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AMENDING THE INDIAN CHILD PROTECTION AND FAMILY VIOLENCE PREVENTION ACT TO REQUIRE BACKGROUND CHECKS BEFORE FOSTER CARE PLACEMENTS ARE ORDERED IN TRIBAL COURT PROCEEDINGS, AND FOR OTHER PURPOSES

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MAY 11, 2015.—Ordered to be printed

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Mr. BARRASSO, from the Committee on Indian Affairs,  
submitted the following

### R E P O R T

[To accompany S. 184]

The Committee on Indian Affairs, to which was referred the bill (S. 184) to amend the Indian Child Protection and Family Violence Prevention Act to require background checks before foster care placements are ordered in tribal court proceedings, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

#### PURPOSE

The purposes of S. 184 are to amend the *Indian Child Protection and Family Violence Prevention Act of 1990* to require background checks before foster care placements are ordered in tribal court proceedings, and for other purposes. S. 184 is intended to create more consistency and accountability by improving criteria for Indian children living and being placed in foster homes and institutions.

#### BACKGROUND

##### *Brief summary of child protection on Indian reservations*

The failure to protect children has a damaging impact on the quality of life on Indian reservations.<sup>1</sup> Native youth are 2.5 times more likely to be victims of abuse or neglect than youth of other

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<sup>1</sup>A more comprehensive overview of child protection in Indian country may be found in previous Committee Reports accompanying prior legislation on this issue. See S. Rep. No. 110-45 (2007); S. Rep. No. 108-228 (2004).

ethnicities.<sup>2</sup> Children exposed to violence are more likely to abuse drugs and alcohol and suffer from depression, anxiety, and post-traumatic disorders. These issues may compound or lead to failures or difficulties in school and delinquent or criminal behavior.

As a general matter, the responsibility for investigating and addressing child protection matters may involve multiple agencies, including the tribal, state, or Federal governments. In some cases, these agencies may handle both or portions of the investigations of neglect or abuse and ensuing placements of the children.

Jurisdictional and resource issues may arise in the child protection cases. Intergovernmental agreements may help facilitate the investigations or placements. However, these types of agreements are not in place for all Indian communities.

One key systemic challenge is ensuring that the child or children are not subjected to any more risk or trauma throughout the duration of the investigation or placement. Various laws have been enacted and intended to reduce further trauma to children and prevent gaps in addressing child protection matters. The *Indian Child Protection and Family Violence Prevention Act of 1990* was one such measure.

#### *History of the Indian Child Protection and Family Violence Prevention Act of 1990*

The *Indian Child Protection and Family Violence Prevention Act of 1990* continues the historical and special relationship between the Federal government and Indian people based on the United States direct interest, as trustee, in protecting Indian children.<sup>3</sup> The purpose of the law is to treat and prevent incidents of family violence and to authorize other actions necessary to ensure effective child protection on Indian reservations.

President George H.W. Bush signed the *Indian Child Protection and Family Violence Prevention Act of 1990* into law on November 28, 1990.<sup>4</sup> The law was a response to the Senate Select Committee on Indian Affairs and the Special Committee on Investigations' findings regarding the increasing numbers of Federal prosecutions for child abuse on reservations and incidents of family violence.<sup>5</sup>

The Committees' findings indicated that child abuse was a problem on Indian reservations.<sup>6</sup> Among the more troubling findings was that there had been multiple incidents of sexual abuse of children on Indian reservations committed by persons employed or funded by the Federal government. The Committees found that background investigations of Federal employees who care for, or teach, Indian children were often deficient.

Moreover, this investigation revealed that the grossly under-reported incidents of child abuse on Indian reservations resulted from the lack of a mandatory Federal reporting law. It found that the funds to meet the growing needs for mental health treatment

<sup>2</sup> U.S. Attorney General's Advisory Committee on American Indian and Alaska Native Children Exposed to Violence: *Ending Violence So Children Can Thrive* (Nov. 2014), available at <http://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2014/11/18/finalaiianreport.pdf>.

<sup>3</sup> 25 U.S.C. § 3201 (1990).

<sup>4</sup> *Indian Child Protection and Family Violence Prevention Act*, Pub. L. No. 101-630, § 401, 104 Stat. 4544 (1990).

<sup>5</sup> S. Rep. No. 104-53, at 1 (1995).

<sup>6</sup> S. Rep. No. 104-53, at 1-2 (1995).

and counseling for victims of child abuse or family violence and the victims' families were inadequate.

Among the more notable goals of the *Indian Child Protection and Family Violence Prevention Act of 1990* were the requirements of appropriate reporting and prevention of the abuse of Indian children.<sup>7</sup> As part of the prevention efforts, the Act required the Secretaries of the Interior and Health and Human Services to conduct a character investigation of each individual employed, or being considered for employment, by the respective Secretary.<sup>8</sup>

While the reach of this Act governed character investigations of Federal employees, over time, the requirement of such reviews to other individuals with specific and significant contact with children, such as foster parents or other adults in a foster home, was not consistently applied. Without a thorough review of all adults in the placement home, there cannot be full assurances that the child would not be placed at risk.<sup>9</sup>

Currently, the Act does not set forth standard minimum guidelines for foster care placements under the direction of a tribal court. The bill, S. 184, would establish these certain minimum guidelines and promote more consistency in tribal placements and reduce security gaps to ensure the safety of children.

#### LEGISLATIVE HISTORY

The bill, S. 184, was introduced on January 16, 2015, by Senators Hoeven and Tester. Senator Heitkamp is also a co-sponsor to the bill. This bill, S. 184, was referred to the Committee on Indian Affairs. No hearing was held on this bill this Congress. On February 4, 2015, the Committee met at a business meeting to consider the bill. No amendments were offered, and the Committee ordered the bill to be reported favorably to the full Senate by voice vote.

On February 27, 2015, Representative Cramer introduced H.R. 1168, the House companion bill to S. 184. The bill, H.R. 1168, was referred to the Subcommittee on Indians, Insular and Alaskan Native Affairs, where the bill was considered during a mark-up session. H.R. 1168 was ordered to be reported by unanimous consent on March 25, 2015.

In the 113th Congress, Senator Hoeven introduced a similar bill, S. 2160, co-sponsored by Senators Barrasso, Tester, Heitkamp, and Begich. The Committee held a hearing on S. 2160 on April 2, 2014. The Administration testified in support of the principles of the bill, but recommended changes. After significant discussions with the Bureau of Indian Affairs, tribes, and the National Indian Child Welfare Association, the bill was revised accordingly as a substitute amendment for Senate consideration. The current bill, S. 184, includes the changes incorporated in the substitute amendment for S. 2160.

<sup>7</sup>*Indian Child Protection and Family Violence Prevention Act*, Pub. L. No. 101-630, §411, 104 Stat. 4544 (1990).

<sup>8</sup>*Indian Child Protection and Family Violence Prevention Act*, Pub. L. No. 101-630, §408, 104 Stat. 4551 (1990).

<sup>9</sup>There is concern that children were placed with individuals who did not have the appropriate safety checks, *i.e.*, criminal background checks for all adults residing in the home or institution. U.S. Dep't of Health & Human Services, Admin. for Children & Families, *Executive Summary: Spirit Lake Tribal Social Services Report 4* (2014).

Representative Cramer introduced H.R. 4534, the House of Representatives companion bill, in the 113th Congress. The House Committee on Natural Resources Subcommittee on Indian and Alaska Native Affairs held a hearing on H.R. 4534 on July 29, 2014. The House Committee on Natural Resources considered the bill and ordered it reported on September 18, 2014. The bill was placed on the Union calendar on December 22, 2014, but no further action was taken.

#### SECTION-BY-SECTION ANALYSIS

##### *Section 1—Short title*

This section states that the short title of the bill is the “Native American Children’s Safety Act”.

##### *Section 2—Criminal records checks*

This section amends Section 408 of the Indian Child Protection and Family Violence Prevention Act (25 U.S.C. 3207) by adding subsection “(d) BY TRIBAL SOCIAL SERVICES AGENCY FOR FOSTER CARE PLACEMENTS IN TRIBAL COURT PROCEEDINGS.—” which includes five paragraphs.

##### *Paragraph 1—Definitions*

This paragraph sets forth definitions of:

“Covered individual” means anyone over the age of 18 years of age or older and any individual who the tribal social services agency determines is subject to a criminal records check.

“Foster care placement” means any action removing an Indian child from a parent or Indian custodian for temporary placement in a foster home.

“Indian custodian” means any Indian who has legal custody of an Indian child, or to whom physical custody has been transferred to by the parent of the child.

“Parent” means any biological parent of an Indian child, or any Indian who has lawfully adopted an Indian child.

“Tribal court” means a court with jurisdiction over foster care placement that is established under the code or custom of an Indian tribe.

“Tribal social services agency” means the agency of an Indian tribe that has the primary responsibility for carrying out foster care licensing or approval.

##### *Paragraph 2—Criminal records check before foster care placement*

This paragraph mandates that before any foster care placement is approved, and any foster care license is issued, the tribal social service agency must complete a criminal records check of every covered individual who lives in the prospective foster care home. A performance of a criminal records check can include a fingerprint-based check of national crime information databases, any child abuse registries maintained by the Indian tribe, and any child abuse and neglect registry maintained by any state in which the covered individual resided in the preceding five years. This paragraph also mandates that an Indian tribe may include additional requirements as they determine necessary and permissible within their existing authority.

*Paragraph 3—Emergency placement*

This paragraph makes clear that Paragraph (2) does not apply to emergency foster care placements, as determined by a tribal social services agency.

*Paragraph 4—Recertification of foster care or institutions*

This paragraph states that not later than two years after enactment, each Indian tribe must establish procedures to re-certify homes in which foster care placements are made. The minimum requirements for the procedures must include a period recertification that ensures the safety of the home for the Indian child and covered individuals subject to a criminal records check. Covered individuals who moved into the foster home after the foster care license was issued will also be subject to a criminal records check.

*Paragraph 5—Guidance*

This paragraph states that not later than two years after enactment, the Secretary of the Interior, after consultation with tribes, shall issue guidance in four areas. First, procedures for criminal records check of covered individuals who reside in a foster care home after the foster care placement was made. Second, self-reporting requirements for foster care homes if the head of the household has knowledge of a covered individual living in the home has a criminal record. Third, practices used by Indian tribes to address emergency foster care placements. Fourth and last, procedure for certifying compliance with the bill.

## COST AND BUDGETARY CONSIDERATIONS

The following cost estimate, as provided by the Congressional Budget Office, dated February 9, 2015, was prepared for S. 184.

FEBRUARY 9, 2015.

Hon. JOHN BARRASSO,  
*Chairman, Committee on Indian Affairs,*  
*U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 184, the Native American Children's Safety Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Martin von Gnechten.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

*S. 184—The Native American Children's Safety Act*

S. 184 would expand the background check requirements for people who hold tribal positions related to the foster care of Native American children. The bill would require tribal social services agencies to complete criminal records checks of each individual who resides in or is employed by a foster care institution that serves Native American children. Under current law, those checks are required only if the tribal agency receives federal funds. S. 184 also would require tribal agencies to develop procedures to recertify the safety of foster care institutions. Under the bill, the Secretary of

the Interior would promulgate guidance to tribes regarding procedures to conduct criminal records checks and to certify foster care institutions.

Based on information provided by the Bureau of Indian Affairs, CBO estimates that implementing the legislation would have no significant effect on the federal budget. CBO estimates that promulgating the procedural guidance required by the legislation would cost less than \$500,000 over the 2015–2020 period, and would be subject to the availability of appropriated funds. Enacting S. 184 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

S. 184 would impose an intergovernmental mandate, as defined in the Unfunded Mandates Reform Act (UMRA) because it would require tribal social services agencies to complete criminal records checks and to recertify existing foster homes and institutions periodically. The bill also would impose private-sector mandates by requiring individuals to submit to criminal records checks and requiring foster care homes and institutions to comply with recertification procedures.

Tribes could incur costs associated with paying background check fees to federal and state governments as well as administrative costs for processing background check applications and recertifying existing foster care homes. However, because many tribal social services agencies are required to conduct criminal records checks as a condition of receiving federal foster care payments and other federal assistance from the Bureau of Indian Affairs, we estimate that the costs of the mandates to tribal governments would fall well below the annual threshold established in UMRA (\$77 million in 2015, adjusted annually for inflation).

Individuals and entities in the private-sector could also incur costs associated with the requirement to submit to a background check or comply with recertification procedures. However, many institutions and foster care providers already meet requirements that are similar to those in the bill. Further, according to agency officials and professionals in the field, most tribal social services agencies would probably absorb the cost of conducting the check of criminal records to avoid imposing a burden on potential foster parents. Therefore, CBO estimates that the incremental cost to the private sector of complying with the mandates in the bill would fall well below the annual threshold established in UMRA (\$154 million in 2015, adjusted annually for inflation).

The CBO staff contacts for this estimate are Martin von Gnechten (for federal costs), J'nell Blanco Suchy (for state and local effects), and Amy Petz (for private-sector effects). The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

#### REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 184 will have a minimal impact on regulatory or paperwork requirements.

## EXECUTIVE COMMUNICATIONS

The Committee has received no communications from the Executive Branch regarding S. 184.

## CHANGES IN EXISTING LAW

In accordance with subsection 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 184, as ordered reported, are shown as follows (new matter is printed in italic):

25 U.S.C. § 3207 (Indian Child Protection and Family Violence Prevention Act)

**§ 3207. Character Investigations**

\* \* \*

*(d) BY TRIBAL SOCIAL SERVICES AGENCY FOR FOSTER CARE PLACEMENTS IN TRIBAL COURT PROCEEDINGS—*

*(1) DEFINITIONS.—In this subsection:*

*(A) COVERED INDIVIDUAL.—The term ‘covered individual’ includes—*

*(i) any individual 18 years of age or older; and*

*(ii) any individual who the tribal social services agency determines is subject to a criminal records check under paragraph (2)(A).*

*(B) FOSTER CARE PLACEMENT.—The term ‘foster care placement’ means any action removing an Indian child from a parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator if—*

*(i) the parent or Indian custodian cannot have the child returned on demand; and*

*(ii)(I) parental rights have not been terminated; or*

*(II) parental rights have been terminated but the child has not been permanently placed.*

*(C) INDIAN CUSTODIAN.—The term ‘Indian custodian’ means any Indian—*

*(i) who has legal custody of an Indian child under tribal law or custom or under State law; or*

*(ii) to whom temporary physical care, custody, and control has been transferred by the parent of the child.*

*(D) PARENT.—The term ‘parent’ means—*

*(i) any biological parent of an Indian child; or*

*(ii) any Indian who has lawfully adopted an Indian child, including adoptions under tribal law or custom.*

*(E) TRIBAL COURT.—The term ‘tribal court’ means a court—*

*(i) with jurisdiction over foster care placements; and*

*(ii) that is—*

*(I) a Court of Indian Offenses;*

*(II) a court established and operated under the code or custom of an Indian tribe; or*

*(III) any other administrative body of an Indian tribe that is vested with authority over foster care placements.*

(F) *TRIBAL SOCIAL SERVICES AGENCY.*—The term ‘tribal social services agency’ means the agency of an Indian tribe that has the primary responsibility for carrying out foster care licensing or approval (as of the date on which the proceeding described in paragraph (2)(A) commences) for the Indian tribe.

(2) *CRIMINAL RECORDS CHECK BEFORE FOSTER CARE PLACEMENT.*—

(A) *IN GENERAL.*—Except as provided in paragraph (3), no foster care placement shall be finally approved and no foster care license shall be issued until the tribal social services agency—

(i) completes a criminal records check of each covered individual who resides in the household or is employed at the institution in which the foster care placement will be made; and

(ii) concludes that each covered individual described in clause (i) meets such standards as the Indian tribe shall establish in accordance with subparagraph (B).

(B) *STANDARDS OF PLACEMENT.*—The standards described in subparagraph (A)(ii) shall include—

(i) requirements that each tribal social services agency described in subparagraph (A)—

(I) perform criminal records checks, including fingerprint-based checks of national crime information databases (as defined in section 534(f)(3) of title 28, United States Code);

(II) check any abuse registries maintained by the Indian tribe; and

(III) check any child abuse and neglect registry maintained by the State in which the covered individual resides for information on the covered individual, and request any other State in which the covered individual resided in the preceding 5 years, to enable the tribal social services agency to check any child abuse and neglect registry maintained by that State for such information; and

(ii) any other additional requirement that the Indian tribe determines is necessary and permissible within the existing authority of the Indian tribe, such as the creation of voluntary agreements with State entities in order to facilitate the sharing of information related to the performance of criminal records checks.

(C) *RESULTS.*—Except as provided in paragraph (3), no foster care placement shall be ordered in any proceeding described in subparagraph (A) if an investigation described in clause (i) of that subparagraph reveals that a covered individual described in that clause has been found by a Federal, State, or tribal court to have committed any crime listed in clause (i) or (ii) of section 471(a)(20)(A) of the Social Security Act (42 U.S.C. 671(a)(20)(A)).

(3) *EMERGENCY PLACEMENT.*—Paragraph (2) shall not apply to an emergency foster care placement, as determined by a tribal social services agency.

(4) *RECERTIFICATION OF FOSTER HOMES OR INSTITUTIONS.*—

(A) *IN GENERAL.*—Not later than 2 years after the date of enactment of this subsection, each Indian tribe shall establish procedures to recertify homes or institutions in which foster care placements are made.

(B) *CONTENTS.*—The procedures described in subparagraph (A) shall include, at a minimum, periodic intervals at which the home or institution shall be subject to recertification to ensure—

(i) the safety of the home or institution for the Indian child; and

(ii) that each covered individual who resides in the home or is employed at the institution is subject to a criminal records check in accordance with this subsection, including any covered individual who—

(I) resides in the home or is employed at the institution on the date on which the procedures established under subparagraph (A) commences; and

(II) did not reside in the home or was not employed at the institution on the date on which the investigation described in paragraph (2)(A)(i) was completed.

(C) *GUIDANCE ISSUED BY THE SECRETARY.*—The procedures established under subparagraph (A) shall be subject to any regulation or guidance issued by the Secretary that is in accordance with the purpose of this subsection.

(5) *GUIDANCE.*—Not later than 2 years after the date of enactment of this subsection and after consultation with Indian tribes, the Secretary shall issue guidance regarding—

(A) procedures for a criminal records check of any covered individual who—

(i) resides in the home or is employed at the institution in which the foster care placement is made after the date on which the investigation described in paragraph (2)(A)(i) is completed; and

(ii) was not the subject of an investigation described in paragraph (2)(A)(i) before the foster care placement was made;

(B) self-reporting requirements for foster care homes or institutions in which any covered individual described in subparagraph (A) resides if the head of the household or the operator of the institution has knowledge that the covered individual—

(i) has been found by a Federal, State, or tribal court to have committed any crime listed in clause (i) or (ii) of section 471(a)(20)(A) of the Social Security Act (42 U.S.C. 671(a)(20)(A)); or

(ii) is listed on a registry described in clause (II) or (III) of paragraph (2)(B)(i);

(C) promising practices used by Indian tribes to address emergency foster care placement procedures under paragraph (3); and

(D) procedures for certifying compliance with this Act.