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An Analysis of the Bureau of Indian Affairs General Assistance Program

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AN ANALYSIS OF THE BUREAU OF INDIAN AFFAIRS GENERAL ASSISTANCE PROGRAM

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I. THE WELFARE SYSTEM FOR INDIANS

The Bureau of Indian Affairs (BIA) operates a General Assistance program of financial aid to needy Indians[1] who live in Oklahoma[2] or Alaska[3] or on federally-recognized reservations in thirteen states.[4] The BIA program provides general assistance to eligible Indians; that is, it aids only those needy Indians who are either ineligible for the categorical assistance programs established by the Social Security Act[5] or whose applications for such aid

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1. The term "Indian" as used in this article includes all Alaska natives and is not limited to persons with one-quarter or more Indian blood.

2. Except in Tulsa and Oklahoma City, Oklahoma. These cities are excluded on the theory that they provide locally funded general assistance to needy Indians. Interview with Mr. Raymond V. Butler, Chief of the Division of Social Services, BIA, Washington, D.C., July 16, 1974. *See* discussion accompanying note 71 *infra.*

3. The BIA's rationale for providing assistance to non-reservation Indians in these two states is that their unique historical situation has left large concentrations of Native Americans with few reservations in both states. The BIA also cites the facts that many of these Indians live under tribal organization and/or on federal trust (allotted) land in Oklahoma, and that there is "substantial separate legislation" dealing with the Alaska Natives. Morton v. Ruiz, 415 U.S. 199, 212 (1974), *quoting* Brief for Petitioner (Secretary of Interior).

4. 66 INDIAN AFFAIRS MANUAL § 3.1.4A (hereinafter cited as I.A.M.). The states are Arizona, Colorado (Southern Ute reservation only), Idaho, Minnesota (Red Lake reservation only), Mississippi, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, South Dakota and Wyoming.

5. The categorical programs are Title IV, Aid to Families with Dependent Children (AFDC), 42 U.S.C. §§ 601-608 (1970) *as amended* 42 U.S.C. § 601-608 (Supp. II, 1972); and Title XVI, Supplemental Security Income for the Aged, Blind and Disabled (SSI), 42 U.S.C.A. §§ 1381-1385 (Supp. 1974). SSI is the federal income maintenance program which on January 1, 1974 superseded the federal-state categorical programs of Old Age Assistance (OAA), 42 U.S.C. §§ 301 *et seq.* (1970), Aid to the Blind (AB), 42 U.S.C. §§ 1201 et seq. (1970), and Aid to the Disabled (AD) 42 U.S.C. §§ 1351 et seq. (1970).

Indians on reservations are legally entitled to AFDC or SSI on the same basis as other citizens of the state. Morton v. Ruiz, 415 U.S. at 207-08. States, however, have been reluctant to provide Indians on reservations with categorical welfare payments toward which the states must contribute funds. Wolf, *Needed: A System of Income Maintenance for Indians,* 10 ARIZ. L. REV. 597, 602-04 (1968). The states still share the funding of

are pending.[6]

Because eligibility for BIA General Assistance is limited to persons who do not fit into any existing welfare category, those eligible for BIA welfare are primarily[7] 1) needy individuals under 65 years of age who are not blind[8] and not disabled,[9] and 2) needy families with children who are not "deprived of parental support or care by reason of the death, continued absence or physical or mental incapacity of a parent."[10] The latter group — families with both parents in the home who are unemployed or underemployed, although they are theoretically "employable" — makes up the vast majority of recipients of BIA General Assistance.[11]

Since 1953,[12] the average monthly number of recipients has increased more than eleven-fold, from 6,665 persons[13] to an estimated 75,000 persons for the fiscal year 1974.[14] In terms of numbers of recipients, the most dramatic increases occurred in fiscal year 1971 when the average monthly caseload rose by almost 22,000 people. Eighty per cent of that increase occurred on the Navajo Reservation, a fact which is attributed in part to the efforts of the legal services program there to inform people about BIA General Assistance.[15]

AFDC with the Federal Government (42 U.S.C. § 603 (1970)), and those states which paid more to their recipients of OAA, AB, or AD in December, 1973 than the amount of the federal SSI benefit ($146 for one person and $219 for two persons (42 U.S.C. § 1382 (b) (1) and (2) (1970)) are required to supplement the federal SSI payment to certain of these former state recipients so that their income is maintained at its December, 1973 level. Pub. L. No. 93-66, § 212 *as amended* Pub. L. No. 92-233, § 10 (Dec. 31, 1973), *quoted in* annotation to 42 U.S.C.A. § 1382.

Ever since Arizona and New Mexico succeeded in obtaining legislation to provide that the Federal Government would pay, in addition to the existing federal share, 80% of the state's share of categorical assistance to Navajos and Hopis (Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 639 (1970)), states have sought unsuccessfully to have similar special funding arrangements extended to cover categorical recipients from other tribes on reservations within their boundaries. T. TAYLOR, THE STATES AND THEIR INDIAN CITIZENS 45-46 (1972); *e.g.*, Amendment No. 395 to H.R. 1, 92nd Cong., 1st Sess. (1971) (introduced by Sen. Metcalf).

6. 66 I.A.M. § 3.1.4B.

7. Some Indians, who are otherwise eligible for categorical public assistance but are denied it because their countable resources exceed the limitations of those programs, are eligible for BIA general assistance since the BIA does not follow the categorical regulations regarding resources. 66 I.A.M. § 3.1.7B. Others may be found ineligible for categorical aid because of an illegal or at least legally questionable requirement (*e.g.*, mother must sue father of child for non-support, caretaker must have legal guardianship of child), and the BIA usually continues their General Assistance while the regulation is being attacked. Therefore, the population receiving BIA General Assistance does include some persons who are blind, disabled, or over 65 and some single-parent families with dependent children.

8. *See* the definition of blindness used by the SSI program. 42 U.S.C. § 1382c(a)(2) (Supp. II, 1972).

9. *See* the definition of disability used by the SSI program. *Id.* § 1382c(a)(3).

10. The quoted phrases are part of the definition of "dependent child" for purposes of eligibbility for AFDC. *Id.* § 606(a) (1970).

11. Interview with Mr. Butler, *supra* note 2, March 13, 1973.

12. For the early history of the program, see Wolf, *supra* note 5, at 607.

13. 1953 SECRETARY OF THE INTERIOR ANNUAL REPORT 39.

14. Statistics on file at the Division of Social Services, BIA, Washington, D.C.

15. Interview with Joe Holmes, Assistant Chief of the Division of Social Services, BIA, in Washington, D. C., July 16, 1974. In fiscal year 1973, four BIA areas (regions) accounted for 84% of all BIA General Assistance recipients; the Navajo area had 53%, the Aberdeen area (the Dakotas and Nebraska) had 14%, the Phoenix area (Nevada and Arizona except for the Navajo reservation) had 10%, and the Juneau area (Alaska) had 7%.

16. 25 U.S.C. § 13 (1970). Morton v. Ruiz, 415 U.S. 199, 205-06 (1974), states that this

II. OPERATION OF BIA GENERAL ASSISTANCE

A. LEGAL CONTEXT

1. *The Statute*

The statutory authority for most BIA activities, including its welfare program, is the Snyder Act of 1921.[16] The Act contains no details of any program but instead provides in pertinent part:

> The Bureau of Indian Affairs, under supervision of the Secretary of the Interior, shall direct, supervise, and expend such monies as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:
>
> General support . . .
>
> For relief of distress . . .

Thus the statute gives to the Secretary of the Interior and the BIA the responsibility of determining the structure of the General Assistance program[17] — a task which they accomplished by setting forth the rules governing the program in an unpublished departmental manual.[18] The responsibility, although broadly worded, is limited by the U.S. Constitution, the intent of Congress (as revealed by the relevant appropriations statutes and the annual hearings on the BIA requests to Congress for General Assistance funds), and the requirements of other federal laws, including, notably, the Administrative Procedure Act.[19]

2. *Morton v. Ruiz*

In *Morton v. Ruiz*,[20] the only case dealing with this program which has reached the U.S. Supreme Court, the unanimous Court stated that the Secretary and the BIA in promulgating rules have two duties. Their substantive duty is to make the rules consistent with governing legislation,[21] and their procedural duty is to "employ procedures that conform to the law."[22] The Court held that the Secretary and the BIA had failed to fulfill their procedural responsibility by not publishing the General Assistance *Manual* in the Federal Register as the Administrative Procedure Act[23] and the BIA's

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statute was enacted to provide general authorization for BIA appropriations in order to avoid the frequent striking of BIA appropriations requests by point-of-order objections in Congress.

17. *See also* 25 U.S.C. § 2 (1970).
18. 66 I.A.M. § 3.1.
19. 5 U.S.C. §§ 551-559, 701-706, 3105, 3344 (1970).
20. 415 U.S. 199 (1974).
21. *Id.* at 232.
22. *Id.*
23. 5 U.S.C. § 552(a)(1) (1970).

own rules[24] require.[25] The provision of the *Manual* which was at issue in the case limited eligibility for General Assistance to residents of federal Indian reservations (and residents of Alaska and Oklahoma). After noting the BIA's exceptions to the "on-reservation rule" and reviewing at length the legislative history of appropriations acts dealing with the scope of BIA services, the Court found that the appropriations were intended by Congress to be for Indians "on *or near*" reservations, in spite of the contrary language in the *Manual*.[26] Because the BIA failed legally to publish its restriction of General Assistance to reservation residents, the Court held that the *Manual* provision did not extinguish the entitlement to General Assistance of persons who were within the class of beneficiaries intended by Congress, namely, those living "near" reservations.[27]

With regard to the responsibility of the Secretary and the BIA for the substance of their rules, however, the opinion is less clear. It can be interpreted as holding that the *Manual's* "on-reservation" limitation is invalid as a violation of the Congressional intent to appropriate welfare funds for Indians both "on" or "near" reservations.[28] But the opinion contains no explicit statement about whether or not the BIA, faced with insufficient appropriations to serve all eligible persons, could legally limit eligibility to reservation residents if it followed the procedures required by law.[29] Instead, the Court stated that, given a scarcity of funds,[30]

> it would be incumbent upon the BIA to develop an eligibility standard to deal with this problem, and the standard, if

24. BUREAU OF INDIAN AFFAIRS MANUAL § 1.2 (1968 Introduction) (hereinafter cited as B.I.A.M.). (The citation "B.I.A.M." refers to sections of the BIA MANUAL which have been revised under that designation. The General Assistance sections have not yet been added to B.I.A.M.; therefore they are still cited as "I.A.M.".)

25. 415 U.S. at 233-34.

26. *Id.* at 229-30.

27. Some progress toward the legally required publication of the General Assistance MANUAL has been made as of July, 1974. Interview, *supra* note 2. Until the BIA does legally publish its rules governing General Assistance, the lack of legal validity of the eligibility conditions in the MANUAL might successfully be raised by persons whose applications for assistance have been denied. *See* the sanction for non-publication in 5 U.S.C. § 552 (a)(1) (1970). However, in the context of the Morton v. Ruiz opinion, the difficulty of aggrieved applicants who attack rules other than that governing reservation residence will be to show that they are members of the class of persons which Congress intended to be beneficiaries of General Assistance.

28. Memorandum to the Commissioner of Indian Affairs from the Associate Solicitor—Indian Affairs, "Supreme Court Decision in Morton v. Ruiz", February 22, 1974.

29. Although the Court affirmed the result reached by the Court of Appeals, Morton v. Ruiz, 462 F.2d 818 (9th Cir. 1972), it did so on narrower grounds, rejecting that Court's position that the wording of the Snyder Act meant that Congress intended that BIA General Assistance be provided to needy Indians wherever they lived "throughout the United States".

30. Presumably an insufficiency of funds could exist only after the BIA had sought and been denied a supplemental appropriation from Congress to serve the total population eligible for General Assistance. Congress has never denied the BIA such additional funding for its welfare program. In fact, during fiscal year 1971, the BIA received a supplemental welfare appropriation of $16.9 million, which was more than the total amount of its regular General Assistance appropriation for that year. Interview, *supra* note 15.

> rational and proper, might leave some of the class otherwise encompassed by the appropriation without benefits.[31]

It may be that the Court, in mentioning permissible restrictions on eligibility, was referring not to a residency limitation but rather to other types of eligibility rules like those state regulations setting limits on the amounts of welfare payments which the Court has approved in the cases it cited in this part of the opinion.[32] Moreover, in order to meet the requirements of rationality, an eligibility classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation"[33] or program[34] — a test which the classification according to reservation residence might fail to meet.

In summary, by raising and leaving unanswered the question of what eligibility restrictions the BIA may legally impose, the Court failed to shed much light on the extent to which Congressional intent limits the BIA in determining the rules governing General Assistance. The case does make it clear, however, that the annual Congressional appropriations for BIA welfare do not constitute a ratification of the provisions of the BIA *Manual*.

3. BIA *Manual*

Although the General Assistance part of the *Manual*[35] has not been legally promulgated, it continues to govern the BIA welfare program. There are also several important memoranda from the Interior Department and the Central Office of the BIA which clarify policies and announce new ones, adding to those in the *Manual* and, in some cases, changing the *Manual's* provisions substantially.[36] It has been the authors' experience that, with the exception

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31. 415 U.S. at 231.

32. Dandridge v. Williams, 397 U.S. 471 (1970) (maximum grant limitation regardless of family size), and Jefferson v. Hackney, 406 U.S. 535 (1972) (reduction of family's determined need by a percentage), both *cited in* Morton v. Ruiz, 415 U.S. 199, 230-31 (1974).

33. Reed v. Reed, 404 U.S. 71, 75-6 (1971), *quoting* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). *See also* U.S.D.A. v. Moreno, 413 U.S. 528, 534 (1973); James v. Strange, 407 U.S. 128, 140-1 (1972); Smith v. King, 277 F. Supp. 31, 38 (M.D. Ala. 1967), *aff'd on other grounds*, 392 U.S. 309 (1968); Carrington v. Rash, 380 U.S. 89, 93 (1965).

34. The declared objective of the BIA welfare activities is:

> . . . so to assist in the development of policy and program that Indian families will be aided in attaining a standard of living which will not only meet requirements of health and well-being but also be conducive to the full development of the respective capacities of the individual members.

66 I.A.M. § 101.01 (Jan. 23, 1952).

35. 66 I.A.M. § 3.1 is entitled "General Assistance". 66 I.A.M. §§ 5.1 *et seq.* contain forms to be used by BIA welfare workers and instructions for filling them out. Related sections are 66 I.A.M. § 3.2 (Social Service to Children), § 3.3 (Social Services to Families and Adults), § 3.4 (Community Organization for Social Welfare), 66 I.A.M. Chapter 4 (Relationship of Branch of Social Services to other BIA Branches, Tribal Organizations and other agencies), and 66 I.A.M. §§ 6.1 *et seq.* (Individual Indian Money Accounts).

36. Memorandum to Area Directors, *et al.*, from Assistant Commissioner Greenwood, November 21, 1955, about the division of responsibility among BIA Divisions of Welfare, Education and Relocation and the Indian Health Service.

Letter to Benjamin Reifel from Assistant Commissioner Selene Gifford, February

of the memorandum dealing with appeals and the Tribal Work Experience Program, these materials are not included when the BIA provides a copy of the *Manual*.

4. *Tribal Actions*

Many Alaska Native villages and a few tribes have entered into contracts with their BIA Area Office which provide for the village or tribal organization to administer BIA General Assistance.[37] Tribal governing bodies, however, which do not choose to take over the daily operation of the program may still seek to influence it.[38] For example, a tribal council resolution might request that the tribal welfare committee have the right to interview and make recommendations about all persons being considered for employment in the Agency Social Services Office, or it might provide that in all cases of reduction, suspension or termination of BIA General Assistance, notice shall be given to the recipient at least 15 days before the proposed action goes into effect.[39]

Although tribal resolutions concerning the operation of General Assistance are merely advisory, they may convince the BIA to make important changes in General Assistance. However, the BIA will disregard a resolution with which it disagrees, as it did when some tribes sought to have their welfare committees make eligibility decisions on every application for General Assistance. Citing the need for confidentiality of welfare information,[40] the BIA refused to allow such a procedure.[41]

B. ORGANIZATIONAL STRUCTURE

Except where the tribal or village government operates General

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27, 1959, about eligibility of Indian wife and children of non-Indian.

Memorandum to the Area Directors from the Commissioner, January 21, 1970, on General Assistance Appeals and Tribal Work Experience Programs (TWEP). The sections about TWEP were updated by Memorandum to Area Directors from the Deputy Assistant Secretary of the Interior, May 24, 1973.

Memorandum to Area Directors for the Assistant to the Secretary of the Interior, June 7, 1973, about provision of money for school clothing to recipients of General Assistance.

Memorandum to Area Directors from Acting Director, Office of Indian Services, BIA, February 4, 1974, on Pub. L. No. 93-134 regarding treatment of per capita judgment distributions.

37. Interview, *supra* note 2, October 12, 1972.

38. The general policy section at the beginning of the Welfare part of the BIA MANUAL (66 I.A.M. § 201 (January 23, 1952)) provides that:

> All welfare programs are to be carried out in cooperation with the tribes and Indians involved. Due consideration shall be given to the rights of individuals and tribes to determine their own programs under a democratic process.

39. See note 89 *infra*, about a recipient's constitutional right to prior notice in such cases.

40. 66 I.A.M. § 201 provides:

> Information given by or about persons making application for . . . assistance shall be confidental and shall not be disclosed to unauthorized persons without consent of the applicant.

41. Interview, *supra* note 11.

Assistance under contract with the BIA, the program is administered by the Division of Social Services in 64 Agency (local) Offices on reservations.[42] The Agency Director of Social Services is responsible to the Agency Superintendent,[43] who in turn reports to the BIA Area (regional) Director.[44] Each Area Office has an Area Social Worker (or Area Chief of Social Services) who deals with problems which arise in the administration of the General Assistance program by the Agency Offices in his or her Area. The line of authority runs from the Agency Superintendent to the Area Director, with the Area Social Worker acting as his advisor.[45] The Area Director is responsible to the Commissioner of Indian Affairs in Washington, D.C.,[46] where the Chief of the Division of Social Services handles matters involving General Assistance and advises the Director of the Office of Indian Services, who in turn advises the Commissioner on this subject.[47]

C. VARIATIONS IN LOCAL ADMINISTRATION

Although a single *Manual* of nation-wide applicability prescribes the rules for General Assistance and although the structure of BIA administration lodges ultimate decision-making authority in the Central Office in Washington, D.C., the daily operation of the program is highly decentralized. Welfare workers in the 64 local offices which provide General Assistance make the day-to-day decisions which shape the impact of the program on needy Indians in each BIA Agency.

Since much of the *Manual* sets forth only general policies, welfare workers have some discretion in applying them to specific situations. BIA welfare workers often exercise this authorized discretion in ways which are favorable to applicants and recipients. Some, however, interpret *Manual* provisions illegally,[48] ignore (or are unaware of) other provisions,[49] and add their own "rules" to

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42. Interview, *supra* note 15.

43. 66 I.A.M. § 104.01. (The parts of the BIA welfare MANUAL on administrative organization date from January 23, 1952 and use an old numbering system and out-of-date job titles, but the relationships they describe are still in effect. Interview, *supra* note 2.)

44. 66 I.A.M. § 103.01.

45. *Id.* and § 103.02.

46. U.S. DEPARTMENT OF THE INTERIOR, DEPARTMENTAL MANUAL, § 103.8.1A (May 20, 1974).

47. *Id.* § 103.3.1.

48. These observations are based on the authors' experience handling BIA welfare cases and reading replies to two questionnaires which we sent to the BIA Offices which run General Assistance and to legal services offices serving reservations. Thirty-eight BIA Offices and thirty-one legal services offices responded. The reports and tabulations of these surveys, dated Summer 1972, are on file at Native American Rights Fund, note 52 *infra*.

An example of an illegal interpretation is the use of the MANUAL's work rules (66 I.A.M. § 3.1.4D) to justify wholesale terminations of recipients' grants during seasons when agricultural workers are needed, without applying the provisions to each individual's circumstances.

49. A widely "overlooked" section, 66 I.A.M. § 3.1.7B(1)(c), provides that recipients may use per capita payments and lease and other periodic income to meet expenses not covered

those in the *Manual*.[50] The hierarchical organization of the BIA does not correct the wide variations in local administration of General Assistance, because the Area and Central Offices generally deal with only those problems which are brought to their attention.

III. MATERIALS FOR MONITORING LOCAL ADMINISTRATION

It has been our experience that the abuses in local administration of BIA General Assistance can be overcome by a vigilant, well-informed legal services program and/or welfare rights group. In order to help local people insure that their program is operated in strict compliance with the BIA *Manual*, the authors have written two booklets. *Your Right to Indian Welfare*[51] is an illustrated pamphlet for laymen; it seeks to describe in simple terms the rules governing the program, how to use the *Manual*, and the ways to appeal an adverse decision. The second booklet, *Handbook on BIA General Assistance for Attorneys and Advocates*,[52] provides a detailed analysis of each provision of the program; it applies general welfare law (case law and regulations of the categorical welfare programs which may be useful by analogy) to BIA General Assistance, describes the issues and results of many administrative appeals and of the few court cases involving the program, and includes forms for interviewing persons with a welfare problem and for requesting a hearing.

This article summarizes some important parts of the *Handbook* and discusses developments affecting the program which have occurred since the publication of the *Handbook*.

IV. ELIGIBILITY RULES

A. SOME ELIGIBILITY CONDITIONS NOT RELATED TO NEED

1. *Residence*

As already noted, the Supreme Court recently struck down the provision of the *Manual* which sought to restrict eligibility for BIA General Assistance to residents of federal Indian reservations (and

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by their welfare grant (like household items, home improvements and education), without having this income subtracted from their determined need.

50. Two examples of such illegal local "rules" are requirements by some offices that a person live on the reservation for a certain period of time before he or she can be eligible for General Assistance and that caretaker relatives file non-support charges against absent parent(s). Such locally imposed requirements are *ultra vires*; the MANUAL gives to the BIA Central Office—and to that office alone—the authority "To formulate policies and procedures for the administration of the welfare program" and "To establish standards for services (and) assistance . . ." 66 I.A.M. §§ 102.02C and K (January 23, 1952).

51. December 1973, Clearinghouse Publication No. 45 (available free from the U.S. Commission on Civil Rights, Washington, D.C. 20425).

52. CENTER ON SOCIAL WELFARE POLICY AND LAW (Oct. 1973) (150 pages, available from Native American Rights Fund, National Indian Law Library Press, 1506 Broadway, Boulder, Colorado 80302) (hereinafter cited as HANDBOOK).

of Alaska and Oklahoma).[53] The Court ruled that the Congressional appropriation for BIA welfare was intended to cover Indians living "near" reservations and that this class included the respondents, the Ruizes.[54] Five criteria for determining the members of this class can be derived from the Ruizes' circumstances:[55] 1) residence in an "Indian Community,"[56] 2) a few miles[57] from 3) the Indian's own reservation,[58] 4) the maintenance of economic and social ties with that reservation,[59] and 5) the lack of assimilation[60] of the Indian into non-Indian society.

There are problems in applying each of these criteria to situations which differ from that of the Ruizes.[61] There are, of course, circumstances which clearly fall within and those which clearly fall outside the range of each of these tests, but borderline situations are the difficult ones.

It is important that needy Indians who may qualify for assistance according to these guidelines apply for it as soon as possible[62] at the nearest BIA Office, because the *Morton* opinion shows that there is a group of Indians, however imprecisely defined,[63] from whom welfare monies have been wrongfully kept by the BIA. These off-reservation residents, if they meet the other eligibility require-

53. Morton v. Ruiz, 415 U.S. 199 (1974).

54. *Id.* at 238.

55. *Id.* Since a sixth possible criterion—that the Indian be full-blooded like the Ruizes—is not repeated in the Court's final summary of its holding and since a blood quantum rule is not directly related to a definition of the term "near", we interpret the opinion as setting forth only five criteria.

56. The Ruizes lived in a part of the town of Ajo, Arizona, called "Indian Village" which was "populated almost entirely by Papagos." *Id.* at 202.

57. In this case, fifteen miles. *Id.*

58. As opposed to that of another tribe.

59. The Ruizes kept a home on the reservation, planned to return there on retirement, went there once or twice a month and held their son's funeral in a church there. The Court also noted examples of other reservation ties: maintenance of cattle or farms on the reservation, attendance at dances and other ceremonies there, voting in tribal elections, and the receipt of medical care there. *Id.* at 203 n.3.

60. In this regard, the Court noted their use of the Papago language and their limited understanding of English. *Id.* at 202. The Court viewed Mr. Ruiz's employment by a large corporation as not amounting to assimilation. *Id.* at 202-03.

61. Some examples are: How heavily "Indian" must the community be? How far beyond fifteen miles does the phrase "a few miles" extend? For a descendant of two (or more) tribes, which is his or her own reservation? How many economic and social ties to the reservation are necessary? At what point does an Indian become "too assimilated" into non-Indian society?

62. Although the BIA may not decide on the applicant's eligibility immediately because of the complexity of the tests, early application is crucial because the General Assistance of those found eligible should legally be retroactive to the day they applied. The MANUAL does not state that entitlement begins at the time of application (*see* 66 I.A.M. § 3.1.8), but in an excellent decision of an adminisrative appeal, the Navajo Area Office has made that the rule for its Area. Memorandum to Agency Superintendents from Acting Assistant Navajo Area Director, April 15, 1974. The memorandum on which this decision was based (dated April 15, 1974 from the BIA Field Solicitor in Window Rock, Arizona) cites similar rulings in Ewing v. Gardner, 185 F.2d 781 (6th Cir. 1950); Class v. White, Civ. No. 74, 764 (D. Conn. 1972); Alvarado v. Houston, Civ. No. G-64-71 CA (W.D. Mich. 1971); and Board of Social Welfare v. Los Angeles County, 162 P.2d 630 (1945).

While the Central Office has not yet made this rule apply nation-wide, it should be adopted by all Area Offices in order to avoid violating the right of Indians in their jurisdictions to treatment equal to that of the Navajos.

63. The class may be more specifically defined by the District Court to which the case was remanded. That court never ruled on the class, because it dismissed the case.

ments, have a right[64] to BIA General Assistance. Only by a decision on the applicability of the *Morton* criteria to each General Assistance application by the BIA and, probably in some cases, by a Court, will the full impact of the case be realized.

The BIA is in the process of revising the rules defining the geographic scope of the service area of most[65] of its programs in light of the *Morton* decision.[66] The head of each BIA program is submitting to the BIA a proposed regulation governing eligibility of off-reservation residents for his program. The tentative plan of the Division of Social Services is to propose a general regulation stating that General Assistance may be provided to any eligible Indian living "near" a reservation when the failure to provide it would adversely affect the applicant, his or her family, or the program on the reservation. The tribal governing body of each reservation will then decide on a proposed definition of the term "near" for its reservation to be published in the Federal Register.[67]

In wording the proposal to state that eligible reservation residents *shall* be given General Assistance while those off-reservation *may* be given it, the Division of Social Services seeks to give welfare workers more discretion in dealing with persons living "near" reservations. This grant of discretion is designed to permit the BIA to reduce its assistance to off-reservation Indians if it is denied sufficient funds to aid both reservation residents and those living "near" reservations.[68] But in the absence of published regulations defining the circumstances when such a cutback on General Assistance to eligible off-reservation residents is to go into effect and the ways it is to be accomplished, the permissive wording of the proposal seems to allow virtually unrestricted discretion. Such a situation was denounced by the Supreme Court when it said:

> No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an *ad hoc* basis by the dispenser of the funds.[69]

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64. The Morton opinion refers to the "entitlement" of eligible beneficiaries of General Assistance. 415 U.S. at 235.

65. Except for the BIA programs of education, adult vocational training, credit and trust management, which are authorized by statutes other than the Snyder Act. Interview, *supra* note 2. Since the Snyder Act is the authorization statute for the programs of the Indian Health Service, that agency and the BIA are working together toward a uniform definition of the geographic scope of their services. *Id.*

66. The information in this paragraph is based on interviews. *Id.* and *supra* note 15.

67. Pursuant to 5 U.S.C. § 553(c) and (d) (1970), the public should be given at least 30 days from the publication of the proposed rules to make comments on them which are to be considered before the rules are issued in final form. Unfortunately this issue may pit reservation Indians against those living off-reservation, if people assume that an increase in the number of eligible Indians will not be accompanied by a corresponding rise in the BIA's budget for programs. Morton v. Ruiz, however, should give the BIA a basis for seeking increased appropriations.

68. Interview, *supra* note 2.

69. 415 U.S. at 232.

In drawing up this proposal, the Social Services representatives apparently rejected as unfair a nation-wide definition of "near" in terms of a specific number of miles and rejected as too administratively burdensome the tests of non-assimilation and economic and social ties. The criteria of nearness to one's own reservation and of a certain degree of Indian blood were also omitted, probably because they are inconsistent with the way the program is now run on reservations.[70] If the problem of undue discretion is solved by the issuance of proper regulations, the proposed rules, by simplifying the determination of eligibility of off-reservation residents, should overcome the present long delays in determining eligibility for Indian programs. The issuance of these proposed rules should also avoid many time-consuming administrative appeals regarding the application of the five *Morton* criteria.

2. *Unavailability of State or Local General Assistance*

The BIA's use of one of its eligibility requirements could, however, seriously undermine the extension of BIA General Assistance to Indians living "near" reservations. The rule is that

> Indians for whom general assistance is actually available from a State, county or local public jurisdiction are not eligible for general assistance from the Bureau.[71]

If the BIA applied this rule to the individual circumstances of each applicant, as it does its other eligibility conditions, the rule would simply prevent duplication of welfare assistance; but instead the BIA uses it to declare *all* Indians in certain geographic areas ineligible for BIA General Assistance. The BIA relies on this rule, as well as on other factors,[72] in deciding whether or not to operate its General Assistance program in a specific location. For example, since Arizona and its counties refuse general assistance to Indians living on a reservation, the BIA operates its General Assistance program on Arizona reservations;[73] but since Utah permits eligible

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70. There are no rules that an Indian must live on his own reservation or that reservation residents must have a certain degree of Indian blood in order to qualify for General Assistance. But in Alaska and Oklahoma, a head of household must be at least one-quarter Indian for his or her household to be eligible for the BIA program. *See* Agreement between Alaska and BIA, March 4, 1939, *quoted in* ALASKA DIVISION OF PUBLIC WELFARE STAFF MANUAL, § 4414.1(2).

71. 66 I.A.M. § 3.1.4B. *Note* that this rule deals with state and local *general* assistance in contrast to state and federal categorical aid. For the relationship of BIA welfare to categorical assistance, see the first paragraph of this article.

72. General Statement released by BIA Division of Social Services in Washington, D.C. (undated) says:

> Bureau responsibilities for social services and related activities including financial aid differ somewhat on different reservations, depending upon economic conditions, the availability of tribal resources, the responsibilities assumed by State or local welfare agencies, differences in local custom and attitudes, and the degree to which tribal institutions and controls are effective.

73. Although the exclusion of reservation Indians from state (or local) general as-

Indians on reservations to receive *state* general assistance, the BIA has no General Assistance program in that state.

In effect, the BIA's position is that if a state or local government has a general assistance program which is available to reservation Indians on the same basis as to people residing off-reservation, the BIA will not have a General Assistance program on that reservation.[74] This policy, however, is based on the false assumption that the existence of a state or local general assistance program which does not discriminate against reservation Indians means that that program is open to *all* needy persons. In fact, some of these programs are available to only certain groups of needy people;[75] unlike the BIA program they are not truly "general" assistance. Thus the blanket application of this rule to reservation areas leaves some needy reservation Indians eligible for no welfare program.[76]

If the BIA tries to extend this geographic application of the rule to the off-reservation areas covered by *Morton v. Ruiz*,[77] by taking the position that it will not operate BIA General Assistance where there are state and local general assistance programs which do not discriminate against (off-reservation) Indians, the effect of the Court decision on General Assistance could be nullified. The States generally do not, according to their written regulations, refuse general assistance to off-reservation Indians the way some of them, by regulation, refuse it to those living on reservations. The Ruizes, for example, were denied State general assistance in Arizona not because they were Indians but because Mr. Ruiz was on strike.[78]

As we understand the plans of the Division of Social Services, the provision on the unavailability of state or local welfare assis-

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sistance poses constitutional problems, raising these issues would only harm Indians, because virtually all state and local general assistance programs provide less money to recipients and are more restrictive in their coverage than BIA General Assistance. *See* ASSISTANCE PAYMENTS ADMINISTRATION, SOCIAL AND REHABILITATION SERV., U.S. DEP'T. OF HEALTH, EDUC. AND WELFARE, PUBLIC ASSISTANCE REP. NO. 39, CHARACTERISTICS OF GENERAL ASSISTANCE IN THE UNITED STATES (1970 ed.) (hereinafter cited as CHARACTERISTICS OF GENERAL ASSISTANCE).

One case did raise these matters during the height of the termination policy. Acosta v. San Diego County, 126 Cal. App. 2d 455, 272 P.2d 92 (1954) held that since Indians living on reservations in California are citizens of the state, the county is required by the privileges and immunities clause of the Fourteenth Amendment to the U.S. Constitution to include them in its welfare program.

74. Interview, *supra* note 2. *See, also*, decision of December, 1971 by the Assistant Director of the Navajo Area upholding the refusal of the Shiprock Agency to grant BIA General Assistance to Indians living on the Utah part of the Navajo reservotion who were in eligible for other assistance, *quoted in* HANDBOOK, *supra* note 52, at 29-30.

75. *See* CHARACTERISTICS OF GENERAL ASSISTANCE, *supra* note 73.

76. This situation does not conform to the MANUAL'S provision that state or local general assistance be "actually available" to the Indian. 66 I.A.M. § 3.1.4B. For other legal arguments attacking the BIA's failure to provide General Assistance on reservations where some needy Indians are ineligible for other welfare assistance, *see* HANDBOOK, *supra* note 52, at 32-34.

77. 415 U.S. 199 (1974).

78. *Id.* at 204. The BIA's blanket application of this rule was not raised in the *Morton* litigation.

tance will continue to be applied in blanket fashion to those states in which the BIA does not now operate its General Assistance.[79] The BIA will, however, apply this eligibility condition to the individual circumstances of those applicants who live in an area defined by a tribal government as "near" its reservation, provided that the reservation now has a BIA General Assistance program.[80]

The BIA Central Office may then erect another barrier to the eligibility of Indians living "near" these reservations by saying that if such a person receives or is eligible to receive any state or local general assistance, *no matter how inadequate,* then he or she is ineligible for BIA assistance. Such an interpretation of this eligibility condition would make needy Indians living "near" reservations (which have a BIA General Assistance program) ineligible for BIA welfare in two types of situations:

1. when an Indian receives state or local general assistance for the full duration of his need but the amount of his monthly grant covers only a fraction of his needs according to BIA standards;[81] and

2. when an Indian receives state or local general assistance for only a limited period of time regardless of the fact that his need continues.

In the first case, there is at least some state or local assistance actually available each month to the needy Indian although the amount may be woefully inadequate.[82] While this policy is deplorable, the denial of BIA welfare in the second case is even worse, because after the needy Indian has exhausted the one or two months of state or local assistance for which he is eligible,[83] he can get no more such aid. To say he is ineligible for BIA General Assistance at that time because he has received state or local assistance in the past is to pervert the meaning of the phrase "actually available". Such persons and families will be left destitute and will no doubt be unable to understand the BIA policy which denies them assistance, because that policy makes no sense.[84]

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79. That is, the BIA will not extend General Assistance to California, Florida, Washington or Oregon, on the theory that in those states, state or local general assistance is available to Indians on an equal basis with others. Interview, *supra* note 2.

80. That is, if the Tribal Government of the Navajo Reservation defines "near" for purposes of the BIA service area to include Gallup, N.M., the BIA will investigate the situation of each applicant from that town in order to determine whether state or local general assistance is actually available to him or her. *Id.*

81. *See* text accompanying notes 91-95 *infra.*

82. The denial of BIA aid in this situation is in line with its unfortunate policy of refusing to supplement categorical public assistance when such assistance pays less than 100% of a household's determined need. 66 I.A.M. § 3.1.4B. But note that BIA General Assistance will supplement other welfare money to pay for certain institutional care for adults. *Id.* § 3.1.12B(2).

83. For example, New Mexico general assistance for temporarily disabled persons is limited to two months. CHARACTERISTICS OF GENERAL ASSISTANCE, *supra* note 73, at 71.

84. This problem, however, will be overcome if the state and local governments take the

3. *Work Rules*

Another condition of eligibility for BIA General Assistance is that "applicants and recipients are expected to seek and accept available employment which they are able and qualified to perform. . . ."[85] There are five criteria which the BIA is to use in determining whether or not an Indian "may be reasonably expected to work."[86] The criteria are:

> (1) availability of employment;
>
> (2) physical and mental capacity and adequate skill of individual to perform the work available;
>
> (3) accessibility of the employment without undue hardship or serious disorganization of the family situation or interruption of school attendance of school age children. (If the employment is at a distance consideration should be given to the availability of transportation.);
>
> (4) rates of pay and working conditions are commensurate with community rates and conditions for the kind of employment involved; and
>
> (5) existence of family or child care problems or illness which would preclude the acceptance of the available employment.[87]

Since these rules are broad and imprecise, they leave a wide area of interpretation when they are applied to an individual or family. Many of the details of the BIA's administration of its work requirement remain to be determined on a case by case basis. However, it has been our experience that lawyers and advocates who have negotiated with the BIA about its application of the work criteria to individual cases have been extremely successful in showing that the BIA's initial decision that a person should be denied or cut off assistance because he could get a job was wrong.[88]

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likely action of changing their rules to exclude from their general assistance programs Indians living in areas "near" reservations, once the BIA has extended its program to these locations.

85. 66 I.A.M. § 3.1.4D. The acceptance of work does not automatically make a person ineligible for BIA General Assistance, since the program supplements the earnings of workers whose net income is less than the standard of need for their households. 66 I.A.M. § 3.1.7B(1)(a). Also note that a recipient who takes a job should get General Assistance until he receives his first paycheck, since only then does he have "actually available" income. *See* 66 I.A.M. § 3.1.7B.

86. 66 I.A.M. § 3.1.4D.

87. *Id.*

88. *E.g.*, Homer v. Hickel, No. 69-83 (D. Ariz., May 14, 1969) (1 C.C.H. Pov. L. REP. § 350.17, 2d ed.), which challenged an Agency's mass termination of 90 recipients of BIA General Assistance under the Tribal Work Experience Program (see text accompanying note 116 *infra*) because seasonal work was allegedly available. The court issued a temporary restraining order prohibiting all terminations of members of the class until each was afforded the right to a hearing prior to the proposed termination date. All but 7 or 8 of the 46 hearings which were then held were won by the recipients. They successfully argued that they were too ill to work, that they were needed to care for sick relatives,

The five criteria given above are safeguards against abuse of the work requirement by the BIA. These rules implicitly place the burden on the BIA to show that there is a specific job available for an individual within his capacity. It is most important that the Indian community learn about: 1) the rule that the BIA must apply the five work criteria to each individual recipient, to his household and, we believe, to each job opening before terminating the General Assistance grant on the ground that work is available, and 2) the constitutional right of recipients to a hearing *before* their grant is reduced or terminated on this (or any other fact-related) ground.[89] The success of persons who have obtained legal assistance in dealing with the work requirement strongly suggests that abuses in this area could be readily ended if recipients understood their rights.[90]

B. FINANCIAL ELIGIBILITY CONDITIONS (NEED)

1. *Standard of Need*

In determining whether an applicant is in financial need[91] and in figuring the extent of his or her need,[92] a BIA welfare worker computes the household's "standard of need" according to the schedule of need for categorical public assistance[93] which is in effect

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that they were the only ones who could haul wood and water for their families, that they were not sufficiently skilled to do the work (since they could not speak English and had not worked off reservation before), and that suitable work was not available. Telephone interview with Roger Wolf, recipients' attorney, April 3, 1972.

89. *See* YOUR RIGHT TO INDIAN WELFARE, *supra* note 51, at 11 and 28-29. In Goldberg v. Kelly, 397 U.S. 254 (1970), the Supreme Court held that the Due Process Clause requires that a recipient of welfare benefits be given adequate notice and an opportunity for a hearing before his benefits are terminated. Wheeler v. Montgomery, 397 U.S. 280 (1970), applied this decision to suspensions of such benefits; and many courts have applied the same reasoning to reductions of welfare grants. *E.g.*, Goliday v. Robinson, 305 F. Supp. 1224 (D.C. Ill. 1969), *remanded for evidentiary hearing*, Daniel v. Goliday, 398 U.C. 73 (1970); Merriweather v. Burson, 325 F. Supp. 709 (D. Ga. 1970), *remanded for evidentiary hearing*, 439 F.2d 1092 (5th Cir. 1971); Barnett v. Lindsay, 319 F. Supp. 610 (D. Utah 1970); Lage v. Downing, 314 F. Supp. 903 (S.D. Iowa 1970). *See also*, Homer v. Hickel, No. 69-83 (D. Ariz., May 14, 1969), which was decided before *Goldberg*.

In spite of this case law, the BIA MANUAL fails to provide for notification to a recipient of an action adversely affecting his General Assistance grant prior to the effective date of such action. 66 I.A.M. § 3.9 (Jan. 21, 1970). The BIA's policy of reinstating assistance retroactive to the date of the adverse action when a hearing is requested and of continuing the aid until the hearing decision has been made (66 I.A.M. § 3.10 (Jan. 21, 1970)) does not meet constitutional requirements. As the Court noted in *Goldberg*, 397 U.S. at 264, unless recipients are given the chance to challenge the termination of their welfare *before* it is cut off, they may be physically, mentally or financially unable to contest an erroneous decision effectively.

90. For further analysis of the employment rules, *see* HANDBOOK, *supra* note 52, at 39-46.

91. This is a condition of eligibility for General Assistance. 66 I.A.M. § 3.1.4C.

92. This is the amount of the BIA welfare grant. *Id.* § 3.1.8.

93. A "standard of need" is a dollar amount representing the total cost of those items (food, clothing, personal incidentals and shelter) which the state has determined are necessary for living on a subsistence level. Such amounts vary according to the size of the household, and, in some states, according to other factors, too. Federal regulations require each state to establish such standards for AFDC and formerly required them for OAA, AD and AB. 45 C.F.R. § 233.20(a)(2)(i) (1973).

Some states also allow "special" needs which are particular items budgeted only when the recipient needs them. *E.g.*, ARIZONA STATE DEP'T OF ECONOMIC ASSISTANCE FAMILY SERVICE MANUAL § 3-1120.1E(1-8), which allows housekeeper services, school books, etc.

in the state where the applicant lives.[94] The welfare worker then subtracts from this amount the household's countable net income.[95] The *Manual* provides that the state categorical assistance plan which "most closely resembles the applicant's individual or family situation" is to be used.[96] The standard of need for Aid to Families with Dependent Children (AFDC) is therefore used for General Assistance applicants with children.

a) *Effect of SSI Program*

In addition, this provision formerly meant that the state standard of need for Old Age Assistance (OAA) or Aid to the Disabled (AD) was used by the BIA in figuring the need of single persons or childless couples who applied for General Assistance. On January 1, 1974, however, OAA and AD were superseded by the new federal Supplemental Security Income (SSI) program, so that there are now no state standards of need for OAA and AD. The BIA, instead of budgeting single persons and childless couples according to the federal SSI payment level,[97] has decided to figure their need by using each state's AFDC standard of need.[98]

One reason given for declining to follow SSI levels is that if the BIA used SSI standards, a childless couple on BIA General Assistance would in some states receive more money than a family of four (budgeted according to AFDC standards) would receive from the BIA program.[99] To avoid this inequity, the lower standard was chosen for everyone. The problem with the decision is that AFDC standards are unlikely to reflect accurately the needs of adults, since they are designed to include children's needs which are usually regarded as less costly than those of adults.

b) *Need for School Clothing*

With regard to the need of General Assistance applicants and recipients for school clothing, the *Manual* departs from its adherence to state standards of need. As the result of an administrative appeal, the BIA adopted a new policy which provides that each child who is a member of a family receiving BIA General Assistance may, on his own request, or that of his parent or caretaker relative,

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The BIA includes these "special" needs in the standard of need for those General Assistance applicants and recipients who have such needs. 66 I.A.M. § 3.1.7A(2).

94. *Id.* § 3.1.7A.

95. *Id.* §§ 3.1.7B(1) and 3.1.8. *Note* that the BIA pays the full amount of the unmet need determined by this method, whereas many states' AFDC programs pay less than 100% of this need. Since the MANUAL prohibits the use of state rules for maximum grants and percentage limitations on grants for BIA assistance, *id.*, BIA recipients often receive more money than they would if they were eligible for AFDC.

96. *Id.* § 3.1.7A.

97. The federal SSI payment is a "flat grant" of $146 for one person and $219 for two persons who have no other countable income. 42 U.S.C. §§ 1381-1385 (Supp. IV, 1974).

98. Interview, *supra* note 2.

99. *Id.*

receive, before the beginning of the school year or "at a subsequent time,"[100] a lump sum grant for school clothing in the amount of $100 or six times the applicable state monthly standard of need for clothing, *whichever amount is greater*.[101]

In most states, $100 is more than six times the monthly clothing allowance for a child. General Assistance recipients will therefore receive $100 for each of their school children, but only the monthly clothing allowance for each of these children will be deducted from their check for the next six months. For example, in a state where the monthly clothing allowance is $10 per child, the BIA, after providing the $100 lump sum, will deduct $60 for each child at the rate of $10 per month.[102]

Thus part of the $100 lump sum clothing grant is "extra" money which the recipient does not repay. For this reason, it is important that recipients request the grant rather than wait for the monthly clothing allowance in their regular General Assistance check.[103] It is unfortunate, and probably unnecessary,[104] that the BIA requires an applicant or recipient to make a request for the lump sum clothing grant in order to receive it. By requiring a request, the BIA creates for itself the duty to take all reasonable steps to inform persons of the availability of the "extra" grant; otherwise the BIA brings about a situation in which a recipient's access to an informed person and to transportation determines whether or not he receives the money to which he is entitled. Moreover, the people who are already the most deprived are likely to be the ones who lose out due to lack of information.

Finally, it should be noted that the Memorandum on school clothing does not permit the BIA to provide clothing in place of

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100. Six months after receiving the first lump sum, the school child may obtain another clothing payment in the same amount. Memorandum of June 7, 1973, *supra* note 36.

101. *Id.* This policy changes 66 I.A.M. § 3.1.12C.

102. The memorandum establishing the clothing policy does not clearly explain the amount to be deducted. Several BIA offices have deducted the entire $100 ($16.66 per month for six months), even though the state need amount for clothing was less.

The Central Office has stated that this practice is incorrect (Interview, *supra* note 2) but has not issued a clarifying memorandum. The deduction of the full $100 violates the BIA policy of following the state standard of need, because it takes money from other budgeted needs, like food and shelter, and applies it to school clothing. Recipients who have had too much deducted from their grants should seek retroactive benefits from the BIA in the amount of the assistance wrongfully subtracted.

103. The request is particularly crucial for those with children who board seven days-a-week at BIA schools, because once the child is in such a school, all of his needs are removed from the family's budget; therefore if he does not receive the lump sum grant, he will receive no money for clothing, not even the regular monthly allowance. Interview, *supra* note 15.

104. The case record is supposed to contain information about the number of children in the household and their schools (in order to determine the amount of the regular grant). Furthermore, it is doubtful that anyone would not want to receive the lump sum since it includes more money than the monthly grant. The only possible justification for requiring a request is to involve the recipient in deciding how the lump sum should be paid (as part of the regular monthly check; in a separate check to the parent, to the child living away from home, or to the head of his school; in a purchase order; or in cash). Memorandum of June 7, 1973, *supra* note 36. In practice, however, recipients may not be given these choices.

money for the purchase of clothing.[105] Representatives of the Navajo Tribe sought early in 1974 to make a contract with the BIA according to which the BIA would give the money for school clothing for General Assistance recipients to the Tribe which would, in turn, buy clothing and distribute it to eligible persons.[106] Such a procedure would be of doubtful legality, because it is not permitted by the written clothing policy and because it would treat Navajo recipients of General Assistance less favorably than recipients from other tribes. Navajo recipients would have been deprived of the freedom to choose their own clothing. Moreover, they would have received clothing the dollar value of which would have been less than the full amount of the clothing grant to which they were entitled, because the administrative cost of buying and distributing the clothes would have been paid from funds which would otherwise have gone directly to the recipients. The proposed contract, which proved unpopular, was never made.

2. *Countable Income*

Although the BIA General Assistance program generally follows state AFDC standards in figuring a person's "standard of need," the *Manual* prohibits the use of a state's method of determining countable income and resources.[107] We will note only the most important BIA rules about income.[108]

First, only *net* income from wages or self-employment may be counted.[109] Second, a related requirement is that "only the income that is *currently available*" will be counted.[110] This rule applies not only to the income of adults but also to that of children; therefore income of a minor which is designated for his "use and benefit"

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105. *Id.*

106. This paragraph is based on interviews with the staff at the Navajo Area Social Services Office and Solicitor's Office, Window Rock, Arizona, Spring 1974.

107. 66 I.A.M. § 3.1.7B. Unlike state assistance plans, the BIA MANUAL contains no resource limitations of a strict dollar amount; instead it provides for a general exploration of an applicant's resources and enumerates the ways in which various types of property are to be treated, *i.e.*, as exempt, as available to meet needs in addition to those in the welfare budget, or as available to meet basic needs. *See* HANDBOOK, *supra* note 52, at 60-62.

108. *See* HANDBOOK, *supra* note 52, at 55-60.

109. 66 I.A.M. § 3.1.7B(1). Expenses deducted from wages include transportation costs (fares, or costs of gasoline, maintenance and depreciation of a vehicle), fees, dues, Social Security taxes, and child care expenses. If an applicant or recipient is self-employed, for example, in agriculture, business, or arts and crafts, then the production and operating costs—*e.g.*, costs of feed, seed, taxes, rent, interest, utilities, licenses, goods, collection and preparation of craft materials and marketing of finished products—are deducted from his or her gross income. 66 I.A.M. § 3.1.7B(1)(a).

110. 66 I.A.M. § 3.1.7B(1) (emphasis added). Assumptions that income is available have often been held illegal in the context of categorical public assistance programs which are governed by policies on this subject similar to those of the BIA; for example, state welfare plans must, in determining financial eligibility and the amount of the AFDC payment, consider only such net income as is actually available for current use. *E.g.*, 42 U.S.C. § 602(a)(7) (1958); 45 C.F.R. § 233.20(a)(3)(ii)(c) (1973); Lewis v. Martin, 397 U.S. 552 (1970); Solman v. Shapiro, 300 F. Supp. 409 (D. Conn.), *aff'd mem.*, 396 U.S. 5 (1969); King v. Smith, 392 U.S. 309 (1968).

alone[111] should not be budgeted against the needs of other members of his household.

Third, in a provision which is often overlooked, the *Manual* accords special treatment to certain types of income derived from Indian lands or from Indian claims against the U.S. Government. It provides:

> Per capita payments, lease rentals, or other income received in considerable amounts on an annual or other periodic basis[112] . . . may be used to meet necessary expenses as improved housing, procurement of needed household items, or special needs not otherwise provided for in the State assistance standard, including expenses necessary to carry out a plan for education and training for self-support.[113]

Thus this money can be used for special needs over and above those included in the welfare budget; only after these special needs have been fully met is the balance to be considered available for basic needs. This income should receive special treatment from the BIA, because it is derived from lands which Indians and their tribes have sacrificed so much to retain.

Finally, the most recent development regarding the BIA's treatment of income significantly changed the provision just discussed with respect to distributions of certain judgment monies. By memorandum[114] the BIA exempted from consideration as income or resources all funds distributed per capita or held in trust in payment of judgments of the Indian Claims Commission or of the Court of Claims after October 19, 1973. In this way the BIA has applied to its General Assistance program the policy enacted by Congress in the Distribution of Judgment Funds Act[115] that these payments be exempt from consideration for purposes of eligibility for public assistance under the Social Security Act.

V. TRIBAL WORK EXPERIENCE PROGRAM

The Tribal Work Experience Program (TWEP) is a program for unemployed employable heads of households who are eligible for BIA General Assistance.[116] Its main objective is "to provide a useful work experience, and when possible, work training . . .

111. *E.g.*, Social Security benefits restricted by 20 C.F.R. § 404.1603 (1973), funds in Individual Indian Money accounts restricted by 25 C.F.R. § 104.4 (1973), and money paid under a court order imposing such limitations.
112. This includes proceeds from the sale of real estate. 66 I.A.M. § 3.1.7B(2)(a).
113. *Id.* § 3.1.7B(1)(c).
114. Memorandum of February 4, 1974, *supra* note 86.
115. 25 U.S.C.A. § 1407 (Supp. 1974). In addition, the BIA exempts payments from the Alaska Native Fund established by the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. I, 1971). Interview, *supra* note 15, July 24, 1974. *Accord*, with respect to public assistance under the Social Security Act, Boures v. Morris, No. 217742 (Wash. Super. Ct., Spokane County, May 17, 1974).

which may lead to gainful employment."[117] During fiscal year 1974 thirty tribes had TWEP contracts, and an average of 4,250 persons worked under the program each month.[118]

The *Manual* requires the BIA to encourage the greatest possible tribal involvement in administering TWEP, including the use of tribal resources to share its administrative expenses.[119] The main restrictions which the *Manual* places on the program are that TWEP workers must not fill established jobs, do work for which people are usually hired or engage in activities for commercial profit;[120] that participation in TWEP must be voluntary (unless the Central Office approves a mandatory program at a tribe's request);[121] and that the payment to each worker shall be his or her household's General Assistance grant plus $40 per month.[122]

The brevity of the *Manual's* rules about TWEP leaves most details of the program to be provided for in each contract.[123] There is no nation-wide model contract; instead each Area Office has developed its own model which it uses in dealing with the tribes under its jurisdiction.[124] The fact that the contracts are renegotiated annually gives the tribes a chance to improve the terms of the program each year in order to overcome problems they have encountered in administering TWEP. In order to shape the TWEP program to meet the needs of its participants, a tribe's representatives should, before meeting with officials from the BIA Area Office, draw up the provisions which they want the contract to contain. The TWEP workers have the most direct interest in the nature of the program; therefore, they may want to try to have their views about the program included in their tribe's proposals for the TWEP contract and to have the contract negotiation opened to public scrutiny.[125]

Some examples of issues which should be considered in writing

116. 66 I.A.M. § 3.1.12D(1). If the household head is not able to work, another household member may substitute for him. *Id.* (The section of the BIA MANUAL dealing with TWEP was added by the Memorandum of January 21, 1970, *supra* note 36, which designated it "C". However, the copy of the MANUAL which the authors obtained from the BIA Central Office includes the section after § 3.1.12C and designates it "D".)

117. *Id.* Adult education may also be included as a TWEP project. *Id.*

118. Interview, *supra* note 15.

119. 66 I.A.M. §§ 3.1.12D(1) and (2). But if tribal funds are insufficient, the BIA will pay necessary administrative costs. *Id.*

120. *Id.* § 3.1.12D(1)(a).

121. *Id.* § 3.1.12D(1)(b). This provision means that if an eligible person declines to take part in a voluntary TWEP, he loses only the $40 monthly TWEP bonus, not any portion of his household's General Assistance grant. The Central Office has approved one mandatory TWEP, which provides that the sanction for refusal to join in the program is the loss of both the bonus and the refuser's share of the household's General Assistance grant. Interview, *supra* note 15.

122. 66 I.A.M. § 3.1.12D(2), *as amended* Memorandum of May 24, 1973, *supra* note 36.

123. In addition to conforming to the MANUAL, the TWEP contracts, of course, must not violate the United States Constitution or the Indian Civil Rights Act, 25 U.S.C. § 1302 (1970), *as amended*, 25 U.S.C. § 1302 (Supp. II, 1972).

124. Interview, *supra* note 15.

125. The organization of TWEP workers into a vocal group should help to accomplish this goal.

a TWEP contract follow. Unless the TWEP program guarantees a job to every eligible person who wants to participate in it, the contract should contain standards for deciding which eligible persons are permitted to work in the program.[126] Similarly, the contract should contain definitions of excused absences,[127] the sanctions for unexcused absences, the grounds for terminating a worker's participation in TWEP and the notice and appeal rights of workers whose pay is docked or who are terminated from the program.[128] In the absence of written standards dealing with these vital issues, it appears impossible to avoid administering TWEP in an arbitrary manner.[129]

VI. CONCLUSION

Since *Morton v. Ruiz*[130] held that the *Manual* dealing with BIA General Assistance has not been published as required by law, the BIA Division of Social Services is revising it for publication.[131] This is an excellent time, therefore, for people interested in the policies governing BIA General Assistance to seek to influence them. General Assistance recipients should communicate their views to their tribal governments and to all levels of the Division of Social Services. If such recipients form active welfare rights organizations, they may be able to bring about substantial improvements in the BIA's written policies or at least in the local administration of the BIA General Assistance program.

126. *See* Holmes v. New York City Housing Authority, 398 F.2d 262 (2nd Cir. 1968). The Court in *Holmes* held that if a housing authority has adopted no standards for selection among non-preference applicants, it has failed to establish a fair and orderly procedure for allocating public housing as required by due process. This reasoning applies to the selection of TWEP participants.

127. The TWEP Contract of the Ramah-Navajo Chapter, July 1, 1971 provided that:

> Legal holidays and religious or tribal obligations shall be considered as days for which there will be leave with pay as it concerns TWEP workers.

128. *See* Goldberg v. Kelly, 397 U.S. 254 (1970); Wheeler v. Montgomery, 397 U.S. 280 (1970); Goliday v. Robinson, 305 F. Supp. 1224 (D.C. Ill. 1969), *remanded for evidentiary hearing*, Daniel v. Goliday, 398 U.S. 73 (1970). These issues are dealt with more fully in HANDBOOK, *supra* note 52, at 94-102.

129. *See* quotation in text accompanying note 69 *supra*.

130. 415 U.S. 199 (1974).

131. Interview, *supra* note 2.