ESTATE OF VICTOR YOUNG BEAR

IBIA 80-3 (Supp.) Decided March 26, 1981

Decision on reconsideration of Board's order of July 24, 1980, declaring as invalid an adoption action taken by the agency superintendent of the Fort Berthold Reservation pursuant to the Act of July 8, 1940, 57 Stat. 746.

Reversed.

1. Indian Probate: Adoption: Generally

   The Act of July 8, 1940, 54 Stat. 746 (25 U.S.C. § 372a (1976)) gave limited authority to agency superintendents over the adoption of Indian children. Evaluated in light of its legislative history, the Act must be read as allowing superintendents to validate adoptions agreed to in writing by Indian parties as well as Indian custom adoptions.

2. Indian Probate: Indian Probate: Adoption: Generally--Adoption: Crow Tribe

   The Act of Mar. 3, 1931, 46 Stat. 1494, relating to the adoption of Indian children on the Crow Reservation in Montana,

WWWVersion

> vested the superintendent of the Crow Agency with adoption authority which served as a model in the draftsmanship of the Act of July 8, 1940.

Estate of Victor Young Bear, 8 IBIA 130, 87 I.D. 311 (1980), is reversed.

APPEARANCES: J anet C. Werness, Esq., for petitioner Theresa Bluhm; James P. Fitzimmons, Esq., for respondent Alice Young Bear; William Babby and Frances Ayer, Esq., for the Bureau of Indian Affairs and Office of the Solicitor, respectively.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

On July 24, 1980, the Board issued a decision in the above estate which, among other things, declared as invalid a purported adoption of Theresa Bluhm by the decedent, Victor Young Bear, and his surviving spouse, Alice Young Bear, approved by the Superintendent of the Fort Berthold Agency, Bureau of Indian Affairs, on December 26, 1945, under authority of the Act of July 8, 1980, 54 Stat. 746 (25 U.S.C. § 372a (1976)). 1/ Estate of Victor Young Bear, 8 IBIA 130, 87 I.D. 311 (1980).

On September 12, 1980, Theresa Bluhm, through counsel, filed a petition for reconsideration of the above determination pursuant to the

1/ All further references to U.S.C. are to 1976 edition.

WWWVersion

provisions of 43 CFR 4.21(c). The Board agreed to reconsider its adoption ruling by order dated September 16, 1980. Interested parties, including the Bureau of Indian Affairs, were requested to file briefs regarding the Board's July 24, 1980, decision and petitioner's objections thereto. Final comments were received in this reconsideration proceeding on December 8, 1980.

Because the factual background to this controversy is not in dispute, no attempt will be made to summarize the Board's findings of fact set forth in its decision of July 24, 1980. (See 8 IBIA 130, 132-36; 87 I.D. 311-14 (1980)). 2/

Questions Presented

The legal issues raised with respect to the Board's prior decision may be summarized as follows:

1. Did the Board err in interpreting the Supreme Court's holding in Fisher v. District Court of the Sixteenth Judicial District of Montana, 424 U.S. 382 (1976), as the equivalent of a pronouncement that 25 U.S.C. § 372a does not confer authority on agency superintendents to approve or grant adoptions of Indian minors?

2. If 25 U.S.C. § 372a does authorize agency superintendents to approve or grant adoptions of Indian minors, what, if any,

---

2/ As necessary to the ultimate resolution of this case, certain findings are repeated later in this opinion.

WWWVersion

limitations are attached to such power and was this power properly invoked in this case?

3. If 25 U.S.C. § 372a was improperly relied upon in this case by the agency superintendent in approving or granting the adoption of Theresa Bluhm, may the Department be estopped from treating the purported adoption as invalid in its probate of Victor Young Bear's trust estate?

Discussion and Conclusions of Law

In Fisher, the Supreme Court reviewed a decision of the Montana Supreme Court which held that a lower state court had jurisdiction over adoption proceedings arising on the Northern Cheyenne Indian Reservation in which all parties were members of the tribe. The Montana Supreme Court read 25 U.S.C. § 372a as a congressional grant of jurisdiction over reservation adoptions to state courts. 3/ This position was rejected by the Supreme Court in the following words:

3/ 25 U.S.C. § 372a (1976) reads as follows:

"§ 372a. Heirs by adoption

"In probate matters under the exclusive jurisdiction of the Secretary of the Interior, no person shall be recognized as an heir of a deceased Indian by virtue of an adoption--

"(1) Unless such adoption shall have been--

"(a) by a judgment or decree of a State court;

"(b) by a judgment or decree of an Indian court;

"(c) by a written adoption approved by the superintendent of the agency having jurisdiction over the tribe of which either the adopted child or the adoptive parent is a member, and duly recorded in a book kept by the superintendent for that purpose; or

"(d) by an adoption in accordance with a procedure established by the tribal authority, recognized by the Department of the Interior, of

WWWVersion

> 25 U.S.C. § 372a manifests no congressional intent to confer jurisdiction upon state courts over adoptions by Indians. The statute is concerned solely with the documentation necessary to prove adoption by an Indian in proceedings before the Secretary of the Interior. It recognizes adoption "by a judgment or decree of a State court" as one means of documentation but nowhere addresses the jurisdiction of state courts to render such judgments or decrees. The statute does not confer jurisdiction upon the Montana courts. [Footnote omitted.]

424 U.S. at 388-89.

In its July 24, 1980, decision, the Board held that Fisher "makes it clear that 25 U.S.C. § 372a (1976) is not a statute which bestows authority to grant adoptions." 8 IBIA at 139; 87 I.D. at 316. We went on to state:

> The Act simply provides that the Secretary of the Interior may rely on adoptions legally consummated under other specific authority in the course of performing the probate functions conferred on him by Congress. See 25 U.S.C.

---

fn. 3 (continued)
the tribe either of the adopted child or the adoptive parent, and duly recorded in a book kept by the tribe for that purpose; or

"(2) Unless such adoption shall have been recognized by the Department of the Interior prior to the effective date of this section or in the distribution of the estate of an Indian who has died prior to that date: Provided, That an adoption by Indian custom made prior to the effective date of this section may be made valid by recordation with the superintendent if both the adopted child and the adoptive parent are still living if the adoptive parent requests that the adoption be recorded, and if the adopted child is an adult and makes such a request or the superintendent on behalf of a minor child approves of the recordation.

"This section shall not apply with respect to the distribution of the estates of Indians of the Five Civilized Tribes or the Osage Tribe in the State of Oklahoma, or with respect to the distribution of estates of Indians who have died prior to the effective date of this section. (July 8, 1940, c. 555 §§ 1, 2, 54 Stat. 746.)"

The first and second paragraphs of 25 U.S.C. § 372a (1976), codify sections 1 and 2, respectively, of the Act.

WWWVersion

> §§ 372-73 (1976). For example, under the Act of March 3, 1931, 46 Stat. 1494, the Superintendent of the Crow Indian Agency is specifically authorized to approve Indian adoptions on the Crow Reservation in Montana. See 25 CFR 11.29C; Estate of Walks With A Wolf, 65 I.D. 92 (1958). In short, Indian adoptions accomplished by the Superintendent of the Crow Agency pursuant to the Act of March 3, 1931, supra, or by any other superintendent pursuant to statute, typify the nature of adoption referred to by Congress in section 1(1)(c) of the Act of July 8, 1940 [codified at 25 U.S.C. § 372a(l)(c)]. [Footnote omitted.]

Id.

The above holding was premised, among other things, on the Board's perception that the Supreme Court had categorically declared section 1 of the Act of July 8, 1940, as unrelated to the establishment of Indian adoption authority, notwithstanding that only the question of State versus tribal authority was at issue in Fisher. That the Court tacitly denied that a purpose of the Act was to vest new adoption powers in the Secretary of the Interior was gleaned from its statement that "[t]he statute is concerned solely with * * * documentation necessary to prove adoption * * * in proceedings before the Secretary" and that the Act recognizes adoption by a decree of a state court "as one means of documentation" 424 U.S. at 389 (emphasis supplied). Reading 25 U.S.C. § 372a(1) as a whole, three other means of documentation, in addition to a judgment or decree of a state court, are cited, viz., by a judgment or decree of an Indian court; by a written adoption approved and recorded by an agency superintendent; and by an adoption in accordance with other established tribal procedure. See 25 U.S.C. § 372a(1)(a) through (d).

WWWVersion

In addition to the above, the Board was struck by the existence of only one Departmental regulation concerning the adoption authority of agency superintendents--that being 25 CFR 11.29C, which pertains to adoptions of Crow Indians. 4/ It was difficult for us to conceive that the Department could view the Act of July 8, 1940, as a grant of jurisdictional authority to effect adoptions on Indian reservations while not bothering to promulgate any regulations subsequent to the Act to govern the exercise of this authority.

We also looked to the Bureau of Indian Affairs' operations manual for guidance. As noted in our initial decision, there are no manual provisions on adoption. 5/

Lastly, the Department's legislative history file concerning the Act of July 8, 1940, was examined by the Board before it rendered its initial decision in this matter. Although portions of this history are supportive of the theory that the Act vested agency superintendents with

---

4/ 25 CFR 11.29C states:

"No future adoptions among or by the Crow Indians shall be recognized except those made in accordance with the Act of March 3, 1931 (46 Stat. 1494)."

The Act of March 3, 1931, is discussed in this opinion at page 16.

5/ Manual provisions do exist on the subject of termination of parental controls. At 66 IAM 3.2.5 D (2) (1957 ed.), it is stated:

"Bureau employees acting in their official capacities shall not accept statements from parents designed to sever their parental controls and responsibilities for their children. Such statements have no legal force or effect in divesting a parent of his control of his child or of his duty to support him. Only by court action can ties between parent and child be legally severed and only by court action can parental control and responsibility for a child be vested in another person or in an agency. Records of such court action or documents issued by the court offer the only evidence of legal changes in status between a parent and his child."

WWWVersion

jurisdiction to effect adoptions, as discussed below, this history was considered irrelevant in the face of what we perceived to be a contrary ruling from the Supreme Court. 6/

[1] The Board has carefully reexamined the Fisher opinion, the 1940 Act and its legislative history. Based on this examination and our review of the reconsideration briefs filed with the Board, we are persuaded that, contrary to our prior holding, limited authority over the adoption of Indian children was bestowed by Congress on agency superintendents through enactment of the 1940 adoption statute.

In arguing that the narrow, evidentiary purpose of 25 U.S.C. § 372a(1)(a), which pertains to state court adoption decrees, should not be attributed, through a reading of Fisher, to 25 U.S.C. § 372a(1)(c), which pertains to written adoptions approved by agency superintendents, the Government's brief in this reconsideration proceeding states:

> § 372a(1)(a) describes a type of evidence which is to constitute acceptable proof of an adoption in Indian probate proceedings. § 372a(1)(c) also describes a type of acceptable evidence and, in addition, delineates the steps to be followed in producing a valid adoption. There is no question that 25 U.S.C. § 372a did not confer jurisdiction on the

6/ The Board also reviewed published legislative history of the Indian Child Welfare Act of 1978, 92 Stat. 3069, which is aimed at fostering tribal control over Indian adoptions and other child custody matters arising in Indian country, for any reference or discussion of the Secretary's authority over Indian adoptions. None could be found. See H.R. Rep. No. 95-1386, 95th Cong. 2d Sess. 6, reprinted in [1978] U.S. Code Cong. & Ad. News 7530-7560.

WWWVersion

> state courts if they did not already possess it. The Department and Bureau of Indian Affairs are not, however, on the same footing as a state. Whereas a state has jurisdiction over Indian matters only if Congress permits, the Bureau is that arm of the Federal Government charged with overseeing and implementing Congress' policies. As such, it has authority to carry out those policies and procedures established by Congress. 25 U.S.C. §§ 2, 9. In this instance Congressional policy, as shown by the legislative history of §372a was to assure that there would be a written record of all adoptions. The functions assigned by Congress to the superintendents were specific mechanisms for effectuating that policy and were functions within the general authority of the Bureau to manage Indian affairs.

Joint Brief of BIA and Solicitor (hereafter, Government's Brief) filed October 27, 1980, at 2.

The most detailed piece of legislative history in this matter is the virtually identical report submitted by Secretary Harold L. Ickes to the House and Senate on February 8, 1940, requesting approval of draft legislation which became the Act of July 8, 1940. It is quoted at length (and line numbered) as follows:

> 1. The proposed bill provides that * * * no person
> 2. shall be held to be an heir of a deceased Indian by
> 3. virtue of an adoption unless the adoption is evidenced
> 4. by a judgment of a State or tribal court; or is a
> 5. written adoption approved and recorded by the super-
> 6. intendent of an agency, an adoption by Indian custom
> 7. made prior to the effective date of the act and
> 8. recorded with a superintendent, or a recorded adoption
> 9. made pursuant to a procedure established by tribal
> 10. authorities * * *. The broad purpose of the bill is
> 11. to require that there be a written record of each
> 12. adoption. The several methods recognized for making
> 13. such an adoption are those which the administration of
> 14. Indian affairs has shown to be desirable. The Depart-
> 15. ment now recognizes the decree of State courts and the
> 16. bill would continue this practice. Another presently

WWWVersion

recognized method of adoption is by tribal court action and this jurisdiction of tribal courts is continued. However, the expense attendant upon an action in a State court frequently compels an Indian to forego a court proceeding and some tribes have not yet established tribal courts; these difficulties the bill would meet by recognizing a third method of adoption, that of adoption by written recordation with the superintendent of an agency. Recorded adoptions made in accordance with procedures established by recognized tribal authorities would also be valid under the provisions of the bill.

It is the present practice of this Department to recognize the so-called "Indian custom" adoption whenever sufficient evidence of the decedent's intention exists. At one time Indian custom adoptions were by formal ceremonies, but in most tribes this ancient practice has been relaxed and it is difficult to determine whether or not an adoption was actually made in a particular case. In none of the Indian custom adoptions is there a written record and the available evidence is often confusing, conflicting and of dubious character. If the bill becomes law, adoptions made in accordance with practices by persons who died prior to the effective date of the act will be recognized by the Department. Indian custom adoptions made prior to the effective date of the act and participated in by persons who are still living can be validated by recordation with a superintendent * * *.

On March 3, 1931, Congress enacted the "Crow" Act (46 Stat. 1494), covering adoption by the Crow Indians of Montana. The act has eliminated practically all dispute and administrative difficulty in adoption among the Crows. The proposed act is similar to the "Crow" Act and in addition recognizes decrees of tribal courts and adoptions made pursuant to tribal procedures, and provides for the validation of "Indian custom" adoptions by their recordation during the lifetime of the parties.

The subject of adoption has been considered by the tribal councils, Government officials and Indian assemblies. All agree that a remedy must be provided. Expressed opinions are (1) adoption should be left to the State courts; (2) it should be handled by the tribal agencies; and (3) Indian custom should be recognized and made of record.

The instant proposal does not conflict with any of these ideas. It embraces all of them and places

WWWVersion

69. both the Indian and this Department in a position
70. where in all probate cases a record will be available
71. that will amply protect the bona fide claimant and
72. likewise eliminate the imposter.

The above report is susceptible to several interpretations. On one hand it clearly seems to state that the bill establishes a "method of adoption" by agency superintendents, supplementary to other recognized methods of adoption (lines 22-25). Elsewhere, however, it is said that the broad purpose of the bill is "to require that there be a written record of each adoption" (lines 10-12). In fact, Secretary Ickes describes the "method of adoption" to be followed by superintendents as one of "adoption by written recordation" (line 24). These latter statements, among others, suggest that what the Secretary actually proposed to Congress was, in essence, a procedure for recording adoptions at Indian agencies agreed to by interested parties or otherwise recognizable under Indian custom. 7/

Supportive of the argument that the Act of July 8, 1940, created no unique authority within agency superintendents to grant adoptions in a judicial sense is the legislative preference to refer to adoptions approved by agency superintendents. The terms "approved by" or "to approve" may have different meanings, depending upon the context in which they are used and the subject matter to which they pertain. City of Springfield v. Commonwealth, 349 Mass. 267, 207 N.E.2d 891 (1965).

7/ See, e.g., lines 43-46 of the quoted report: "Indian custom adoptions * * * can be validated by recordation with a superintendent."

WWWVersion

Ordinarily the act of "approval" is an action to commend, confirm, ratify, sanction, or to consent to some act or thing done by another. In re State Bank of Millard County, 84 Utah 147, 30 P.2d 211 (1934). While in some statutes or texts, the act of "approval" implies the exercise of judicial action or discretion, in other cases it may only contemplate the doing of a purely ministerial act. Baynes v. Bank of Caruthersville, 118 S.W.2d 1051 (Mo. App. 1938). Evaluated against the intended "broad purpose" of 25 U.S.C. § 372a--that of providing a written record for adoptions to facilitate the Secretary's probate functions--we hold that the adoption approval and recordation authority conferred by Congress on agency superintendents in the 1940 Act was ministerial, not judicial, in nature.

If the proposal submitted by Secretary Ickes to Congress contemplated the establishment of jurisdiction in agency superintendents to sit in judgment on adoption matters arising on their reservations, the Secretary could hardly have concluded in his report to both Houses:

> The instant proposal does not conflict with any of these ideas [i.e. that (1) adoption should be left to the State courts; (2) it should be handled by the tribal agencies; and (3) Indian custom should be recognized and made of record]. It embraces all of them and places both the Indian and this Department in a position where in all probate cases a record will be available.

There was only limited substantive debate of the Department's proposed adoption bill when it was considered by Congress. It consisted of an exchange in the House between Representative Rogers of Oklahoma

WWWVersion

and Representative Case of South Dakota, following Mr. Rogers' summary of the bill (H.R. 8499):

> Mr. CASE: Does not the gentleman think it would be fair to have a 6-month period, at least during which the Indians might be given notice, and then adoptions that have been made in accordance with the tribal custom may be put on record so that they may be protected?
>
> Mr. ROGERS: It does not affect anything that has been done in the past. It only provides for future cases.
>
> Mr. CASE: Even there the gentleman knows Indian families have taken children in and, to all intents and purposes, have adopted them; but unless there is some way for these adoptions to be put on record or to be recognized in some way, an injustice might be done.
>
> Mr. ROGERS: That may be true. It would not affect those who have been adopted in the past, because it is provided that if it had been done by a decree of an Indian tribe it shall be valid. The main requirement is that in the future there must be a record kept. The bill provided that the tribe itself shall keep the record, but we finally decided to place this obligation on the Indian Department.

86 Cong. Rec. 3009 (1940).

The above colloquy does not present a penetrating analysis of the bill. It does convey, however, that the proposed legislation was represented to the lawmakers to be a recordkeeping measure.

With respect to the type of Indian adoptions which agency superintendents were authorized to approve and record under 25 U.S.C. § 372a(1)(c), the Government's brief appears to take conflicting stands. Its main contention appears to be that the Fort Berthold superintendent

WWWVersion

was authorized in 1945 to approve the adoption of Theresa Bluhm by virtue of the 1940 Act, an action taken by the agency on the basis of written statements received from Theresa's natural and adoptive parents. On the other hand, the Government submits that "[t]he kinds of adoptions which the superintendents were authorized to approve and record were, in essence, Indian custom adoptions, for which written evidence would henceforth be required" (Government's Brief at 4).

The Board observed in its initial decision that Indian custom adoptions were not recognized by the Three Affiliated Tribes of the Fort Berthold Reservation in 1945. 8 IBIA at 142, 87 I.D. at 317. Assuming, in the light most favorable to the superintendent, that the governing tribe of the reservation did not possess exclusive jurisdiction over Indian adoption matters arising thereon, 8/ it was

---

8/ The Three Affiliated Tribes of the Fort Berthold Reservation accepted the terms of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. §§ 461-79 (1976), and the Secretary subsequently approved the tribe's Code of Laws, adopted Dec. 9, 1943, which contains provisions concerning adoption.

Without ruling on the question of tribal jurisdiction, we noted before that in this case an apparent indispensable party to the adoption proceeding, Theresa's natural mother, did not live on the Fort Berthold Reservation and was not a member of the Three Affiliated Tribes; neither was Theresa's adoptive mother, Alice Young Bear, a member of the Three Affiliated Tribes. 8 IBIA 141; 87 I.D. 316-317. These circumstances differ from Fisher in which the Supreme Court held that the Northern Cheyenne Tribe possessed exclusive jurisdiction over an adoption proceeding. There, the Court noted that all parties were members of the tribe who resided on the reservation at all relevant times, and that none of the acts giving rise to the adoption proceeding occurred off the reservation. (Jurisdictional problems between states and tribes in Indian child custody proceedings have been substantially resolved for the future as a result of the Indian Child Welfare Act of 1978. A major feature of the Act is that it secures to an Indian tribe "jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law." 25 U.S.C. § 1911(a) (Supp. 1978). The

WWWVersion

nevertheless incumbent on the superintendent to approve and record an Indian custom adoption only if such adoptions were recognizable under tribal law. 9/

We do not think 25 U.S.C. § 372a(1)(c) authorizes superintendents to approve and record Indian custom adoptions only. If this is what Congress intended, it is reasonable to suppose that the term "Indian custom" would have been included in subparagraph (c). That it was not intended is also evident from the inclusion of an independent paragraph (section 2 of the Act) devoted to the documentation of Indian custom adoptions.

Secretary Ickes' report of February 8, 1940, also shows that Indian custom adoptions were viewed as a separate kind of adoption, subject to BIA approval. See report, supra, at lines 1-10.

---

fn. 8 (continued)
Act makes no attempt to resolve jurisdictional conflicts between tribes and agency superintendents.)

The Board avoided ruling on the question whether the Three Affiliated Tribes possessed exclusive jurisdiction over the adoption in question here by invalidating the superintendent's action on other grounds. 8 IBIA at 140-41; 87 I.D. at 316. Since we are reversing our prior holding in this reconsideration proceeding, we are obliged to answer that we do not believe the state of the law in 1945 precluded the superintendent from approving the adoption of Theresa Bluhm. We recognize that this is an important ruling and that it is rendered without the benefit of participation in this case by the Three Affiliated Tribes. As interested as we are in putting this case to rest, it is nevertheless appropriate in our view to afford the tribe an opportunity to seek reconsideration of the foregoing opinion pursuant to terms set forth in the closing order of this decision.

9/ As stated in our initial decision, there is no universal doctrine of Indian custom adoption. 8 IBIA at 141; 87 I.D. at 317. The right to designate the customs that are to be given recognition in regulating matters that affect tribal internal and social relations rests with each tribe as an incident of its sovereignty, United States v. Mazurie, 419 U.S. 544 (1975), and such customs may vary among tribes.

WWWVersion

For an adoption to be approved by an agency superintendent under 25 U.S.C. § 372a(1)(c), the Act provides that it be a "written" adoption. The recording of an adoption pursuant to subparagraph (c) does not, in our opinion, satisfy the requirement for an adoption in writing. 10/ Consistent with our opinion that the approval power bestowed by Congress to superintendents was ministerial, not judicial, the nature of adoption ultimately subject to agency approval would be "adoptions by consent" or other noncontested adoptions agreed to in writing by the parties.

[2] Nothing in the Crow Adoption Act (Act of Mar. 3, 1931, 46 Stat. 1494), which the Department used as a model in the drafting of the 1940 Act, 11/ contradicts the above interpretations. Modifying our previous assessment of the relationship of the Crow Act to the 1940 law, see 8 IBIA at 139; 87 I.D. at 316, we agree with the position of the Government that "25 U.S.C. § 372a is worded virtually identically to the Crow Act and, as evidenced by the legislative history, was intended to become general legislation * * * [applying] the successful adoption procedures in the Crow Act to all tribes" 12/ (Government's Brief at 5).

10/ Section 372a-372a(1)(c) reads, in pertinent part, "no person shall be recognized as an heir of a deceased Indian by virtue of an adoption * * * [u]nless such adoption shall have been * * * by a written adoption approved by the superintendent * * * and duly recorded by the superintendent." (Emphasis added.)

11/ See Secretary Ickes' report, supra, at lines 48-57.

12/ The Act of March 3, 1931, states:

"[H]ereafter no person shall be recognized as an adopted heir of a deceased Indian of the Crow Tribe of Indians of Montana unless said adoption shall have been by a judgment or decree of a State court, or by a written adoption approved by the superintendent of the Crow Indian Agency and duly recorded in a book kept by him for such purpose: Provided; That adoption by Indian custom made prior to the date of approval hereof involving probate proceedings now in process of consummation, shall not be affected by this Act."

WWWVersion

In the case at hand, the Fort Berthold superintendent was furnished written and signed statements by petitioner's natural and "adoptive" parents which satisfied the superintendent that these parties were agreeable to the adoption of petitioner, then age 5, by the Young Bears. It is too late for Theresa's adoptive mother, Alice Young Bear, to challenge the regularity of consents obtained over 30 years ago. See 8 IBIA at 137-38; 87 I.D. at 315. Alice Young Bear's contention that the superintendent lacked jurisdiction to approve Theresa's adoption is rejected on grounds that by virtue of the Act of July 8, 1940, 54 Stat. 746, Congress vested agency superintendents with specific authority to approve and record written adoptions agreed to by Indian parties. The Fort Berthold superintendent was therefore acting within the scope of his authority and in accordance with Federal law by approving petitioner's adoption in 1945. 13/

In accordance with the above, the Board hereby affirms in toto the Order Determining Heirs entered August 8, 1979, by Administrative Law Judge Garry V. Fisher in which he held that Theresa Bluhm is entitled to a one-fourth share of the estate of Victor Young Bear.

In light of the above holding, we shall not attempt to answer petitioner's alternative contention that the doctrine of estoppel should be applied to uphold her adoption. We do observe that the Office of Hearings and Appeals has previously acknowledged the passing of the traditional rule that estoppel cannot be invoked against the Government

---

13/ The Government's Brief observes that enactment of the Indian Child Welfare Act in 1978 reflects "a change in Congressional policy and may eliminate future superintendent approved adoptions." At p. 5.

WWWVersion

and has recognized the elements of estoppel set forth by the Ninth Circuit in United States v. Ruby Co., 588 F.2d 697 (1978), as the initial test for determining whether estoppel is appropriate. Dorothy Smith, 44 IBLA 25 (1979); Edward L. Ellis, 42 IBLA 66 (1979); United States v. Larsen, 36 IBLA 130 (1978). 14/ Assuming we were to adhere to our initial holding that the superintendent's adoption action was unlawful, one possible bar to the appropriateness of an estoppel in this case is the recognized principle that estoppel is unavailable against the Government if its representative has not acted within the scope of his authority. Ruby, supra, at 701-704; Dorothy Smith, supra, at 31.

The governing body of the Three Affiliated Tribes of the Fort Berthold Reservation is hereby allowed 30 days from receipt of this decision in which to petition the Board for reconsideration. (See n. 8.) If no such petition is timely filed, this decision will then be final for the Department.

Wm. Philip Horton
Chief Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge

14/ The elements of estoppel as identified in Ruby (and recited by petitioner) are:

"(1) The party to be estopped must know the facts;

"(2) He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;

"(3) The latter must be ignorant of the true facts;

"(4) He must rely on the former's conduct to his injury."

588 F.2d at 703.

WWWVersion