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Introduction

The Indian Child Welfare Act of 1978[1] was enacted by the United States Congress to protect Indian children and to promote the stability and security of Indian tribes.[2] Congress had found that an alarmingly high percentage of Indian children were being removed from their homes by nontribal agencies and that, in exercising their jurisdiction, the states were often failing to recognize tribal relationships and the culture of the Indian communities.[3]

In response to these troubling discoveries, Congress declared a national policy regarding Indian children:

> 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.[4]

In order to realize this policy Congress fixed the jurisdictional rights and responsibilities of the tribes and the states.[5] Before the passage of the Act, jurisdiction was dependent on case law.[6] Under the Act the tribes have exclusive jurisdiction over certain Indian child custody proceedings; the states must transfer proceedings in certain circumstances; and the tribes have a right to intervene in any state court proceeding involving foster care, placement of, or termination of parental rights to an Indian child.[7] The gist of the Act is that the Indian tribes will have con-

1. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 25 U.S.C. § 1901 (1978).
2. *Id.* § 1902.
3. *Id.* § 1901(4), (5).
4. *Id.* § 1902.
5. *Id.* § 1911.
6. *See* Wakefield v. Little Light, 347 A.2d 228 (Md. 1975). This case contains a summary of case law bearing on jurisdictional issues in child custody cases arising before the passage of the Indian Child Welfare Act.
7. 25 U.S.C. § 1911 (1978).

trol (to a degree determined by the tribes) of the placement of Indian children.

The Indian Child Welfare Act offers a prime opportunity for Indians to inhibit the destruction of their culture and to revitalize their tribes. Of equal importance is the opportunity to end the suffering and trauma imposed on Indian children by an unsympathetic culture.

These are ambitious goals, the attainment of which will require the curing of the destructive effects of actions that have been occurring for nearly half of a millenium. That the tribes will have jurisdiction or the right to intervene in child custody proceedings is not enough to overcome the past deprivations and attain these goals. Success will require placement and family service resources.

Most tribes, particularly in Oklahoma, have few child placement resources in the forms of foster homes and institutions. In Oklahoma most of these kinds of placement resources are maintained by the state of Oklahoma through its Department of Human Services. Other placement facilities that may be needed as child placement resources are maintained by the state of Oklahoma through the Department of Mental Health.

The relationship between Oklahoma tribes and these two state agencies, with respect to the allocation of the resources controlled by these agencies to meet the objectives of the Indian Child Welfare Act, is the subject of this note. The theme of this analysis is that the lopsided allocation of resources between tribal and state governments makes cooperation between the two governments essential to the fulfillment of the Act.

An appraisal of attempts to allocate these resources through tribal court orders will be made. Of necessity, this appraisal is a discussion of the fundamental state-tribal relationship, including the meaning of tribal sovereignty in the context of the Indian Child Welfare Act. The appraisal will show that tribal court orders alone are ineffective as instruments of resource reallocation; it is followed by a plan for making these resources accessible to the tribes. Finally, any monetary obligations arising from the use of these resources will be discussed.

Tribal Sovereignty as a Factor in Resource Allocation

The most obvious way for a tribe to try to gain access to child placement resources of state agencies is for the tribal court to issue an order vesting custody of a child in a state agency. The effect of that order would depend on the relationship of the tribe to the state.

That tribal governments are sovereigns vis-á-vis the states was recognized by the United States Supreme Court one hundred fifty years ago in *Worcester v. Georgia.*[8] The years since *Worcester* have seen much confusion and contradictory policies in regard to Indian tribes, but one principle remains—tribal governments are not part of state governments.

The nature of the relationship between tribal government and state government has been blurred by the simultaneous state citizenship and tribal membership of Indians. The dual citizenship of Indians has led to confusion as to the limits of the jurisdiction of the two entities. Viewing the tribes and states in the context of their mutual independence brings into focus their relationship as sovereigns.

It is a well settled conflict of laws principle that the laws of one sovereign are not binding on another sovereign.[9] The United States Supreme Court has phrased the rule, "No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived."[10]

The Supreme Court recently offered some clarification in determining the limits of a sovereign in relation to another sovereign. In *Bigelow v. Virginia*[11] the Court, considering whether a Virginia court could by its actions in effect bar a New York abortion clinic from advertising its services in Virginia where such advertising was illegal, said, "A State does not acquire power or supervision over the internal affairs of another state merely because the welfare and health of its own citizens may be affected when they travel to the other state." The application of *Bigelow* to the tribal-state relationship establishes that neither the tribe's nor the state's jurisdiction is extended to the internal affairs of the other merely because the actions of each may affect Indians as individuals.

The one reported case that even remotely deals with the effect of a tribal order on a state agency supports the conclusion that the order is not binding on the agency. The material facts of this case, *White v. Califano,*[12] are as follows. Florence Red Dog, a member of the Oglala Sioux Tribe, was determined by an Indian Health Service worker to be in need of psychiatric treatment. The

8. 31 U.S. 515 (1832).
9. 15A C.J.S., *Conflict of Laws,* § 4 (1967).
10. Hilton v. Guyot, 159 U.S. 113, 163 (1895).
11. 421 U.S. 809, 824 (1975).
12. 437 F. Supp. 543 (D.S.D. 1977), *aff'd,* 581 F.2d 697 (8th Cir. 1978).

state of South Dakota declined to file a petition for her commitment on the ground that it had no jurisdiction over an Indian residing on the reservation. The tribal judge, acting on a petition of the Indian Health Service worker, ordered Ms. Red Dog to be committed to a facility administered by the state of South Dakota. South Dakota did not acknowledge the order and maintained that it had no jurisdiction.

The issue presented to the United States District Court was whether Ms. Red Dog was entitled to state services on the basis of equal protection. The state's defense was that it had no jurisdiction and could not attain jurisdiction through its court system. The district court, agreeing with the state, asserted that the state was barred from exercising jurisdiction over an Indian residing on the reservation by the limit (infringement test) set in *Williams v. Lee.*[13]

The plaintiff, the defendant, and the court ignored the tribal court order and did not discuss the possibility of its having any bearing on the issue of jurisdiction. By implication, the court affirmed that the conflict of laws principle that the law of one sovereign is not binding on another sovereign applies to the relationship between tribal and state governments.

An important ramification of the principles and examples that have been discussed is that tribal sovereignty has been firmly recognized—with one exception. The Sioux Tribal Court in *White v. Califano* did not recognize and respect its own sovereignty. By trying to exercise jurisdiction over another sovereign, the Sioux Tribe violated the basic doctrines by which sovereigns deal with one another. This action on the part of an Indian tribe muddies the concept of its own sovereignty, contributes to the hostility of state governments toward Indian governments, and invites intrusion by the states into Indian governments. A tribe demeans itself by behaving as though it is a quasi-state entity.

This self-defeating conduct is particularly serious in the context of the Indian Child Welfare Act.[14] Respect for and recognition of tribal sovereignty on the part of tribal members, as well as those outside the tribe, is vital to a tribe's development of the will, the pride, and the power to make real the promise of the Indian Child Welfare Act.

The necessity of tribal sovereignty to the fulfillment of the Indian Child Welfare Act creates a vicious circle for the tribes. It

13. 358 U.S. 217 (1959).

14. Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 (1978).

appears that this very sovereignty, by depriving the tribes of access to important resources, could actually work to prevent their full participation in the decisions concerning their children. If a tribe does not have jurisdiction to place Indian children in state facilities, it is faced with the choice either of denying these services to Indian children who need them or acquiescing to the state's exercise of jurisdiction over these children.

There are placement resources over which a tribe could acquire jurisdiction. These resources are limited for practical purposes to those placements set out in the Act as preferred placements for Indian children (*e.g.*, foster families, extended families).[15] Such placements are not always available. When a tribe has to decline jurisdiction over a proceeding involving a child for whom no such placement exists, the purpose of the Act is frustrated.

The Indian child for whom no preferred placement is available is as valuable a resource to the tribe as children for whom one of the preferred placements is available. Such a hard-to-place child needs the protection of the tribe as much as, if not more than, the child for whom a preferred placement is available. It is these hard-to-place children who are likely to become "lost" in the nontribal juvenile justice system and suffer the consequences the Act was designed to avoid. Must their tribe abandon these children?

Under the Act a tribe can have a role in state court proceedings. A tribe may become a party at any point in such a state court proceeding.[16] As a party, a tribe could introduce evidence and cross-examine witnesses. However, all of this information would be presented to a nontribal judge who will make the final decision.

One action a tribe can take in state court is to petition for transfer of the proceeding to tribal court, according to section 1911(b) of the Act. It seems obvious, however, that a tribe would not petition for transfer and would decline to assume jurisdiction upon petition for transfer by any other party if the child concerned is one in need of services that his tribe cannot acquire for him. Moreover, if, during the hearing in state court, it became apparent that the child did not need placement in a state facility and the tribe could provide the needed services, transfer to tribal court at that point would bring added stress to the child.

The importance of a tribe having jurisdiction over a child to

15. *Id.* § 1915(b).
16. *Id.* § 1911(c).

determine his initial placement is evident. Just as important is the tribe's continued supervision of the child's care after he is placed initially.

The commitment of an Indian child to a state agency brings to bear on that child and his family a powerful system that has often been unaware of and unresponsive to the special factors and forces bearing on an Indian child and his tribe.[17] For example, once committed to the Department of Human Services (of Oklahoma), the child can be placed until he is eighteen years old according to the policies of that department. Placement changes by the Department of Human Services do not require a court hearing. While the Indian Child Welfare Act provides that changes of placement shall be in accordance with the Act,[18] there is no provision in it for intervention by the tribe in internal placement changes. Records of such placements must be made available for inspection by the tribe;[19] but, if the child has been committed by a state court, the tribe is limited to petitioning a nontribal court to invalidate the action.[20]

While this action might be effective, tribal court jurisdiction would be a more powerful presence. The tribal court, having jurisdiction, could remove the child from Department of Human Services' custody whenever the tribal court determined that the services being provided were in contravention to the Act or to tribal well-being. An important aspect of this power would be the tribal court's ability to remove the Indian child from custody when he is no longer in need of the intervention of state agencies.

A significant consequence of a tribal court retaining jurisdiction is the synergistic effect that tribal involvement with individual Indian children would have on the tribal and nontribal juvenile justice systems. The tribe's awareness of problems that tribal families face would be increased, and the tribe's efforts to meet these problems through resource development would be encouraged. Through its active participation in the treatment of its Indian children, a tribe would establish itself as an entity participating in the nontribal juvenile justice system. Flowing from this recognition would be the routine inclusion of Indian judges and child-care workers in organizations, nontribal as well as tribal, that influence child-care policies.

17. *Id.* § 1901(5).
18. *Id.* § 1916(b).
19. *Id.* § 1915(e).
20. *Id.* § 1914.

The tribe's having to decline jurisdiction because of its not having tribal resources or access to state resources that can meet Indian children's needs will delay, if not dilute, the impact of the Indian Child Welfare Act. The power given a tribe under the Act to monitor what happens to its children who come under the state's jurisdiction[21] is helpful, but in the absence of tribal court jurisdiction a tribe cannot assume its most effective role. This disabling of tribal courts because of their lack of resources must and can be overcome.

A Plan for Oklahoma Indians

Section 1919 of the Act[22] authorizes Indian tribes to enter into agreements with the states respecting the care and custody of Indian children. The Act has no provision *requiring* a state to enter into any agreement with the tribes; nor does the Act ensure a speedy agreement process.

The tribes must take the initiative to gain access to state children's placement resources. Yet, how can tribes accomplish this if a state is under no obligation to cooperate with tribal governments?

In Oklahoma the answer lies in the Interstate Compact on the Placement of Children[23] and the Interstate Compact on Mental Health.[24] These two compacts provide the means for the tribes to overcome jurisdictional barriers to their using state resources maintained by the Department of Human Services and the Department of Mental Health. The following examination of these compacts shows their value as potential tools for tribal governments.

The Interstate Compact on the Placement of Children[25] is a jurisdictional instrument through which Oklahoma and forty-six other states have provided for the interstate placement of children.[26] The purpose of the compact is to provide a vehicle for cooperation among party states.[27] It has the effect of making it possible to operate across state lines much as one would operate within a single state.[28]

21. *Id.* § 1915(e).
22. *Id.* § 1919(a).
23. 10 OKLA. STAT. § 571 (Supp. 1980).
24. 43A OKLA. STAT. § 501 (Supp. 1980).
25. 10 OKLA. STAT. § 571 (Supp. 1980).
26. *Id.*
27. *Id.*
28. American Public Welfare Association, Interstate Compact on the Placement of Children, Compact Administrators' Manual 2.5 (1977).

From the legal point of view, Article V, "Retention of Jurisdiction," is this compact's core.[29] Paragraph (a) of this article provides:

> The sending agency shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, treatment and disposition of the child which it would have had if the child had remained in the sending agency's state, until the child is adopted, reaches majority, becomes self-supporting or is discharged with the concurrence of the appropriate authority in the receiving state. Such jurisdiction shall also include the power to effect or cause the return of the child or its transfer to another location and custody pursuant to law.[30]

By retaining jurisdiction over these specified matters, the sending agency extends its protection to the child even while the child is placed in another jurisdiction.

The interstate jurisdictional arrangements become of operational significance when the placement fails or is to be terminated for some other reason. Without the compact, the sending agency would be powerless to intervene in another jurisdiction on behalf of the child. Under the compact the sending agency not only has jurisdiction but is actually obligated to remove the child.

One provision of the compact might be seen as a loophole by which state agencies could avoid providing services. The compact affords the receiving state the opportunity and requirement to determine whether the proposed placement is suitable.[31] Article III, paragraph (d)[32] of the compact says that the appropriate authorities in the receiving state shall determine "that the proposed placement does not appear to be contrary to the interests of the child." The spirit in which this requirement is to be met is expressed in the Compact Administrator's Manual as follows:

> The language of the Compact is carefully chosen. It is stated in the negative because it is unreasonable to expect a finding that the placement is the best that could possibly be imagined for the child. Most children might be appropriately placed in a number of alternative homes and environments, any of which would be satisfactory. Accordingly, the only requirement for a

29. *Id.* at 2.4.
30. 10 OKLA. STAT. § 571 (art. I(a)) (Supp. 1980).
31. *Id.* (art. III(d)).
32. *Id.* § 571.

finding is that the proposed placement is reasonable and satisfactory considering all the relevant circumstances.[33]

The receiving state is not likely to find that placement in one of its state-operated foster homes or institutions is contrary to this standard. Thus, careful reading of the statute in light of the intent of the compact shows this provision not to be an avenue for a state to avoid its obligations under the compact.

The value of the compact to Indian tribes is readily seen. By joining the compact a tribe could overcome the jurisdictional disabilities separating it from state children's placement resources. A tribal court could retain jurisdiction over its tribe's children without depriving them of state services, thus effectuating the Indian Child Welfare Act.[34]

Another way the tribes could gain access to state services is through the Interstate Compact on Mental Health.[35] This compact was enacted for the purpose of providing treatment for the mentally ill regardless of their residence or citizenship.[36]

A fundamental difference between the Interstate Compact on Mental Health and the Interstate Compact on the Placement of Children is that the sending agency does not retain jurisdiction under the Mental Health Compact.[37] This feature is usually considered to be of little moment to the courts as the clinical nature of the decisions concerning the treatment of the patient is thought to make interference by the courts inappropriate.

For the purpose of monitoring child placement resources, it is not important for the tribes to retain jurisdiction over these placements because the Department of Mental Health is not in the business of providing residential care for normally functioning children and, presumably, will not be inclined to retain custody of a child when he is not in need of mental health care services. The importance of the Interstate Compact on Mental Health to a tribe is that through its participation in the Mental Health Compact, a tribal, rather than a nontribal, court would determine whether an Indian child needs to be placed in a mental

33. Compact Administrators' Manual 2.3. There is no case law interpreting this section. This information comes from the interpretive summary in the Compact Administrators' Manual which governs the administration of the compact in accordance with article VII of the compact.

34. Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 (1978).

35. 43A OKLA. STAT. § 501 (Supp. 1980).

36. *Id.* (art. I).

37. *Id.* (art. VII(a)).

health facility and thus it would retain power over the child's guardianship.[38]

One obstacle to a tribe taking advantage of the Interstate Compact on the Placement of Children and the Interstate Compact on Mental Health is the joinder provision of each compact. Indian tribes are not *expressly* included in the list of those eligible to join the compacts.

The joinder clause of the Interstate Compact on the Placement of Children provides for joinder by any state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and, with the consent of Congress, the government of Canada or any province thereof.[39] The Interstate Compact on Mental Health includes the same entities except for Canada.

It is submitted that *for the purposes of these compacts* Indian tribes should be included within the definition of territories. There is support for this proposal. According to the United States Supreme Court, the determination of the territorial status of an entity "within the meaning of any particular statutory or constitutional provision depends upon the *character and aim* of the specific provision involved."[40]

An analysis of two of the Court's decisions as to the territorial status of the District of Columbia demonstrates the application of this principle.[41] In *Embry v. Palmer*[42] the Court held that the District of Columbia was a territory for purposes of the enabling legislation of 1804.[43] But, in *District of Columbia v. Carter*,[44] the Court decided that the District of Columbia was not a territory for purposes of certain civil rights legislation.

This principle has been applied to determine the territorial status of an Indian tribe for purposes of particular legislation.[45] The Cherokee Nation was accorded territorial status for the purposes of the enabling legislation of 1812 in *Mackey v. Coxe*.[46]

38. *Id.* (art. VIII).

39. 10 OKLA. STAT. § 571 (art. IX) (Supp. 1980).

40. District of Columbia v. Carter, 409 U.S. 418, 420 (1972) (emphasis added).

41. Ragsdale, *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M. L. REV. 133, 137-38 (1977).

42. 107 U.S. 3 (1882).

43. Act of Mar. 27, 1804, ch. 56, 2 Stat. 298.

44. 409 U.S. 418 (1972).

45. Ragsdale, *Problems in the Application or full Faith and Credit for Indian Tribes*, 7 N.M. L. REV. 133, 138 (1977).

46. 59 U.S. 100 (1855).

The construction of "territory" in the context of the purposes and intents of the Interstate Compact on the Placement of Children and the Interstate Compact on Mental Health would result in the tribes being considered territories for purposes of these compacts. The intent of the Interstate Compact on the Placement of Children is to maximize opportunities for children through overcoming jurisdictional barriers.[47] The Interstate Compact on Mental Health bespeaks a similar purpose.[48] From a reading of the provisions of the compacts in light of these intents to alleviate the jurisdictional barriers standing between a child and his receiving proper care, it is apparent that the tribes should be considered territories for purposes of enabling them to join these compacts.

Financial Responsibility Under the Compacts

The final hurdle the tribes would face in their quest to gain placement resources from the states is financial. Most tribes would be unable to bear the cost of keeping a child in an institution or foster care. If the tribes must pay for these services, they are effectively cut off from state resources.

The Interstate Compact on the Placement of Children speaks to this issue. Article V, paragraph (a)[49] provides that the sending agency shall continue to have financial responsibility for support and maintenance of the child during the period of the placement. The key word is "continue." The compact does not assign initial financial responsibility. It simply clarifies that participation in the compact does not shift financial responsibility. Whether the tribes must pay for foster care services received from the state through the compact depends upon who is initially financially responsible for these services. A tribe obviously would not continue to be responsible for something for which it has never been responsible.

Of the few cases in which the right of Indians to state assistance (*i.e.*, a state's responsibility to provide services for Indians) was at issue,[50] most resulted in holdings that Indians are

47. 10 OKLA. STAT. § 571 (art. I) (Supp. 1980).

48. 43A OKLA. STAT. § 501 (art. I) (Supp. 1980).

49. 10 OKLA. STAT. § 571 (Supp. 1980).

50. *See* Arizona v. Hobby, 221 F.2d 498 (D.C. Cir. 1954); Acosta v. San Diego County, 126 Cal. App. 2d 455, 272 P.2d 92 (1954); County of Beltrami v. County of Hennepin, 119 N.W.2d 25 (Minn. 1963); State *ex rel.* Williams v. Kemp, 78 P.2d 585 (Mont. 1938).

eligible for state assistance.[51] Neither the Oklahoma Supreme Court, the federal courts in the Tenth Circuit, nor the United States Supreme Court have ruled on this issue. However, the United States Supreme Court has indicated its position.

In *Morton v. Ruiz*,[52] a case dealing with the eligibility of off-reservation Indians for BIA relief assistance, the Court cited with approval the holding in *State ex rel. Williams v. Kemp*,[53] a case in which the Montana Supreme Court held that the state was responsible for the relief of Indians. The Supreme Court further stated by way of dictum in *Morton*: "Any Indian, whether living on a reservation or elsewhere, may be eligible for benefits under the various social security programs in which his State participates and no limitation may be placed on social security benefits because of an Indian claimant's residence on a reservation."[54]

Even though the Court has not ruled on the specific issue of the right of Indians to state assistance, the Court's position seems clear. The conclusion may safely be drawn that Indians are eligible to receive aid from state government if the program is at least partially funded through the federal Social Security Act.[55]

In Oklahoma the foster care program of the Department of Human Services is funded largely through Title XX[56] of the Social Security Act.[57] Two of the state institutions where deprived children and children in need of supervision (the adjudications of Indian children under tribal jurisdiction) can be placed are designated to be funded partially through Title XX.[58] Thus, Indian children who are Oklahoma residents are entitled to foster care and institutional placement from the state of Oklahoma.

Since Oklahoma must provide foster care and institutional placement for Indian children without a right of reimbursement, and since the Interstate Compact on the Placement of Children does not alter the financial responsibilities, a tribe that places a child pursuant to the provisions of the compact would not bear

51. For an analysis of these cases, *see* Note, *Indian Rights: Eligibility of Indians for State Assistance*, 4 AM. INDIAN L. REV. 289 (1976).

52. 415 U.S. 199 (1974).

53. 78 P.2d 585 (Mont. 1938).

54. 415 U.S. 199, 208 (1974).

55. *See* Note, *Indian Rights: Eligibility of Indians for State Assistance*, 4 AM. INDIAN L. REV. 289 (1976).

56. 42 U.S.C. § 1397 (1980).

57. Department of Human Services, Proposed Title XX Comprehensive Services Plan of the State of Oklahoma, Program Period July 1, 1981 through June 30, 1984, 12 (1981).

58. *Id.* at 32, 33.

the financial responsibility for the child's support and maintenance in an Oklahoma state institution.

The Interstate Compact on Mental Health is silent as to payment for services. It is not clear what financial arrangements are intended. Because the receiving state gains full jurisdiction over the person sent,[59] a logical presumption is that under this compact the receiving state assumes financial responsibility for the patient.

The federal government was held to be responsible for mental health services provided to Indians in *White v. Califano*,[60] an Eighth Circuit case not involving the Interstate Compact on Mental Health. Coupling the presumption under the Mental Health Compact with the holding in *White v. Califano* leads to the conclusion that any dispute over responsibility for payment for services rendered under the Mental Health Compact would properly be between the state and the federal governments.

Conclusion

The Indian Child Welfare Act provides an opportunity for the Indian tribes to influence a system that for too long has inflicted untold heartache and trauma on Indian children, their families, and their tribes.

Central to the success of the tribes in realizing the promise of the Act is the concept of tribal sovereignty. This concept can be enhanced by the tribes' participation, to the fullest extent their resources will allow, in the determination of what happens to their people.

The tribes can increase the resources available to them, and thus their influence on the system, by overcoming barriers that stand between them and resources maintained by the states. By cooperating under existing compacts, with their established procedures for overcoming these barriers, the tribes and the states could unite for the good of Indian children and yet each could assert themselves as sovereigns in ways understandable and legally palatable to the other.

Responsible actions and a spirit of cooperation on the part of both the tribes and the states can make the promise of the Indian Child Welfare Act a reality.

59. 43A OKLA. STAT. § 501 (art. VII(a)) (Supp. 1980).

60. 437 F. Supp. 543 (D.S.D. 1977), *aff'd*, 581 F.2d 697 (8th Cir. 1978).