

**OPINION
71-183**

July 28, 1971 (OPINION)

Mr. Leslie O. Ovre

Executive Director

Department of Social Services

RE: Indians - Jurisdiction - Licensing of Foster Homes

This is in reply to your letter of July 21, 1971, concerning the authority of the State of North Dakota to license and enforce standards of foster homes for Indian children on the federal Indian reservations in North Dakota. You ask our opinion on the following questions:

1. With reference to the Social Security Act, Section 402(a)(20) provides that a state plan for aid and services to needy families with children must, effective July 1, 1969, provide for aid to families with dependent children in the form of foster care in accordance with Section 408.

"Section 408 should be read in its entirety, but reference is had to a portion thereof which is in Section 408(f)(2)(a). This portion reads: 'For the purposes of this section, the term "foster family home" means a foster family home for children which is licensed by the state in which it is situated or has been approved, by the agency of such state responsible for licensing homes of this type, as meeting the standards established for such licensing;"

"Our question on which we wish your opinion as to this section of the Social Security Act is whether in your opinion there is any difference or distinction as to state authority on the federal Indian reservation with reference to the terms license and approve.

2. Is there a conflict between the certification of the Attorney General which certifies the state plan of the Social Service Board to HEW as the 'single state agency' to provide social services and the lack of authority of the Social Service Board to act on the federal Indian reservation in terms of licensing and the enforcement of licensing standards for foster homes?
3. Inasmuch as the Social Security Act, as implemented by federal regulations, requires the Social Service Board as the single state agency to provide social services, including the licensing or approval of foster homes in terms of established standards in all parts of the state, does this federal requirement give the state authority to discharge this service function on the federal Indian reservation?

4. Can the Social Service Board of North Dakota contract with a third party to license foster homes for Indian children on the federal Indian reservations in North Dakota?
5. Could the Tribal Court, the Tribal Council, or the Bureau of Indian Affairs give the county welfare board the authority to license foster homes and enforce licensing standards on the federal Indian reservations?
6. Could the person having custody of an Indian child and the foster home parents on the federal Indian reservation voluntarily elect to come under state jurisdiction thereby permitting the State of North Dakota to license the home and provide the necessary protective services incidental to licensing?
7. In your opinion, who does have authority to provide protective services including the licensing and approval of foster homes for Indian children on the federal Indian reservations?"

Your questions will be considered in the order presented.

1. Since the Social Security Act is a federal enactment it is not a proper subject for construction by this office. In your letter you state the Bureau of Indian Affairs and the Department of Health, Education, and Welfare have been involved in discussions concerning the January 13, 1971, opinion. In view of this fact it might be well for one of the federal agencies interested in the matter to request the opinion of the federal official who has the authority to issue legal opinions construing the provisions of the act. Presumably it might be possible for the Department of Social Services to approve a foster family home without actually licensing same. We further presume, however, that in order to approve the particular home the Department would need actual inspection, information, etc., from the home. Assuming the particular home is willing to supply this information and permit actual inspection of the premises, there would apparently be no problem. The problem only occurs when the State Department might wish to enforce the inspection against the desires of the operators of the home on the reservation. In such instance, as stated in the January 13, 1971 opinion, we do not believe the State Board would have authority to do so. In this connection we must note the January, 1971, opinion you requested concerned the authority of the Department to enforce the licensing function. If no objection to such enforcement by the State is raised there would be no difficulty.
2. We see no conflict between the certification of the Attorney General which certifies the state plan of the Social Service Board to HEW as the "single state agency" to provide social services and the lack of authority of the Social Service Board to act on the federal Indian reservation in terms of licensing and the enforcement of

licensing standards for foster homes. We understand this provision to mean that no other state agency has any authority to do so. In this instance the January, 1971, opinion reflected the lack of authority for the Department to do so but it in no manner implies that any other state agency has authority to do so.

3. The question of whether a federal requirement gives the State Board authority to discharge this service function on the federal Indian reservation would appear to be a question peculiarly within the province of the federal government to answer. In the first instance the Social Security Act is a federal act. Secondly, the limitation on jurisdiction upon a federal Indian reservation stems from the retention of jurisdiction thereon by the federal government. Since both instances involve federal action it would appear the federal government should provide the answer to the question. If there were no question of state jurisdiction on a federal Indian reservation there would be no doubt but that the Department has authority to exercise the licensing functions anywhere within the boundaries of the State. We believe this question is governed by the opinion issued in January, 1971.
4. Since the Department has no jurisdiction on the reservation in this regard it would not appear they could confer jurisdiction on another agency by means of a contract. It is conceivable that a contract could be entered into with a federal agency which does have jurisdiction on the reservation although there may be a question whether such agency would have the authority to enforce state requirements.
5. Again, the question of whether a tribal court, tribal council, Bureau of Indian Affairs have authority to grant jurisdiction on a federal Indian reservation to a state agency or a local agency created by the state, requires an interpretation of laws and statutes of the tribal court, tribal council, the federal government, etc. We do not believe this office can issue opinions on these matters which are binding upon these agencies since they do not involve state law.
6. We assume that under chapter 27-19 of the North Dakota Century Code, the persons involved could voluntarily elect to come under state jurisdiction thereby permitting the State of North Dakota to license the individual home. In view of the decision in *In Re Whiteshield*, 124 N.W.2d. 694 (ND 1963) however, it would appear that individual acceptance of jurisdiction for a minor Indian child might also be necessary before the state would have authority to provide necessary protective services incidental to licensing for the individual child. If consent to jurisdiction were granted by the individuals operating the home and if the state contemplated no action by means of "protective services" such as attempting to terminate parental rights of an Indian family on an Indian

Reservation in State Court, individual consent for each child might not be necessary. In this instance, we cannot entirely foresee what "protective services incidental to licensing" might be contemplated or subsequently found to be necessary and therefore we find it difficult to make any comprehensive statement concerning same.

7. Again, the answer to this question would depend upon the construction of the statutes and regulations governing federal or Indian agencies and we do not believe it proper for this office to attempt to construe same. Presumably there are federal or Indian agencies which would have such authority.

HELGI JOHANNESON

Attorney General