HCR

3

COMMITTEE REPORT

SENATE

FURTHER: None

2/28/79

Date: 3/6/79

Mr. President:

The Committee on JUDICIARY has had HCR 3 am
enforcement of the Antiquities Act

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[X] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for _____ [ ] same title [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[X] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

_____ CHAIRMAN

S 60 (Rev. 12/78)

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

M E M O R A N D U M March 6, 1979

SUBJECT: HCR 3 am - Enforcement of Antiquities Act

TO: Senator Robert H. Ziegler, Sr.
Chairman, Senate Judiciary Committee

FROM: Billy G. Berrier BGB
Director
Division of Legal Services

You have asked whether HCR 3 am which requests the governor to direct that no state personnel, time, facilities or funds be used to enforce or aid the federal government in enforcing the Antiquities Act or implementing regulations poses constitutional difficulties.

It is clear that under the Supremacy Clause of the United States Constitution, federal law is applicable within each state as if it were also the law of the state. It is equally clear that states have no power of interposition, they may not declare federal law not applicable within the state. Both statements are firmly recognized in the case law.

Although the first recital seems to suggest the State of Alaska is declaring federal action illegal, the operative provisions of the resolution do not go this far. They simply request that the state not provide active assistance in enforcement.

There is authority that Congress can constitutionally impose upon state officers the power and duty to enforce federal criminal law (e.g. Testa v. Katt (1947) 330 U.S. 386, 67 S. Ct. 810, 91 L. ed. 967) and there are cases holding that it is entirely proper and permissable for state officers to cooperate in enforcement of criminal law even though no federal requirement for that cooperation exists.

I have, in the time available, found no authority on the question directly involved which is, absent specific requirements for cooperation, is there an affirmative duty on the state to use its resources to enforce federal criminal law. The courts of a state are required to recognize and enforce federal law but the resolution is directed solely to the executive branch.

In logic, the authorities suggest that there is no requirement that a state take affirmative action through its executive branch to enforce federal law absent a mandate to do so.

BGB:nem:jdn

HCR

43

COMMITTEE REPORT

SENATE

FURTHER: None

4/14/80

Date: April 23, 1980

Mr. President:

The Committee on JUDICIARY has had CSHCR 43

endorsing concept and requesting implementation of the Indian Child Welfare Act of 1978

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for _____ [ ] same title [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

CHAIRMAN

S 60 (Rev. 12/78)

TELEGRAM

[illegible]
[illegible]
[illegible], AK [illegible]

[illegible] PDT FBA ANCHORAGE ALASKA 15 04-30 1210P ADT

[illegible] SENATOR ROBERT H ZIEGLER

[illegible] FAU AK

WE URGE YOUR SUPPORT OF HCR 43 AND FUNDING FOR THE

ALCOHOLISM PROGRAMS THROUGHOUT THE STATE

[illegible] AND [illegible]

CITY OF ANGOON BOX [illegible] ANGOON AK 99820

Passed Senate 4/29/80

Have always supported

3

CENTRAL COUNCIL
tlingit and haida indians of alaska
One Sealaska Plaza - Suite 200
Juneau, Alaska 99801
(907) 586-1432 or 586-3613

April 25, 1980

The Honorable Robert H. Ziegler, Sr.
Chairman, Senate Judiciary Committee
Pouch V
Juneau, AK 99801

Dear Senator Ziegler:

We are writing to you to express our support for the Committee Substitute for House Concurrent Resolution No. 43, "a resolution endorsing the concept and requesting implementation of the Indian Child Welfare Act of 1978".

We are pleased that this resolution was passed by the House so quickly, and it is our hope that the Senate action on the resolution will indicate the same support and commitment to the act. We understand that the Senate Judiciary Committee will soon consider the resolution, and we therefore wish to share our support with you.

As representatives of the Native community, we firmly believe that the Indian Child Welfare Act is necessary and desirable legislation, and we want to see it implemented as smoothly and quickly in Alaska as possible. To implement the act, informed and enthusiastic cooperation must exist between the Department of Health & Social Services, the court system and the various Native organizations that will be funded to provide services under the act. We believe that the resolution before you will provide the impetus for the needed cooperation.

It is our hope that the Judiciary Committee and the Senate as a whole will show support for the interest of Alaskan Natives by passing HCR #43.

Thank you for giving this matter your consideration.

Sincerely,

CENTRAL COUNCIL OF TLINGIT AND
HAIDA INDIAN TRIBES OF ALASKA

Raymond E. Paddock, Jr.
President

cc: Bill Ray
Don Bennett
Pete Meland
Ed Dankworth

April 30, 1980

Dear Ray:

HCR 43 passed the Senate on April 29.

May 1, 1980

Rep. E. J. Haugen
Alaska State House of Representatives
Pouch V State Capitol Building
Juneau, Alaska 99811

Dear Mr. Haugen;

As president of the Local A.N.B. Camp #7 it has been brought to my attention that shortly, you will be reviewing Bill HCR 43 pertaining to the Indian Child Welfare Act of 1978. We in Angoon have a population of 530, 90% are native and therefore support and request that you support the passage of HCR 43.

Passed both bodies a few days ago 3 vs

Sincerely,

Ivan Gamble
President
Angoon A.N.B. Local Camp #7

cc: Rep. Jim Duncan
Rep. Richard Eliason
Rep. Oral Freeman
Rep. Terry Gardiner
Rep. Mike Miller

Senator H.D. Meland
Senator Bill Ray
Senator Robert Ziegler

TELEGRAM

ALASCOM INC.
PHONE: 586-6462
JUNEAU, AK 99802

80 APR 18 PM 4 05

02040 TDA HOONAH ALASKA 27 04-18 1155A AST

PMS SENATOR ROBERT ZIEGLER

SENATE JUDICIARY COMMITTEE CHAIR MAN

2491

JUNEAU AK

I WOULD LIKE TO REFLECT MY ENDORSEMENT OF HOUSE CONCURRENT RESOLUTION 43. IT IS MY HOPE THAT THIS BILL PASSES. THANK YOU FOR THIS CONSIDERATION.

JOHN HINCHMAN JR PRESIDENT HUNA TOTEM CORPORATION

TELEGRAM

ALASCOM INC.
PHONE: 586-6442
JUNEAU, AK 99802

02227 POM TDA SITKA AK 15 04-18 130P AST

PMS SEN ROBERT ZIEGLER

JUNEAU

WE URGE YOU TO SUPPORT PASSAGE OF HCR43.

HENRY BENSON, PRESIDENT

SITKA COMMUNITY ASSOCIATION

TRIBAL COUNCIL

'80 APR 18 PM 9 18

CALL, HAYCRAFT & FENTON
AN ASSOCIATION OF
DAVID H. CALL AND THOMAS E. FENTON
PROFESSIONAL CORPORATIONS
1919 LATHROP - SUITE 206
FAIRBANKS, ALASKA 99701

DAVID H. CALL
THOMAS E. FENTON
JAMES D. DEWITT
PAUL A. BARRETT

TELEPHONE
907 - 452-2211
452-2296

March 13, 1980

Representative Charles H. Parr
Pouch V
Juneau, AK 99811

Re: House Concurrent Resolution No. 43
Indian Child Welfare Act of 1978

Dear Charlie:

I am writing to state my opposition to House Concurrent Resolution No. 43, "a resolution endorsing the concept and requesting implementation of the Indian Child Welfare Act of 1978."

As background, I have never represented any parent whose parental rights were being terminated or involuntarily relinquished or otherwise being surrendered by force. I have never represented the State of Alaska in an action to take away parental rights. I have, however, on numerous occasions, represented the children in these proceedings for termination. My official title has always been "guardian ad litem" but my duties have frequently involved reconciliation, peacemaking and negotiation.

Under Alaska law, a guardian ad litem represents the "best interests of the child" in the proceeding; not necessarily what the child wants and not necessarily what the parents or the State of Alaska want. It is a difficult assignment and I confess I am uncomfortable with it in many situations. However, I accept appointments as guardian ad litem because all too frequently the children themselves are not otherwise a concern in a parental rights termination proceeding. It is very easy for the other parties involved to lose sight of the fact that while their lives may be impacted by whatever decision a court may reach, the children will live with the results and be affected by the results for the rest of their lives. The Alaska Supreme Court has begun to recognize that the children are a party in interest, that they have constitutional rights in custody and termination proceedings and that those rights deserve to be represented. The Indian Child Welfare Act, as to the class of children who happen to be of fractional Native blood, removes those rights and removes the right of the children to be represented in a meaningful sense in those kinds of proceedings.

My first dispute is with the underlying premise for the Act, that "a highly disproportionate number of Native American children in Alaska are from families broken up by the removal of children. . .", with the inference that that statistical fact is somehow evidence of wrongdoing by the State of Alaska. The hard truth, however politically unpopular it may be, is that Native American families have the highest rate of alcoholism, the highest rate of broken, unstable homes, and the highest rate of child abuse in Alaska and that that, not any wrongdoing or excess of zeal by the Department of Health and Social Services or the State of Alaska, is the reason why Native American homes are broken up most frequently. I will leave it to sociologists, psychologists and anthropologists to describe why these statistical facts exist, but they do. Those problems may or may not be susceptible of solution, but you are treating a symptom when you remove the right of the children to be removed from abusive homes. If the Alaska Legislature wants to solve the problem of abused Native children and their statistically anomalous frequency, it should create programs to treat the underlying problems, not endorse a statute which forces the children to continue to live in those homes, regardless of consequences.

And it is effectively impossible to terminate the parental rights of a parent whose child is an Alaska Native. To terminate those parental rights, someone must prove beyond a reasonable doubt (1) that there is a clear and present physical danger to the children; (2) that the danger has caused harm or imminently will cause harm to the children; and (3) that that conduct constituting a clear and present danger is likely to continue. Check with your legislative counsel, but in my view it is effectively impossible to prove beyond a reasonable doubt that a pattern of conduct is likely to continue. It is hard enough to establish beyond a reasonable doubt that something has happened; ask any district attorney.

So the parental rights cannot be terminated, the parents will continue to have contact with their children, no matter how abusive they have been in the past and no matter how harmful that conduct may be to the children themselves.

In my view, the Indian Child Welfare Act of 1978 is unconstitutional since it unfairly imbalances the constitutional rights of the children as against the constitutional rights of their parents. I emphasize that is my opinion alone, and has not been endorsed by any court of which I am aware.

Another serious problem with the Act is its application in Alaska. Assuming the Act exists to preserve a Native culture, its avowed purpose, then it operates without regard to that avowed purpose. An Alaska Native family, regardless of its ties to its culture, is entitled to the protections of the Indian Child Welfare Act. If I may, I would like to analyze a specific hypothetical.

Let us assume that two fathers in Barrow, Alaska have sexually abused their five year old daughters. One family is caucasian, the other is one-quarter Eskimo. To terminate the parental rights of the caucasian father, the State of Alaska must establish by clear and convincing evidence that the child has suffered emotional harm and that it is likely that the conduct leading to the emotional harm will continue. That is not an easy matter, and is not likely to be proven by one specific bad act, in the absence of other conduct. Obviously, it is not going to be possible to terminate the parental rights of the Native father for a single act.

Now let us assume that each father again sexually abuses the five year old daughter. Probably, it will now be possible to terminate the parental rights of the caucasian father. In the view of most of the courts of Alaska, two specific, identical instances give rise to an inference that conduct is likely to continue and reach the burden of proof: clear and convincing evidence. While the matter has not been ruled upon, it is reasonably certain that it is not going to be possible to terminate the Native father's rights, even though the conduct takes place in the same community, even though the children are harmed in precisely the same way and to precisely the same degree. In fact, as long as there is even a slight doubt that the Native father will continue to sexually abuse his daughter, his parental rights may <u>not</u> be terminated.

Obviously I oppose House Concurrent Resolution No. 43. While I cannot pretend to make up your minds for you, I urge you to give the Act, its implications and the points I have raised in this letter serious consideration before proceeding further with this Resolution. The State of Alaska and the Department of Health and Social Services have not attempted to force all of the diverse cultures of Alaska into one white, suburban, middle class mold. Whatever the rationale for the Indian Child Welfare Act in other jurisdictions, Alaska has acted in every way to protect the cultural identities of its peoples. The Act is unnecessary, harmful to the children it is intended to protect and possibly unconstitutional. I urge you to resist adoption and passage of the Resolution.

Thank you for your time and patience in reviewing the points that I have set out. Please feel free to contact me if you have questions regarding my position.

Sincerely yours,

CALL, HAYCRAFT & FENTON

James D. DeWitt

JDD:so

95TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No.–1386

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

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

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

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 12533]

[Including the cost estimate of the Congressional Budget Office]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 12533) to establish standards for the placement of Indian children in foster or adoptive homes, to prevent the breakup of Indian families, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

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

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

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

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

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

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

20-006—78——1

(2) Within seven months from the date of this Act, the Secretary shall present the proposed rules and regulations to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives.

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

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

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

TITLE IV—PLACEMENT PREVENTION STUDY

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

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

SEC. 402. Within sixty days after enactment of this Act, the Secretary shall send to the Governor, Chief Justice of the highest court of appeal, and the Attorney General of each State a copy of this Act, together with Committee reports and an explanation of the provisions of this Act.

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

PURPOSE

The purpose of the bill (H.R. 12533) introduced by Mr. Udall et al.,[1] is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes or institutions which will reflect the unique values of Indian culture and by providing for assistance to Indian tribes and organizations in the operation of child and family service programs.

BACKGROUND

> • • • I can remember (the welfare worker) coming and taking some of my cousins and friends. I didn't know why and I didn't question it. It was just done and it had always been done • • •.[2]

[1] H.R. 12533 was introduced by Representatives Udall, Roncalio, Baucus, Bingham, Blouin, Burke of California, Phillip Burton, Carr, Dellums, Fraser, Miller of California, Risenhoover, Selberling, Stark, Taongas, Vento, and Weaver. A similar bill, S. 1214, has been approved by the Senate.

[2] Testimony of Valancia Thacker before Task Force 4 of the American Indian Policy Review Commission.

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

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

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

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

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

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

Standards

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

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

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

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

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

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

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

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

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

Due process

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

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

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

Economic incentives

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

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

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

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

Social conditions

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

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

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

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

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

CONSTITUTIONALITY

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

Supremacy clause

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

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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

The Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and constitution. Their obligation "is imperative upon the State judges, in their official and not merely in their private capacities. From the very nature of their judicial duties, they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or constitution of the State, but according to the laws and treaties of the United States—'the supreme law of the land.'" *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816); State courts have both the power and duty to enforce obligations arising under Federal law. *Claflin* v. *Houseman*, 93 U.S. 130 (1876); *Second Employers' Liability Cases*, 223 U.S. 1 (1912); *Testa* v. *Katt*, 330 U.S. 386 (1947).

Plenary power of Congress over Indian affairs

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

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

In an unbroken line of Supreme Court decisions, beginning with Chief Justice John Marshall's decision in *Worcester* v. *Georgia*, 3 U.S. 515 (1832):

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

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

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

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

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

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

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

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

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

Plenary power and child welfare

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

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

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

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

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

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

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

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

And again:

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

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

Geographic scope of plenary power

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

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

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

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

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

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

Membership and plenary power

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

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

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

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

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

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

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

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

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

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

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

> 2. That for purposes of applying this (Federal) exemption, the class of "Indian persons" * * * shall include persons possessing the following qualifications:
>
> (a) that the person possess some quantum of Indian blood;
>
> (b) that the person be recognized as an Indian by the community in which he or she lives, and that the putative taxpayer's wardship status has not been terminated by the government;
>
> (c) that the person be an enrolled member of a federally recognized Indian tribe *or otherwise eligible to be recognized as an Indian ward by the Federal Government.* (Emphasis added.)

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

Supremacy clause versus States' rights

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

SECTION-BY-SECTION ANALYSIS

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

Section 1

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

Section 2

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

Section 3

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

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

SECTION 4

Section 4 defines various terms used in the bill.

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

Public Law 95-608
95th Congress

An Act

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

Nov. 8, 1978
[S. 1214]

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

Indian Child Welfare Act of 1978.

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

25 USC 1901 note.

25 USC 1901.

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

(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;

Congress, responsibility for protection of Indians.

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

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

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

25 USC 1902

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

Definitions. 25 USC 1903.

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

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

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

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

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

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

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

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

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act (85 Stat. 688, 689); 43 USC 1606.

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

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

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

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

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 3(c) of the Alaska Native Claims Settlement Act (85 Stat. 688, 689), as amended; 43 USC 1602.

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

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

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

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

TITLE I—CHILD CUSTODY PROCEEDINGS

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

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

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

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

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

Foster care placement, court proceedings. 25 USC 1912.

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

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

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

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

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

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

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

Parental rights, voluntary termination.
25 USC 1913.

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

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

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

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

25 USC 1914.

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

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

Adoptive placement of Indian children. 25 USC 1915.

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

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

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

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

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

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

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

Petition, return of custody. 25 USC 1916.

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

Removal from foster care home.

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

25 USC 1917.

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

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

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

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

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

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

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

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

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

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

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

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

States and Indian tribes, agreements. 25 USC 1919.

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

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

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

Improper removal of child from custody.
25 USC 1920.

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

25 USC 1921.

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

Emergency removal of child
25 USC 1922.

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

Effective date.
25 USC 1923.

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

TITLE II—INDIAN CHILD AND FAMILY PROGRAMS

25 USC 1931.

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

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

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

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

(4) home improvement programs;

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

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

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

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

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

42 USC 620, 1397.

Additional services.
25 USC 1932.

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

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

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

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

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

Funds.
25 USC 1933.

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

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

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

TITLE III—RECORDKEEPING, INFORMATION AVAILABILITY, AND TIMETABLES

SEC. 301. (a) Any State court entering a final decree or order in any Indian child adoptive placement after the date of enactment of this Act shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show— Final decree, information to be included. 25 USC 1951.

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

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

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

SEC. 302. Within one hundred and eighty days after the enactment of this Act, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this Act. Effective date. Rules and regulations. 25 USC 1952.

TITLE IV—MISCELLANEOUS

Day schools.
25 USC 1961.

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

Report to congressional committees.

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

Copies to each State.
25 USC 1962.

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

25 USC 1963

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

Approved November 8, 1978.

LEGISLATIVE HISTORY:

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

○

ALASKA FEDERATION OF NATIVES, INC.

1577 'C' Street, Suite 304 • Anchorage, Alaska 99501 • Phone 907-274-3611

1979 ANNUAL CONVENTION

Resolution 79-39

WHEREAS, the Congress of the United States has adopted the Indian Child Welfare Act of 1978 (P.L. 95-608) declaring "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

WHEREAS, it is State policy to promote the stability and security of Native American families, and

WHEREAS, historically a highly disproportionate number of Native American children in Alaska are from families broken up by the removal of children with an alarmingly high percentage of these children being placed in non-native foster homes, adoptive homes or institutions, and

WHEREAS, the primary intent of the Act is to prevent the break up of Native American families and to preserve the cultural and social standards prevailing in Native culture, and

WHEREAS, the intent and policy of the Act accords with, and is a strong tool for implementation of, State policy,

THEREFORE BE IT RESOLVED, by the Alaska Federation of Natives that it supports and endorses the concept and policy of the Indian Child Welfare Act of 1978 (P.L. 95-608).

RESOLUTION COMMITTEE RECOMMENDATION Do Pass

CONVENTION RECOMMENDATION Passed

March 24, 1980

The Honorable Charles H. Parr,
Alaska State Representative
Room 124 Capitol Building
Juneau, Alaska

Dear Charlie:

I am already well aware of the imperfections and drawbacks in the Child Indian Welfare Act of 1979.

Mr. Dewitt's concerns and apprehensions are right on target and it was lousy legislation at the federal level.

Thanks,

Robert H. Ziegler, Sr.

RHZ:lk

cc: Senator Hackney

CHARLIE PARR

ALASKA LEGISLATURE

S. R. Box 50599
Fairbanks, Alaska 99701
456-5029

Po ıch V
Juneau, Alaska 99811
465-3797

March 19, 1980

M E M O R A N D U M

TO: Senator Glenn Hackney, Chairman
Health, Education and Social Services Committee

Senator Robert Ziegler, Chairman
Judiciary Committee

FROM: Representative Charles H. Parr

SUBJECT: House Concurrent Resolution No. 43

Enclosed is a letter from Mr. James DeWitt expressing what appear to be some valid concerns about HCR 43. I believe Mr. DeWitt's comments will be of interest to you as you consider the resolution.

CHP:vc
Encl.

CALL, HAYCRAFT & FENTON
AN ASSOCIATION OF
DAVID H. CALL AND THOMAS E. FENTON
PROFESSIONAL CORPORATIONS
1919 LATHROP - SUITE 206
FAIRBANKS, ALASKA 99701

DAVID H. CALL
THOMAS E. FENTON
JAMES D. DEWITT
PAUL A. BARRETT

TELEPHONE
907 - 452-2211
452-2296

March 13, 1980

Representative Sarah J. Smith
Pouch V
Juneau, AK 99811

Re: House Concurrent Resolution No. 43
Indian Child Welfare Act of 1978

Dear Sally:

I am writing to state my opposition to House Concurrent Resolution No. 43, "a resolution endorsing the concept and requesting implementation of the Indian Child Welfare Act of 1978."

As background, I have never represented any parent whose parental rights were being terminated or involuntarily relinquished or otherwise being surrendered by force. I have never represented the State of Alaska in an action to take away parental rights. I have, however, on numerous occasions, represented the children in these proceedings for termination. My official title has always been "guardian ad litem" but my duties have frequently involved reconciliation, peacemaking and negotiation.

Under Alaska law, a guardian ad litem represents the "best interests of the child" in the proceeding; not necessarily what the child wants and not necessarily what the parents or the State of Alaska want. It is a difficult assignment and I confess I am uncomfortable with it in many situations. However, I accept appointments as guardian ad litem because all too frequently the children themselves are not otherwise a concern in a parental rights termination proceeding. It is very easy for the other parties involved to lose sight of the fact that while their lives may be impacted by whatever decision a court may reach, the children will live with the results and be affected by the results for the rest of their lives. The Alaska Supreme Court has begun to recognize that the children are a party in interest, that they have constitutional rights in custody and termination proceedings and that those rights deserve to be represented. The Indian Child Welfare Act, as to the class of children who happen to be of fractional Native blood, removes those rights and removes the right of the children to be represented in a meaningful sense in those kinds of proceedings.

My first dispute is with the underlying premise for the Act, that "a highly disproportionate number of Native American children in Alaska are from families broken up by the removal of children. . .", with the inference that that statistical fact is somehow evidence of wrongdoing by the State of Alaska. The hard truth, however politically unpopular it may be, is that Native American families have the highest rate of alcoholism, the highest rate of broken, unstable homes, and the highest rate of child abuse in Alaska and that that, not any wrongdoing or excess of zeal by the Department of Health and Social Services or the State of Alaska, is the reason why Native American homes are broken up most frequently. I will leave it to sociologists, psychologists and anthropologists to describe why these statistical facts exist, but they do. Those problems may or may not be susceptible of solution, but you are treating a symptom when you remove the right of the children to be removed from abusive homes. If the Alaska Legislature wants to solve the problem of abused Native children and their statistically anomalous frequency, it should create programs to treat the underlying problems, not endorse a statute which forces the children to continue to live in those homes, regardless of consequences.

And it is effectively impossible to terminate the parental rights of a parent whose child is an Alaska Native. To terminate those parental rights, someone must prove beyond a reasonable doubt (1) that there is a clear and present physical danger to the children; (2) that the danger has caused harm or imminently will cause harm to the children; and (3) that that conduct constituting a clear and present danger is likely to continue. Check with your legislative counsel, but in my view it is effectively impossible to prove beyond a reasonable doubt that a pattern of conduct is likely to continue. It is hard enough to establish beyond a reasonable doubt that something has happened; ask any district attorney.

So the parental rights cannot be terminated, the parents will continue to have contact with their children, no matter how abusive they have been in the past and no matter how harmful that conduct may be to the children themselves.

In my view, the Indian Child Welfare Act of 1978 is unconstitutional since it unfairly imbalances the constitutional rights of the children as against the constitutional rights of their parents. I emphasize that is my opinion alone, and has not been endorsed by any court of which I am aware.

Another serious problem with the Act is its application in Alaska. Assuming the Act exists to preserve a Native culture, its avowed purpose, then it operates without regard to that avowed purpose. An Alaska Native family, regardless of its ties to its culture, is entitled to the protections of the Indian Child Welfare Act. If I may, I would like to analyze a specific hypothetical.

Let us assume that two fathers in Barrow, Alaska have sexually abused their five year old daughters. One family is caucasian, the other is one-quarter Eskimo. To terminate the parental rights of the caucasian father, the State of Alaska must establish by clear and convincing evidence that the child has suffered emotional harm and that it is likely that the conduct leading to the emotional harm will continue. That is not an easy matter, and is not likely to be proven by one specific bad act, in the absence of other conduct. Obviously, it is not going to be possible to terminate the parental rights of the Native father for a single act.

Now let us assume that each father again sexually abuses the five year old daughter. Probably, it will now be possible to terminate the parental rights of the caucasian father. In the view of most of the courts of Alaska, two specific, identical instances give rise to an inference that conduct is likely to continue and reach the burden of proof: clear and convincing evidence. While the matter has not been ruled upon, it is reasonably certain that it is not going to be possible to terminate the Native father's rights, even though the conduct takes place in the same community, even though the children are harmed in precisely the same way and to precisely the same degree. In fact, as long as there is even a slight doubt that the Native father will continue to sexually abuse his daughter, his parental rights may <u>not</u> be terminated.

Obviously, I oppose House Concurrent Resolution No. 43. While I cannot pretend to make up your minds for you, I urge you to give the Act, its implications and the points I have raised in this letter serious consideration before proceeding further with this Resolution. The State of Alaska and the Department of Health and Social Services have not attempted to force all of the diverse cultures of Alaska into one white, suburban, middle class mold. Whatever the rationale for the Indian Child Welfare Act in other jurisdictions, Alaska has acted in every way to protect the cultural identities of its peoples. The Act is unnecessary, harmful to the children it is intended to protect and possibly unconstitutional. I urge you to resist adoption and passage of the Resolution.

Thank you for your time and patience in reviewing the points that I have set out. Please feel free to contact me if you have questions regarding my position.

Sincerely yours,

CALL, HAYCRAFT & FENTON

James D. DeWitt

JDD:so

POSITION PAPER/Department of Health & Social Services

POSITION PAPER

CS FOR HOUSE CONCURRENT RESOLUTION NO. 43

"A resolution endorsing the concept and requesting implementation of the Indian Child Welfare Act of 1978."

Committee Substitute for House Concurrent Resolution No. 43 resolves that: 1) the legislature endorse and support the concept and policy of the Indian Child Welfare Act of 1978 (P.L. 95-608); 2) urgently requests the Governor to direct the Department of Health and Social Services to promptly take the steps necessary for implementation of the Act in Alaska and provide the financing necessary for this implementation; and 3) requests the Chief Justice of the Alaska Supreme Court to direct the court system to promptly take steps necessary to cooperate in the implementation of the Act.

The Department strongly supports the concepts and policies embodied in the Indian Child Welfare Act of 1978 and, therefore, supports the legislature's endorsement and support of the Act. The Department has been actively involved in implementing the Act since its passage in November, 1978. During calendar year 1979, the Department has taken numerous steps towards full implementation of the Act (report attached). The Department plans to increase its efforts during 1980 through close coordination with the various Indian Child Welfare programs established under Title II of P.L. 95-608 and recently funded by the Bureau of Indian Affairs, and through close monitoring and evaluation of its own programs to ensure compliance with the Act.

Attachment

RECOMMENDED BY: _____ DATE: 2/26/80
Art Holmberg, Director
Division of Social Services

APPROVED BY: Helen D. Beirne DATE: 3-3-80
Helen D. Beirne, Commissioner
Department of Health and Social Services

REPORT ON IMPLEMENTATION OF THE INDIAN CHILD WELFARE ACT

The Department of Health and Social Services has been quite active since the passage of the Indian Child Welfare Act in working towards full implementation. As early as February 13, 1979 Department representatives met with the Area Director of BIA and representatives from various native non-profit corporations to begin mapping out strategies and procedures necessary for implementation. In early March Department Representatives met with the BIA contractors to further discuss implementation. On March 7, 1979 the Department testified at hearings held in Juneau regarding the first draft of federal regulations (testimony attached). These regulations were finally published as proposed regulations on April 23, 1979 and were not finalized until July of 1979.

During this interim period before finalization of the implementing regulations the Department's Regional Social Services Managers met with representatives of the native non-profit organizations as well as various village and IRA council leaders to discuss the Act and to begin informal working procedures. The Managers also met with court personnel and the attorney general's offices to establish appropriate court procedures. The Social Service's Field Director met with Art Snowden, the Court Administrator, his staff, the BIA Social Services Director, and the BIA Counsel to further work toward state-wide development of court procedures. As a result of this meeting the Court Administrator agreed to include a letter summarizing the Act in the next mailing to the Alaska Bar members.

Since the finalization of regulations the Department has not only attempted to comply with the formal procedures established by the regulations but has developed many cooperative projects for furthering the implementation of the Act. For example, the Division of Social Services has been working with Tanana Chiefs and United Crow Band on locating, studying, and licensing native foster homes. Similar projects have also been operating in Fairbanks (Fairbanks Native Association) and in Southeast Alaska (Tlingit-Haida). The Division also held a two day training session in Anchorage on Oct 8 & 9, 1979 on the Indian Child Welfare Act. The trainer was Bert Hirsh, one of the original drafters of the law. All the native non-profit organizations as well as state and private agencies were invited to attend. Finally, the Division's training director by request of the native non-profit in the Bethel area provided a training session in Bethel.

These are just some of the examples of the cooperative efforts that have been initiated state-wide. It should be noted however that the Department has supported the concepts embodied in the Indian Child Welfare Act before its passage in 1978. In fact the Department supported a change in 47.10.230 (Powers and duties of Department over care of child) which made placement with blood relatives mandatory if they requested custody.

The intent of this statute was to provide for placement of children in surroundings which meet their social and cultural needs.

The Department has attempted to implement this statute to the fullest extent possible. It has been very successful in areas such as Nome and Bethel but less successful in larger cities such as Anchorage, Fairbanks, and Juneau. For example, 10 years ago 92% of all native children placed for adoption were placed in non-native homes. This has been completely reversed. Presently 75% of the native children placed for adoption are placed in native homes. The only exceptions being some severely handicapped children who have special medical needs and some native children who have been in long term foster care with a non-native family. In addition, in the Nome Region in 1969 all but two Eskimo children were in non-native foster homes. Today in Nome the figures are: 32 native children in native homes and 7 in non-native homes. In the Bethel Region there are 42 native children placed in foster homes. All are placed in native foster homes. However, the placements of native children in native foster homes are significantly lower in the larger cities with Anchorage having the lowest percentage (20 out of 127 native children are in native foster homes). The Department has been working diligently to improve the situation. As noted earlier Tlingit-Haida and Fairbanks Native Association have had foster home finding projects in Juneau and Fairbanks respectively. The Department has supported and worked closely with the staff of these projects. However, the success has been limited.

In summary the Department has been supporting the concepts of the Indian Child Welfare Act for a number of years. It has implemented certain policies consistent with the Act prior to its passage. In addition the Department, has worked diligently to develop formal procedures to implement the Act as well as numerous cooperative projects. The Department realizes there is stil much to be accomplished and certainly agrees to continue its present efforts of implementation and to increase its efforts wherever necessary.

THE LEGISLATURE OF THE STATE OF ALASKA
ELEVENTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. CS FOR HOUSE CONCURRENT RESOLUTION NO. 43
Title endorsing concept/requesting implementation of the Indian Child Welfare Act of 1978
Requested by _____ Date February 26, 1980

II. FISCAL DETAIL
Agency Affected Department of Health and Social Sevices
Program Category Affected All Program Categories
BRU, Program, or Subprogram(s) Affected All BRU's
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

		FY 80	FY 81	FY 82	FY 83	FY 84	FY 85
100	PERSONAL SERVICES						
200	TRAVEL						
300	CONTRACTUAL						
400	COMMODITIES						
500	EQUIPMENT						
600	LAND & STRUCTURES						
700	GRANTS, CLAIMS, ETC.						
	TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS	-0-	-0-	-0-	-0-	-0-	-0-
OTHER (Specify Fund Source)	-0-	-0-	-0-	-0-	-0-	-0-
	-0-	-0-	-0-	-0-	-0-	-0-
	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS

FULL TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART TIME	-0-	-0-	-0-	-0-	-0-	-0-
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

This Resolution has no fiscal impact on the Department of Health and Social Services.

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

Prepared by: [illegible] Date: 2/27/80
Division/XXXXX: Social Services PH: 465-3170
Department of Health & Social Services

Approval DHSS Mgt. & Bdgt: [illegible] Date: 2/27/80

33-001 (Rev. 12/79)
Modify by DHSS (11-28-79)

HCR

62

COMMITTEE REPORT

SENATE

FURTHER: None

3/31/80

Date: 4/1/80

Mr. President:

The Committee on JUDICIARY has had HCR 62 am federal census

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for _____ [ ] same title [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

CHAIRMAN DO PASS

S 60 (Rev. 12/78)

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K—STATE CAPITOL
JUNEAU, ALASKA 99811

465-3666

April 4, 1980

The Honorable Robert Ziegler
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: HCR 62 am, relating
to the federal census
Our file: J-66-587-80

Dear Senator Ziegler:

We enclose a copy of our letter of March 28 to Senator Fahrenkamp on the subject of census questions in which we concluded that, given the express legal authority of the census takers to ask their questions, the express legal duty to answer them, and the repeated judicial affirmation of both, it would be most inadvisable to counsel anyone to refuse to answer any of the questions asked by the census takers.

In our view, the final resolve of HCR 62 am could have the effect of making some persons believe that it would be safe to refuse to answer some census questions in the belief that the state will defend those who do so "responsibly." There is, however, absolutely no authority for the attorney general to defend persons who refuse to comply with the census laws, and even if there were, there appears to be no legal basis for refusing to answer the questions on which a defense could rely.

In short, passage of the resolution as it is now written could lull persons into violation of federal laws and resulting punishment.

We recommend that the resolution be amended to strike the final resolve and substitute the following:

FURTHER RESOLVED that the Alaska congressional delegation take prompt, vigorous, and effective steps to ensure the enactment of amendments to the census laws to prevent unnecessary intrusions into the privacy of the citizens

of this state and nation.

We appreciate this opportunity to comment on the resolution.

Sincerely yours,

AVRUM M. GROSS
ATTORNEY GENERAL

By: Rodger W. Pegues
Rodger W. Pegues
Assistant Attorney General

RWP/pjg

Enc.

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K—STATE CAPITOL
JUNEAU, ALASKA 99811

March 28, 1980

The Honorable Bettye Fahrenkamp
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: Census questions
Our file: J-66-587-80

Dear Senator Fahrenkamp:

You have asked whether persons must answer the questions on the so-called long form used for the census.

The answer is that it is a violation of federal law, punishable by a fine of $100, for a person to refuse to answer the questions asked on any questionnaire submitted to him in connection with the census. United States v. Little, 321 F. Supp. 388 (D. Del. 1971).

The census administrators have express statutory authority to determine the questions to be asked, 13 U.S.C.S. § 5 (1978), and to determine the "form and content" of the census survey. 13 U.S.C.S. § 141 (1978). They are also empowered to use sampling techniques, i.e., long forms for some and short forms for others. 13 U.S.C.S. § 195 (1978). The federal constitution itself requires that the census be taken every ten years and that it be done in the manner provided by Congress by law. U.S. Const., art. I, § 2, cl. 3. Accordingly, there can be no question that under the Supremacy Clause, U.S. Const., art. VI, cl. 2, the federal census laws are controlling, and to the extent -- if any -- that their requirements come into conflict with the Privacy Clause of the state constitution, Alaska Const., art. I, § 22, the latter is superseded and must give way. If there is any bar to the census requirements, it must be found in the federal constitution.

Federal courts have already ruled that the questions asked by the census of households, i.e., by the long form do not violate the right to privacy under the federal constitution. United States v. Rickenbacker, 309 F.2d 462

(2d Cir. 1962), cert. denied, 371 U.S. 962 (1963), cited with approval in Wyman v. James, 400 U.S. 309 (1971); United States v. Little, 321 F.Supp. 388 (D. Del. 1971). We have no reason to believe that the questions on the 1980 census so far depart from those asked in the 1960 and 1970 censuses that the courts will arrive at a different result now.

In Rickenbacker, it was urged that the questions asked by the 1960 "supplementary household questionnaire" were invasive of privacy. The court responded:

> The questions . . . related to important federal concerns, such as, housing, labor, and health, and were not unduly broad or sweeping in their scope . . . . [T]hat some . . . experts might regard the . . . 'sample' [one-in-four households] as larger than necessary does not support a conclusion that the census was arbitrary . . . .

309 F.2d at 463-464.

In Little, the court relied expressly on Rickenbacker and also on the provisions of the census law, 13 U.S.C.S. § 9 (1978), which make the data collected on individuals strictly confidential in holding that the constitutional right of privacy is not invaded by the census questions. There is no question of confidentiality of these data in the hands of the census takers. St. Regis Paper Co. v. United States, 368 U.S. 208 (1961), reh. denied, 368 U.S. 972 (1961); motion to recall and amend or correct denied, 369 U.S. 809 (1962); Op. U.S. Atty. Gen. 362 (1930).

In view of the express legal authority for the census takers to ask their questions, the express legal duty to answer them, and the judicial affirmation of both, it would be most inadvisable to counsel anyone to refuse or willfully neglect to answer the questions requested by the federal census takers.

Sincerely yours,

AVRUM M. GROSS
ATTORNEY GENERAL

By: Rodger W. Pegues
Assistant Attorney General

RWP/pjg

HCR
80

COMMITTEE REPORT

SENATE

FURTHER: Finance

3/24/80

Date: 5/8/80

Mr. President:

The Committee on Judiciary has had HJR 80

Proposing an amendment to the Constitution of the State of Alaska relating to joint budget revision power of interim committees

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for HJR 80 [ ] same title [ ] new title

and recommends CSHJR 80 (J) 1953

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

_____
CHAIRMAN

S 60 (Rev. 12/78)

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y · STATE CAPITOL
JUNEAU ALASKA 99811
907·465·3800

M E M O R A N D U M

May 7, 1980

SUBJECT: Senate Judiciary CS for HJR 80

TO: Senator Robert H. Ziegler, Sr.

FROM: Billy G. Berrier
Director
Division of Legal Services

The draft of the committee substitute for HJR 80 omits reference in the title to joint budget revision power of the interim committees.

In Section 11 of Article II of the Constitution of the State of Alaska, the requirement appears that

> The subject of each bill shall be expressed in the title.

While the requirement does not explicitly include resolutions, in my opinion it is highly probable that it would be held applicable to resolutions proposing constitutional amendments.

The power to jointly revise budgets is a substantive provision that goes beyond merely creating committees since it is intended to lay to rest the argument that such revisions violate the separation of powers doctrine. Therefore, omitting to mention this in the title would seriously cloud the constitutionality of the amendment.

BGB:jdn

Enclosure

HJR

20

COMMITTEE REPORT

SENATE

FURTHER: None

5/27/80

Date: 5/27/80

Mr. President:

The Committee on JUDICIARY has had CSHJR 20 am

Proposing an amendment to the Constitution of the State of Alaska relating to appointment and confirmation of members of state boards and commissions

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] same title

[ ] replace with CS for _____ [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

_____

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MEMBERS HAVING
OTHER RECOMMENDATIONS:

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CHAIRMAN

S 60 (Rev. 12//8)

Bob:

1 Report on H.S.R. 20

Senator Mulcahy reported the resolution out of committee after a conversation with Terry Gardiner. There was NO pressure. Terry just convinced Bob that the resolution was desirable. The main reason Bob felt he should report it out is that because of recent Court decisions, the Governor feels that he need not send certain names to the Legislature for confirmation. If the amendment passes, the names will be sent to the Legislature for confirmation.