Indian residents on these three reservations do not receive the same type of Social Services as the non-Indians in the State of Montana.

More specifically, the facts are as follows:

1. Crow Tribe and Reservation - No staff or services are provided to the reservation proper unless the case was initiated in Hardin where State staff is located. This population is basically unserved by the State.
2. Northern Cheyenne Tribe and Reservation - The tribe reluctantly signed a tribal State agreement which will enable the payment of Title IV-E foster care payments but provide for no staff or administrative funds for the program. This means current tribal staff funded under the P.L. 93-638 contract with the Bureau of Indian Affairs (BIA) will have to carry out the additional work associated with these placements. Please remember the tribe is funded under this contract to handle Bureau funded placements and have extremely high caseloads. These additional cases will only add to that caseload and diminish the quality of services to this population.

3. Chippewa Cree Tribe, Rocky Boy's Reservation - The tribe has signed a tribal State agreement similar to the Northern Cheyenne agreement. However, the tribe does not operate a Social Services program themselves. The existing Social Services program is a BIA program, and BIA staff are responsible for Title IV-E cases. The current BIA staff is averaging a generic caseload of 188 cases apiece. This is much higher than any approved caseload standard. The BIA has not signed off on this agreement which commits our staff to an additional caseload.

In all three situations the residents of these reservations may be denied equal protection under the Law as other residents of the State of Montana. The current administration of the State program in these instances appears to fall under 45 CFR 80.3(b)(2) "Nondiscrimination Under Programs Receiving Federal Assistance Through the Department of Health and Human Services Effectuation of Title VI of the Civil Rights Act of 1964: Specific discriminatory actions prohibited".

The State may be in noncompliance with Title IV-E regulations (45 CFR 1355.21(b), and 1355.30(m)) which relate to the State plan requirements for financial assistance under the Social Security Act (45 CFR 205.100(a)(1)(ii)). The State plan is a comprehensive statement submitted by the State agency describing the nature and scope of its program. This section requires certification by the Attorney General of the administration of the plan on a "State-wide basis."

In the two situations where tribal/State agreements are in existence, this practice may expose both the State program and the BIA program to unnecessary liability due to the unmanageable caseload requirements. This past year, Indian children have died or were injured in foster care settings. Other States already have had legal actions taken against them for similar situations, e.g., New Mexico, Maryland.

We bring these concerns to your attention in order to facilitate planning to correct this situation. We request you consider the following options:

1. Investigate the current allocation of resources across the State, and, if necessary, consider the reallocation of funds or staff to serve the reservations identified.
2. The Department of Family Services recently submitted a proposal to your office for funding 13.4 full time employees for direct services on a reservation. The total request is for \$350,544, only \$99,099 of which would be State funds.

We believe this is meant to address the Northern Cheyenne and Rocky Boy's Reservations, but not the Crow Reservation. We would strongly encourage you to support this request and seek out an alternative to providing services to Crow.

These concerns have been raised to the Solicitor's Office due to the Rocky Boy's Superintendent's concern about the impact such agreements, without any administrative resources connected to foster care placements, may have on the social services program. We will also be sharing a copy of this correspondence with the respective tribal governments involved in order to keep them abreast of State issues impacting their reservations.

We hope we can work cooperatively to correct the social services delivery problems identified above.

If you would like to discuss these issues further, please feel free to contact me, or my staff at 657-6315.

Sincerely,

/s/ RICHARD C. WHITEHILL

Area Director

EXHIBIT 1
DATE 1-28-91
HB 366

Social Services
Code 351

NCV 1 100

Honorable Stan Stephens
Governor of Montana
Helena, Montana 59620

Dear Governor Stephens:

We recently received a Solicitor's opinion concerning an issue we raised with you in a June 1, 1990, letter concerning the status of tribal/State agreements between the Department of Family Services (DFS) and several of the Indian tribes in the State. This legal opinion was originally requested relative to the agreement signed between DFS and the Chippewa Cree Tribes of the Rocky Boy's Reservation. However, since that time, it has taken on greater implications since the Northern Cheyenne rescinded their agreement with DFS shortly after signing it.

The primary issue previously pointed out is these agreements enable the payment for foster care through Title IV-E of the Social Security Act on the reservation but do not provide for any staff to carry out the program. At Rocky Boy's and Northern Cheyenne Agencies, in the absence of the State carrying its responsibility, the BIA or tribe has had to shoulder these additional State responsibilities. This means although the State facilitates the payment of the actual foster care payment through this mechanism, the foster care case load adds to the workload of existing staff.

We understand you submitted in this year's budget submission a request for additional funds for staff at these reservations. Accordingly, we have recommended to these tribes that they sign the tribal/State agreements this year, while the State attempts to address the need for service staff through the budgetary process. However, this does not address the situation at Crow where a tribal/State agreement is not being negotiated and there are no current State services available.

Our Solicitor has recommended we refer this issue to the Department of Health and Human Services (HHS) staff at the Region VIII and Central Office level since it has broader implications. Therefore, his decision will be sent to the respective DHHS offices as well as our Central Office for further action.

As citizens of the State of Montana, we do understand the additional budgetary responsibilities this may entail. However, as citizens of this great Nation and as Federal employees, we also realize the importance of equal protection principles with which Federally-funded programs must comply.

A copy of the legal opinion cited above is enclosed for your information.

Please feel free to call on us if we can be supportive in your effort to address the existing situation. We intend to continue reviewing the legalities and the policy considerations with the DHHS.

Sincerely,

/s/ RICHARD C WHITESELL

Area Director

Enclosure

LREYES:kpf:10/16/90:Gov2-Sol

bcc: 351 subject/chrono file

100 & 300 reading file

Regin IIX, Administration for Children, Youth and
Families, Department of Family Services

Chief, Division of Social Services, Central Office



United States Department of the Interior

OFFICE OF THE SOLICITOR

P.O. BOX 31394

BILLINGS, MONTANA 59107-1394

EXHIBIT

DATE 1-28-91

HB 366

TAKE
DOWN
AMERICA

September 25, 1990

BIA.BL.0684

MEMORANDUM

TO: Area Director, Indian Affairs, Billings
Attention: Social Services, Code 351

FROM: Richard K. Aldrich, Field Solicitor
Pacific Northwest Region (Billings)

SUBJECT: State of Montana Agreements for Title IV-E Services
under the Social Security Act, Rocky Boy's

Thank you for your December 29, 1989, memorandum on the above-referenced topic. I apologize for the delay in our response. However, litigation and other pressing matters have had to take precedence.

You have attached the Superintendent's December 6, 1989, memorandum inquiring whether they should agree to the State's "Extension of Agreement" pertaining to provision of Social Services to children on the reservation. You have also attached Bea Lunda's October 27, 1989, memorandum to Linda Walker, the November 21, 1989, Ann Gilkey letter to Earl Arkinson of the Tribe, the proposed Extension of Agreement, the August 1, 1988, Novation of Agreement, and the March 5, 1986, "AGREEMENT BETWEEN DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES, HILL COUNTY HUMAN SERVICES AND THE ROCKY BOY'S INDIAN COMMUNITY."

I asked for additional information and you provided the Department of Health and Human Services (HHS) policy interpretation on Title IV-E and adjudicated delinquents. You further provided Gary Walsh's October 27, 1988, letter to HHS attaching the State plan. You have provided the December 30, 1986, Area Director's letter to HHS, the November 24, 1986, Eric Dahlstrom (of Four Rivers Indian Legal Services) comments on the Montana Attorney General's Opinion No. 76, dated July 30, 1986.

You have also attached the HHS Joint Planning Policy Memorandum dated November 27, 1985. You have also provided the State's statistical report of November 1989, and GAO's October 1988 report on "Funding of Select Services, Taxation of Real Property."

You have raised this matter with the Governor's Office by letter of June 1, 1990, and Hank Hudson, Acting Director, Department of Family Services (DFS) responded on August 13, 1990. In our

meeting of September 11, your staff felt the DFS' letter did not go far enough and deal with the key issues. DFS has not only the responsibility to pay for placements of children but the administrative responsibility to employ social services employees on Indian reservations to service those cases. Your staff believes no effective services are being provided at Crow, Northern Cheyenne, and possibly Rocky Boy's. Apparently in Wyoming both placement payments and state social service representatives are available on the Wind River Reservation. Also, Colorado apparently provides not only funding but provides commensurate social service representatives on the Ute Reservation.

The DFS' budget request of January 11, 1990, (provided September 12) so much as acknowledges some 14 new positions are needed for these services on Montana reservations.

Your inquiry of whether the Superintendent on behalf of the Bureau of Indian Affairs (BIA) should continue the Social Services Agreement with the DFS raises very complex issues. You advise that even though the State receives state funds and matching federal funds to provide Title IV-E social services for children on the reservation, the State will not provide services at Rocky Boy's and Crow Reservations unless the Superintendents thereof sign the above-referenced agreements.^{1/} You indicate that although the State receives those federal matching funds to complete applications, train staff, etc., the BIA has to provide the services without any reimbursement from the State. In other words, your conclusion is that the State is retaining funds but passing along to the BIA the obligations for which such funds were obtained by way of agreement and thereby "complying" with HHS requirements for a state-wide program. You indicate that the result however is that the Rocky Boy's and Crow people receive less social services inasmuch as your staff is overloaded and the State has no manpower on the reservation for delivery of those services. The DFS' January 11, 1990, memorandum confirms that they provide no IV-E services on the reservation, and that the state is required to do so. You explain however that if the Bureau does not sign off on the agreement, those funds may not be available and the Bureau may not be in accordance with Bureau social services programs as set forth in 25 C.F.R. § 20.3.

^{1/} GAO's October 1988 report entitled "Funding of Selected Services, . . . , p. 28, indicates that for four reservations (Blackfeet, Flathead, Fort Belknap, and Northern Cheyenne) only \$203,000 of Title IV-E funds were expended. It may be difficult to show failure of equal protection in state services on and off reservation with that small amount of funds.

You indicate that HHS policy has required that states provide the services on the reservations as well as off-reservation.

I have briefly reviewed Opinion No. 76 by the Montana Attorney General. He makes several somewhat persuasive arguments relating to the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963. However, I do not agree with his opinion. The Indian Child Welfare Act essentially is a statement in law by Congress to states regarding jurisdiction over Indian children. He combines that with rulings by courts that the state regulatory authority does not apply on the reservation, and under a Montana law which allows access to courts for child custody matters and concludes that since the State Department's authority is limited jurisdictionally that it accordingly does not have the authority nor responsibility to provide child protection services to Indian children. The State is apparently saying that it will not provide services where it does not have authority from or does not have access to state courts.

Of course, the Indian Child Welfare Act allows access to state courts except in certain cases where that authority may be transferred to tribal court. The "natural" conclusion I draw from the State's opinion is that they will not provide services unless their emergency administrative actions are adjudicated in State courts. The corollary to that conclusion is that the State does not want to be bound by tribal court decisions on Indian child decisions under the Indian Child Welfare Act. The State references Title IV of the Social Security Act, 42 U.S.C. § 1601-676, and from the absence therein of any direct reference to Indian reservation services draws the conclusion that they do not have to provide the services. It is just as easy to draw the opposite conclusion that where a state has Indian reservations included within its exterior boundaries and submits a state plan for state-wide use of federal funds from HHS for services that the HHS could easily require an equal and non-discriminatory provision of services on reservations as well as off.^{2/}

I agree with the Attorney General's opinion holding that the States's DFS cannot be required by tribal court order to make foster care maintenance or adoption assistance payments, in the sense that the tribal court may not have any jurisdiction over the State. The tribal courts though do have jurisdiction in those certain instances over children under the Indian Child Welfare Act. In other words, if HHS requires provision of

^{2/} HHS has similar non-discrimination or equal protection requirements that Interior has when states contract for federally-assisted programs. See 43 CFR § 17 and 45 CFR § 80.

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services to those children, then the State may have to make such payments in order to comply with HHS requirements, and provide equal protection of the laws.

I note that the August 9, 1974, opinion of Robert A. Dublin, Special Assistant to the Assistant General Counsel of the Human Resources Division of HHS, disagreed with the State of North Dakota, which State made a similar assertion that the State of Montana is making. He said that the State has to take into account significant cultural differences in applying the objectives of Title IV. He noted of course that Indians on the reservations are citizens of the State. They have rights as citizens of the State under the Fourteenth Amendment. See Acosta v. San Diego County, 272 P.2d 92 (1954), citing In the Matter of the Application of Albert Heff, for a Writ of Habeas Corpus, 197 U.S. 489 (1904). His opinion went so far as to say:

" . . . if a state is providing welfare services to its people, even without any Federal involvement whatsoever, the failure to provide the same services on Federal Indian reservations located within the state as are provided elsewhere in the state is a denial of equal protection of the laws pursuant to the Fourteenth Amendment."

He continued as follows:

"In other words, a state may, and must, extend its assistance to Indians living on a reservation on the same conditions that it applies to all other recipients in the state: namely, that the recipient abide by the laws and regulations of the state governing assistance under its various programs. If an Indian living on a reservation should refuse to comply with any of those regulations or laws, the state could merely terminate assistance. Therefore, there is no difference between the Indian living on the reservation and someone living off the reservation vis-a-vis the state's authority and responsibilities under its welfare programs."

That federal view was consistent with DHEW's Program Instruction APA-PI-75-13 of December 30, 1974, with the Interior's Assistant Secretary of Indian Affairs' letter of April 17, 1986, with the HHS Assistant Secretary, Human Development Services, June 20, 1986, response and with the HHS Commissioner, Administration for Children, Youth and Families, October 1, 1987, memorandum. Further your Area Office has taken a similarly consistent position in Mr. Whitesell's August 11, 1986, memorandum to HHS.

EXHIBIT 1

DATE 1-28-91

HB 366

I note the Solicitor's Office in Washington, D.C., advised that this problem would best be solved through the policymakers, and not through litigation. But if litigation, as a last resort, were considered by your office, very finite factual proof of the failure of equal protection would be necessary. DFS' January 11, 1990, letter is a strong beginning in that regard. The proposed Agreement alone may be insufficient to prove a failure to provide equal protection of the laws or an actual discrimination.

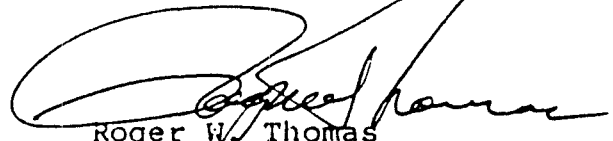
Next, I want to set forth the BIA policy under the regulations, 25 C.F.R. § 20.3, which requires Bureau assistance in matters such as child welfare, family and community services and other miscellaneous assistance where the state or local agencies are not providing such assistance. I do not believe that that policy requires you to sign an agreement with the State that would allow the State to obtain federal funds from HHS and not provide the services for which such funding is being granted to the State. In other words, I assume that your regulation is consistent with HHS statutes and regulations requiring provision of services for children on the reservation. However, the regulation does not preclude you from refusing to sign an improper agreement with the State for providing social services or an agreement being improperly implemented. I believe your position is that if you do provide the services that the State is required to provide and for which the State receives federal funding from HHS, that the State should pass through those funds back to the BIA for hiring of staff and so on for such services (or the State should put the proper manpower on the reservation itself). Since HHS is providing the funds, the State cannot contract away its responsibility without providing the funds for complying with that responsibility that HHS is giving the State. To do so would be akin to a misrepresentation by the State to HHS.

I assume that the State's philosophy has been that if they can get the BIA to provide those services by way of agreement then the State can focus their efforts on other areas of the State off-reservation where they would prefer to allocate the funds from HHS. The January 11, 1990, memorandum appears to comprise a proper recognition by DFS staff of the State's responsibilities as you have asserted.

Further, the key player in this issue is really HHS who provides the funding. If they are made aware of your position in the matter and agree with the factual conclusions that you have asserted, they have the authority to either require the State to equitably place the funds for staff around the State (including on-reservation) or withdraw the funding that the State obtains until the State complies with HHS requirements.

You may wish to consider offering a written counterproposal to the State's Agreement that would identify the problem and obtain the State's commitment to resolve it.

If you have further questions or comments, please do not hesitate to contact us.



Roger W. Thomas
For the Field Solicitor

RWThomas:cp

EXHIBIT 1
DATE 1-28-91
HB 366

Social Services
Code 351

NOV 1 1990

Charles Graham
Chief of Children's Bureau
Federal Office Building, 9th Floor
1961 Stout
Denver, Colorado 80294

Dear Mr. Graham:

Enclosed are two letters to the Governor of Montana concerning the unavailability of Title IV-E child welfare services on three Indian reservations in Montana. These are the Rocky Boy's, Northern Cheyenne, and Crow Reservations. We have spent a considerable amount of time discussing this issue with the Montana Department of Family Services staff, but have had limited results.

The State has developed tribal/State agreements to transfer funds for the payment of Title IV-E foster care payments on two reservations. However, on the three reservations cited above, they do not have staff to provide services; and, as a result, the Bureau of Indian Affairs funded contract or direct Social Service program must provide the manpower to operate the program. The result is increased case loads for overburdened Bureau staff and concurrently decreased effectiveness of the program.

We are continuing to take a supportive stance with the State because the Governor has submitted a budget request for additional staff to serve these reservations this year. A Solicitor's opinion was requested to address various aspects of the situation identified above. A primary issue he raised is the validity of any tribal/State agreement which provides only for the transfer of foster care payments and not administrative dollars to operate the program. According to regulations, the State has the responsibility to provide a State-wide program. In this particular instance, the State is not complying with this requirement.

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Therefore, we are submitting this material for your review and request your assistance in resolving this issue. Our Area Social Worker has discussed this concern with Mr. Bill Twine, including some alternative approaches for the State if the budget request is not approved. We anticipate your support in fulfilling the Department of Health and Human Services' commitment to provide equitable federally-funded services to all citizens of the State of Montana on the reservations, as well as off.

We have also made contact with the Chief, Division of Social Services for the Bureau of Indian Affairs, and have asked him to raise this issue with your Central Office. Issues involving tribal/State agreements and the passage of administrative funds through the State to the tribe have been problematic for years. We have made a concerted effort with Montana and now believe some of these issues need further attention from the funding agency. Your attention to addressing the administrative funds issue under the Title IV-E program would be appreciated. The Solicitor is also reviewing the civil rights or equal protection implications of this issue and is considering alternative legal approaches.

Our staff, as well as the Field Solicitor, would be most happy to discuss these issues further with the State, you, or your staff.

Please feel free to contact me directly, or work through my Social Services staff at FTS 585-6651 to discuss this matter further.

Sincerely,

/s/ RICHARD C. WHITESELL

Area Director

Enclosures

LREYES:kpf:10/26/90:ACYF-Chi
bcc: 351 subject/chrono file
100 & 300 reading file

EXHIBIT 2
DATE 1-28-91
HB 366

WITNESS STATEMENT

NAME Louise Zekan Deles Rey BILL NO. HB 366

ADDRESS Billings, MT

WHOM DO YOU REPRESENT? Bureau of Indian Affairs (BIA)

SUPPORT X OPPOSE _____ AMEND _____

COMMENTS: The BIA supports the appropriation
of funds for staff to administer the
Title IV-E program on Indian reservations.
Comments (testimony) to be submitted.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

EXHIBIT 3
DATE 1-28-91
HB 366

WITNESS STATEMENT

NAME ERNIE BIGORN BILL NO. _____

ADDRESS P.O. BOX 726

WHOM DO YOU REPRESENT? ~~IDEA~~ INDIAN DEVELOPMENT AND EDUCATIONAL AFFAIRS
NILUA - NORTHERN UNITED INDIAN ASSOCIATION

SUPPORT ✓ OPPOSE _____ AMEND ✓

COMMENTS: ADD ONE OFF-RESERVATION FTE AND
INCLUDE FAMILY BASED SERVICES PROGRAM

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

EXHIBIT 4
DATE 1-28-91
HB 366

WITNESS STATEMENT

NAME Paulette Kohman BILL NO. HB 366

ADDRESS 1030 11th Ave, Suite 10

WHOM DO YOU REPRESENT? Mt Council Mat & Ch Hlth

SUPPORT X OPPOSE AMEND

COMMENTS: Mt may violate Federal
Indian Child Welfare Act by
failing to provide adequate
FTES to treat Child Abuse &
Neglect on Reservations and
for off-reservation Indian
populations.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

HOUSE OF REPRESENTATIVES

VISITOR'S REGISTER

Human Services & Aging

COMMITTEE

BILL NO. 366

SPONSOR Rep. Angela Russell

DATE 1-28-91

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY.

WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU WANT TO SUBMIT WRITTEN TESTIMONY.

PLEASE PRINT

PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	BILL	SUP- PORT	OPP- OSE
ERNEST BIGHORN P.O. Box 725 Miles City MT 59201	IDEA AND MUIA LEBANON INDIAN ORGANIZATION		X	
Louise Zokan Delos Reyes	Bureau of Indian Affairs	HB 366	X	
JOHN ORTWEIN	MT. CATHOLIC CONF.	H.B. 366	X	
Angela Russell	HD 99	366	X	
Judy Garrity P.O. Box 876 Helena, MT. 59624	Montana Children's Alliance	366	X	
Diane Sands	MT Women's Lfth	366	X	
Paulette Kohman	MT Council for Maternal & Child Hlth	366	X	
Ann L. L. L.	Montana Foster Adoptive Parents Assn	366	X	
Shirley Steele	Foster parent	366	X	